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**IN MEMORY OF**

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FIRST DEAN OF THE SCHOOL

**By his Wife and Daughter**

**A. M. BOARDMAN and ELLEN D. WILLIAMS**

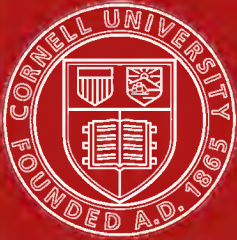
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DIGEST  
OF THE  
DECISIONS  
OF THE  
SUPREME COURT  
OF  
MINNESOTA.

FROM VOL. I. TO XVI., INCLUSIVE.

By JASPER N. SEARLES,

ATTORNEY AT LAW.

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CHICAGO:  
CALLAGHAN & CO., PUBLISHERS.  
1872.

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# EXPLANATORY NOTE.

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The decisions digested in this volume include all the reported cases in the first sixteen volumes of the Minnesota Reports, except a few cases in the first volume, which were reluctantly omitted on account of an entire absence of any opinion of the Supreme Court.

The value of this work to the practising lawyer will depend somewhat upon a thorough understanding of the plan upon which it is constructed. While it is thought that the body of the work will explain itself, yet a few words to that end, in this place, may not be out of place.

*First.* In drawing off the points decided, it has been the aim of the author to show, whenever it was practicable, the exact state of the facts which gave rise to the decision. But where an opinion was not directly called for by the facts presented, it has still been drawn off, especially if it was designed to indicate the proper practice under any given circumstances, in the hope that the volume would thereby be better calculated to supply the want of any work on practice in this State..

*Second.* No attempt has been made to show whether a point is within the class of *res adjudicata*, or simply a *dictum*, otherwise than as stated heretofore, for the reason that the disputed territory lying between a *binding authority* and the merest *dictum* is so great, and subject to so many qualifications, that it was thought impracticable to attempt the adoption of any system which should pretend to stamp each point with its degree of importance.

*Third.* In the arrangement of the titles, regard has been had more to the law as it is, than to what it has been. Living titles have had the preference. The design has been to impress upon the work the character of all those changes which modern legislation has made with the law and its procedure. Especially is this noticeable in the titles *Civil Action*, *Pleading*, and *Practice*.

*Fourth.* Every title has been made as comprehensive as possible, so that wherever it was practicable, the whole of the law on a given subject, so far as illustrated by the decisions of the court of last resort, may be found under that title.

*Fifth.* The design has not been to repeat a point, but to arrange it under the head of the law to which it was most directly related, and by proper cross notes and a copious index to refer to other heads of law to which it was less directly related.

*Sixth.* The incorporation of the Statutes, construed into the body of the work, would have rendered the publication of the book at this time inexpedient. Hence, the

difficulty has been remedied, so far as possible, by incorporating into the draft of a point the operative words of the Statute on which it turns.

*Seventh.* It was intended to insert at the top of each page a running title containing the sub-heads of the different titles, but the rapidity with which the titles succeeded each other rendered it impracticable.

*Eighth.* The execution of the plan of the work falls far short of perfection, but it is hoped the performance, with all its shortcomings, will form a valuable assistant to those for whose use it is designed.

*Ninth.* In the arrangement of some parts of the work I have been materially aided by the Messrs. Abbots' Form Books, Tillinghast & Sherman's Practice, and Waite's New York Digest, titles Civil Action, Pleading and Practice.

J. N. S.

HASTINGS, MINN.,  
December, 1872.

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OF THE  
TERRITORY OF MINNESOTA.

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# JUDGES OF THE DISTRICT COURTS

DURING THE PERIOD COVERED BY THE

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## FIRST DISTRICT.

HON. S. J. R. McMILLAN.

HON. CHAS. MCCLURE.

## SECOND DISTRICT.

HON. E. C. PALMER.

HON. WESCOTT WILKIN.

## THIRD DISTRICT.

HON. THOMAS WILSON.

HON. LLOYD BARBER.

## FOURTH DISTRICT.

HON. E. O. HAMLIN.

HON. C. E. VANDERBURG.

## FIFTH DISTRICT.

HON. N. M. DONALDSON.

## SIXTH DISTRICT.

HON. L. BRANSON.

HON. HORACE AUSTIN.

HON. M. G. HANSCOM.

HON. F. H. WAITE.

## SEVENTH DISTRICT.

HON. JAMES M. McKELVY.

## EIGHTH DISTRICT.

HON. L. M. BROWN.

HON. ANDREW J. CHATFIELD.

## NINTH DISTRICT.

HON. M. G. HANSCOME.

# ERRATA.

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The body of this work was originally completed for the press when there were but fifteen volumes of the reports published. The subsequent incorporation of the matter of the sixteenth volume resulted in changing the numbers of the sections throughout the work, and rendered necessary a revision of the cross references. In some instances it is found that a cross reference has escaped the attention which the calls of a reasonably active practice enabled the writer to give to the matter. These miscitations are all corrected in the index.

Below are noted such errors as would tend to mislead, so far as they have been discovered.

PAGE 26, SEC. 9, for "*Allen v. Jones*, 8 Minn. 202," read "*Barker v. Kelderhouse*, 8 Minn. 207."

PAGE 118, SEC. 1, last line, for "7 Minn." read "8 Minn."

PAGE 137, ninth line from bottom of SEC. 23, after "receipts" insert "nothing."

PAGE 188, SEC. 17, line eight, for "now" read "were."

PAGE 310, SEC. 118, last line, for "9 Minn. 23," read "9 Minn. 28."

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# ABBREVIATIONS.

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"R. S.," or "R. S. (1851)"—Used for the Territorial Laws known as the "Revised Statutes of Minnesota," compiled in 1851.

"C. S.," or "Comp. St."—Used for the "Public Statutes of the State of Minnesota;" compiled by Moses Sherburne and William Hollinshead, Commissioners, and published in 1858; sometimes cited as "Pub. Stat.," but more generally as "Comp. Stat."

"G. S.," or "Gen. Stat."—Used for the "General Statutes of the State of Minnesota." This is the revision of 1866, and the one now in force.

"G. L." and "Sess. Laws."—Used synonymously for the annual "General Laws," in contradistinction from the annual "Special Laws."

Special Laws are referred to in full.

# DIGEST

OF THE

## MINNESOTA REPORTS.

### ABANDONMENT.

(See CONTRACT, II.)

(See EASEMENT, III.)

### ABATEMENT.

**1.** Persons upon whom, by operation of law, title has been cast *pendente lite* must be made parties and the complaint cannot proceed without them. *Steele v. Taylor et al.*, 1 Minn. 279.

**2. Waiver of plea.** The right to plead in abatement is waived by pleading to the merits. *Gerrish et al. v. Pratt et al.*, 6 Minn. 53.

**3. An assignment** by plaintiff pending the action does not abate or affect the action. Sec. 37 Comp. St. '535. *Whitacre v. Culver*, 9 Minn. 295

See CIVIL ACTION; PLEADING.

### ABSTRACT OF TITLE.

**1. Contents of conveyances not stated.** When a purchaser takes title on the strength of an *abstract of title* which fails to state the contents of the conveyances, it

is such negligence as not to excuse him from notice of the existence of any incumbrance which is referred to in any of the conveyances in his chain of title. *Daughday v. Paine et al.* 6 Minn. 443.

### ACCORD AND SATISFACTION.

**1. Requisites.** Defendant pleaded an accord and satisfaction, and to support it showed that, with plaintiff's consent he sold property on which the latter had a lien, to C., with the understanding between all parties that C. should pay to plaintiff sufficient of the purchase price to pay defendant's debt to plaintiff, that C. promised to make such payment to plaintiff, but failed. *Held*, insufficient to sustain the plea—should have shown that plaintiff by reason of the arrangement discharged the defendant. *Washburn v. Winslow*, 16 Minn. 33.

### ACCOUNT STATED.

**1. The object** of declaring on an account stated, is to save the necessity of proving the correctness of the *items* com-

posing the same; the effect of the account stated being to establish *prima facie* the accuracy of the items without further proof, and the party seeking to impeach the account is therefore bound to show affirmatively any mistake or error complained of. *Warner v. Myrick*, 16 Minn. 91.

## ACKNOWLEDGEMENT.

(See DEEDS, II.)

(See LIMITATION OF ACTIONS, IV.)

## ADMISSIONS.

(See EVIDENCE, I.)

(See PARTNERSHIP, VI.)

## ADULTERY UNDER PROMISE OF MARRIAGE.

(See CRIMINAL LAW, 137.)

## ADMIRALTY.

**1. The admiralty jurisdiction of the United States** extends to all rivers or waters navigable *in fact* from the sea by vessels of ten or more tons burden. *Reynolds v. Steamboat Favorite*, 10 Minn. 242; *Morin v. Steamboat F. Sigel*, 10 *Ib.* 250.

## AGENCY.

[SCOPE NOTE.—This title is designed to be complete with the exception of such matter as will be found under the title EVIDENCE. See Evidence 83 *et seq.*]

### I. PUBLIC AGENTS.

### II. PRIVATE AGENTS.

1. *Agent's authority.*

2. *Authority, how executed.*

3. *Agent's liability to third persons.*

4. *Principal, liability of to third persons.*

5. *Ratification.*

6. *Liability of third person to principal.*

### I. PUBLIC AGENTS.

**1. In absence of intent not liable personally though they exceed their authority.** When public agents, in good faith, contract with parties having full knowledge of the extent of their authority or equal means of knowledge with themselves, they do not become liable, individually, unless the intent to incur a personal responsibility is clearly expressed, although through ignorance of law they exceed their authority. *Sanborn v. Neal et al.*, 4 Minn. 126.

**2. Liability of public agents.** Generally, where one assumes to act as the agent of another, and fails to bind his principal, he is himself liable; but public officers, acting within the scope of their general powers, are an exception to this rule—and Trustees of school districts are public officers within the exception. *Ib.*

### II. PRIVATE AGENTS.

1. *Agent's Authority.*

**3. Implied authority.** An agent has an implied authority to bind his principal in all matters fairly within the scope of his agency, even though, in that particular case, his power is denied by the terms of his appointment, if this restriction is not known to the person dealing with him. *Selden, Withers & Co. v. Bank of Commerce*, 3 Minn. 166.

**4.** The fact that the making of a promissory note and subsequent payment thereof by a person as the agent of another was acquiesced in by said person, will raise no implication of an authority in said agent to bind the principal by an instrument in the nature of a mortgage. *Humphreys et al. v. Havens et al.*, 12 Minn. 298.

**5.** An authority in an agent to do a certain act, cannot be implied from the fact that another act of an entirely different character had been performed by the assumed agent, to which the principal has assented. *Ib.*

**6.** When the belief of the authority of an agent arises only from previous action on his part as an agent, the persons so treating with him must on their own responsibility, ascertain the nature and extent of his previous employments. *Ib.*

**7.** Where plaintiff seeks to charge defendant with service performed by his agent, a receipt of such agent in full for all services will not bind plaintiff, without showing an authority from plaintiff to receive the payment; nor would voluntary statements of such agent bind plaintiff as to the value of the services. *Cooper v. Stinson*, 5 Minn. 201.

## 2. Authority, How Executed.

**8. Where there are more than one.** An authority conferred upon several agents must be executed by them all, and any act done by a less number will be void as against the principal—contra in case of public agents. *Rollins et al. v. Phelps et al.*, 5 Minn. 463.

**9. In what name to be executed.** A sale to "J. W. Sencerbox, agent for J. G. Sencerbox," is a sale to J. W. Sencerbox. Where an agent or attorney contracts on behalf of his principal he must do so in the name of the latter or he is not bound. *Sencerbox v. McGrade*, 6 Minn. 484.

## 3. Agent's Liability to Third Persons.

**-10. When agency appears in the body of the instrument.** A promissory note stated that the makers—who signed the same as individuals without any additions—promise "as Trustees" of a school district. *Held*, that the intention to bind themselves as trustees only appeared as clear as though they had signed in that capacity. *Sanborn v. Neal et al.*, 4 Minn. 126.

**11. Addition of "descriptio person-**

**arum" to signature.** The addition of the words "Trustees of School District No. 5," to the signatures of the makers of a promissory note will not relieve them from personal liability. To relieve them from all liability, except as trustees; it must appear in, or from the instrument itself, that they executed the same in their capacity as trustees. See *Sanborn v. Neal et al.*, 4 Minn. 126. *Fowler et al. v. Atkinson*, 6 Minn. 578.

**12.** A contract signed "Temple & Beaupre, agents Steamer Flora," holds the signers *prima facie* personally; the rule being that when words that may be either descriptive of the person, or indicative of the character in which a person acts, are affixed to the name of a contracting party, *prima facie* they are descriptive of the person only, but the fact that they were not intended by the parties as descriptive of the person, but were understood as determining the character in which the party contracted, may be shown by extrinsic evidence, but the burden of proof rests upon the party seeking to change the *prima facie* character of the contract, and when a party seeks to change the *prima facie* character of the contract on the ground of agency in making the contract, the fact of his agency must be clearly established, for if he acted as agent without authority he is personally liable. *Pratt v. Beaupre*, 13 Minn. 187.

**13. Where whole number of agents do not execute the contract.** A contract to which "J. R., J. G. R., J. C., and G. H.," as "agents authorized by the log owners" are parties of the second part, signed by said parties, with their individual names, with the addition of "agent," to each name, except G. H., who does not sign, is on its face, a contract with the persons individually, and not the log owners—because: *First*, it is not disclosed who the log owners are; *Second*, it appears that four persons were the constituted agents of the log owners, and only three of them joined in the contract. *Rollins et al. v. Phelps et al.*, 5 Minn. 463.

**14. Principal is not bound.** When a private agent so executes his authority as

not to bind his principal, he will be himself liable. *Ib.*

**15. When agent assumes liability.** A party, when contracting with parties who are willing, and do, place themselves in the position of principals though claiming to be agents, is not obliged to follow up every channel of information to discover a principal. *Ib.*

**16. When an agent acts within his instructions,** an action will not lie against him unless it will lie against his principal. *Strong v. Colter*, 13 Minn. 82.

**17. When liable for money had and received.** When an agent has collected for his principal, money which belongs to a stranger, he is liable for money had and received, so long as he has not paid it over to his principal. *Spencer et al. v. Levering et al.*, 8 Minn. 461.

**18. When neither agency nor responsibility of principal is proved.** When a defendant claims that he acted as agent, for a responsible principal, whom he named, but his agency nor responsibility of his principal is not shown, it does not require an express promise to make him liable. *Spencer v. Tozer*, 15 Minn. 146.

**19. Agent the Real Principal.** One who, without authority, executes an instrument in the name of another whose name he puts to it, and adds his name only as an agent for that other, cannot be sued upon it, unless it be shown that he was the real principal. *Sheffield et. al. v. Ladue*, 16 Minn. 388.

**20. Subsequent Ratification by Principal.** When defendant, without authority, executed a note to plaintiffs in name of A., which the latter subsequently ratified, in an action against defendant on the note. *Held*, that as the validity of a ratification does not, in general, depend on its being communicated, defendant's failure to notify plaintiffs of the ratification, does not make him liable without showing facts imposing a duty on him to give such notice, and damage resulting from his neglect. *Ib.*

**21.—before plaintiff is damaged.** Defendant was authorized by A. to exchange

a pair of horses belonging to the latter, and did exchange them with plaintiffs for a pair of plaintiff's and for the difference in the estimated value gave plaintiffs the following note:

Ninety days after date, for value received, we promise to pay to the order of (plaintiffs) two hundred dollars, \* \* \*

Faribault, April 3, 1868. A., per (defendant.)

Defendant was not authorized to give a note, but plaintiffs supposed he was. *Held*, defendant was not liable on the note. Plaintiffs' remedy was by an action, in the nature of an action on the case against defendant for falsely assuming authority to act as agent, but if A. afterward, with knowledge of the facts, ratified the acts of defendant, then such action could not be maintained against him, except where suit was commenced, or injury had resulted to plaintiffs from defendant's acts before ratification, or where the effect of making the ratification relate back, would be to put the plaintiffs in a worse position than they would otherwise have been in consequence of such unauthorized act. *Ib.*

**22. Liability how determined.** In determining upon the liability of a defendant for work and labor, where he claims that he acted for a responsible principal, whom he disclosed, the question is, to whom was the credit given. *Spencer v. Tozer*, 15 Minn. 146.

#### 4. Principal, Liability of to Third Persons.

**23. Generally.** Declarations of an agent will be binding on his principal, when,

1st. He was authorized to make them.

2d. If though made without authority, they were brought home to the principal, who assented to or acquiesced in them, or remained silent when it was his duty to speak, whereby third parties were misled, so that when an agent held property of his principals, as his own, the latter could recover it from *bona fide* purchasers where none of the aforesaid circumstances existed, the mere possession of the agent not

affecting the principal by way of estoppel. *Greene vs. Dockendorf, et al.* 13 Minn. 70.

**24. Officer of the United States.** F., United States Indian Agent, acting within his authority, took defendant's promissory notes, payable to the order of himself, "United States Indian Agent, or his successor in office, for the use of the Winnebago tribe of Indians." *Held*, his official character being known, a suit thereon must be brought in the name of the United States, his principal, F. not having the requisite capacity. *St. A. D. Balcombe v. Northrup et al.* 9 Minn. 172.

**25. Principal may repudiate when.** When defendant's agent had exceeded his authority in a given transaction by which defendant received certain property from plaintiff's grantor, but knowledge of such unauthorized action of the agent did not come to the defendant until he had placed the property beyond his control, he may repudiate such unauthorized action without returning the property—as when the agent purchased for the principal real estate and executed back in defendant's name an instrument in the nature of a mortgage containing covenants to pay, while the agent's authority extended to purchasing for cash only—such instrument may be repudiated. *Humphrey et al. v. Havens et al.*, 12 Minn. 293.

**26.** T. took conveyance of certain land from plaintiff, (giving his note and mortgage on the same to secure the purchase money,) in trust for B., and defendant jointly (B. assuming to act as agent for defendant) on the understanding that he would convey at B's request; and to secure himself took from B. acting for herself and as agent of defendant an instrument of indemnity against the note given to plaintiff, and afterward conveyed all the lots at B's request, part to defendant. Defendant, ignorant of the instrument of indemnity, disposed of the lots, supposing his agent B., had acted within her authority and paid for them in cash. *Held*, defendant might repudiate the instrument of indemnity without reconveying the lots

since they had passed beyond his control in good faith before any knowledge of his agent's unauthorized action. That such repudiation released T. from his covenants to defendant, and that plaintiff not having contracted for any liability on part of defendant could not complain even if his mortgage on the lots did not pay T's notes, and if the lots are not worth the value of the notes on foreclosure, the equity of redemption is worthless, so that defendant's failure to recovery to T. works no injury to T. *Ib.*

**27. Implied liabilities.** When the agency is to be inferred from the conduct of the principal, that conduct furnishes the only evidence of its *extent* as well as its existence. *Ib.*

#### 5. Ratification.

**28. Generally.** A ratification of a contract which the agent had no authority to enter into, will bind the principal. *Minor v. Willoughby et al.* 3 Minn. 225.

**29. Has relation back to time of performance of the act ratified.** The ratification by the principal of a deed defectively executed by an attorney under a defective power, relates back to the execution of the conveyance and makes it competent evidence. *Lovry et al. v. Harris et al.*, 12 Minn. 255.

**30. What is a ratification.** Where an unauthorized person gave time to the maker of a promissory note, on which a surety was bound, by taking a new note for the interest which had accrued on the old note, and would accrue on the extension, and the owner of the same afterwards accepted and retained the original note as well as the new note for interest. *Held*, a sufficient ratification of the transaction to bind the owner as principal and operated to discharge the surety. *Woodbury et al. v. Larned*, 5 Minn. 339.

**31. What essential to a ratification.** A ratification of the acts of an agent previously unauthorized—to bind the principal—must be with full knowledge of the facts. The acceptance of a benefit accru-

ing from the acts of an agent, precludes the principal from denying his authority. *Ib.*

**32.** Ratification of the acts of one assuming to act as agent must be with full knowledge of all the material facts. *Humphrey et. al. v. Havens et al.*, 12 Minn. 293.

**6.** *Liability of Third Person to Principal.*

**33.** N. having contracted in his own name for the purchase of land of L., but for the benefit of plaintiff and with plaintiff's money; L. on being notified of the true character of the transaction by plaintiff is bound thereby. *Gill v. Newell et al.* 13 Minn. 462.

## AMENDMENTS.

(See PRACTICE, II. 18.)

(See CRIMINAL LAW, 19.)

## ANOTHER ACTION PENDING.

(See EVIDENCE 83, *et seq.*)

**1.** Plaintiff claims to recover of defendant for the taking and conversion of 172 bushels of wheat. The answer set up the following facts as constituting pendency of another action, viz : That plaintiff had retaken the wheat on writ of replevin, with the usual bond conditioned to prosecute, &c., but had failed to prosecute on the return day, and his replevin suit was dismissed and defendant had already brought suit on the replevin bond to collect its penalty against plaintiff and his surety in the District Court, &c., and said suit is now pending. *Held*, the answer does not show the pendency of another action between the same parties or their privies respecting the same subject matter. Nor is the answer good as a counter claim under sub div. 1, Sec. 71, p. 541 Pub. St., it not "arising out of the contract or transaction set forth in the complaint" for the one was prior to the other, nor is it "connected

with the subject of the action" within the meaning of same statute, for one is for taking of wheat, the other breach of replevin bonds. *Mayerus v. Hoscheid*, 11 Minn. 243.

## APPEARANCE.

(See PRACTICE, II. 2.)

## APPEAL BOND.

(See CIVIL ACTION, VIII. 2.)

(See BOND, II.)

## APPEAL.

(See JUSTICE OF THE PEACE, VII.)

(See PRACTICE, II. 15, A. a.)

(See PRACTICE, II. 15, B. II.)

(See COUNTIES, VI.)

## APPROPRIATION OF PAYMENTS.

(See CONTRACT, IX, b.)

## ARBITRATION BOND.

(See CIVIL ACTION, VIII. 1.)

## ARBITRATION.

### I. THE AWARD.

1. *Setting aside thereof.*
2. *Its return.*
3. *Its attestation.*
4. *Recommittal.*

### II. JUDGMENT ON THE AWARD.

(See Bonds, 3.)

### I. THE AWARD.

1. *Setting Aside Thereof.*

### 1. Neglect to pass on all the matter



**submitted.** An award will not be set aside on account of an omission to act on all the matters submitted, or a neglect or refusal to pass upon any of such matters, when the complaining party shows no injury he has sustained from the alleged failure of the arbitrators to exercise the powers conferred upon them. Awards will not be set aside except for corruption or misbehavior, or for some great or palpable error. *Daniels v. Willis*, 7 Minn. 374.

**2. Stipulation that it shall be final.** When a submission to arbitration stipulated that the award shall be final and "no appeal or writ of error, or other proceeding shall be taken" from the award, &c. *Held*, such a stipulation can only be evaded on the ground of fraud or misbehavior, not for a mistake of law or fact. *Ib.*

**3.** After an award has been filed with the clerk, and the parties have stipulated that "no appeal, writ of error, or other review, of whatever kind" should be taken from said award or judgment" and authorized the clerk to enter up judgment without confirmation by court, neither of them can question the award or judgment, except on ground of fraud. *Lovell v. Wheaton et. al.* 11 Minn. 92.

**4. An action is maintainable** to set aside an award of arbitrators on account of fraud in the arbitrators. *Devey v. Leonard*, 14 Minn. 153.

### 2. Its Return.

**5. May be returned in vacation.** It is not essential to the validity of arbitration proceedings on award that the award should be returned during a term of court—it may be returned to the clerk in vacation.—Chap. 85 Comp St., sec. 15—providing that the award *may* be returned at any term, &c., being permissive only. *Ib.*

### 3. Its Attestation.

**6. Subscribing witness.** An award that is not attested by a subscribing witness is not a nullity, but cannot be enforced.—Sec. 9 chap. 85 Comp. St.—the court may recommit or modify. *Ib.*

### 4. Recommittal.

**7. Court can recommit.** The court has ample power under Sec. 11 and 12, chap. 85 Comp. St., to recommit an award *generally*, the latter section allowing a recommitment for a "rehearing" being permissive not restrictive. *Ib.*

## II. JUDGMENT ON THE AWARD.

**8. Without confirmation, by stipulation.** A submission of an award having been properly executed under Chap. 85, Comp. St., conferred jurisdiction on the arbitrators, and it being filed with the clerk, within time stipulated by the parties, the court acquired jurisdiction. The court having acquired jurisdiction it was competent for the parties to waive all objections to the award on account of formal errors and irregularities, and to authorize the clerk to enter judgment thereon at once, without confirmation by the court. *Ib.*

## ARCHITECT.

(See MECHANICS' LIEN, 3.)

## ARREST.

**1. Unauthorized arrest.** If defendant acted without authority of law in arresting and detaining plaintiff, the implication of malice arising therefrom is not rebutted by proof that he supposed himself to be acting legally, though such proof may be evidence in mitigation of damages. *Judson v. Reedon*, 16 Minn. 431.

**2. Arrest by private person.** To justify an arrest of an individual by a private citizen, the common law requires that the latter shall be able to show that he detained the former only till an officer could be sent for to take charge of him, or that he proceeded without unnecessary delay to take him to a magistrate or peace officer, or otherwise to deal with him according to law, and under our statute—G. S.—it is no

less needful that he should without unnecessary delay take the individual before a magistrate or deliver him to a peace officer. *Ib.*

**3. Arrest at a fire under a fire ordinance.** Under an ordinance of the city of St. Paul establishing a fire department and providing a fine not exceeding \$50.00, in case, in the absence of sufficient excuse, of a refusal by any one at a fire to obey any order or direction given by a person duly authorized to order or direct; and that "any member of the common council, or any fire warden may arrest and detain such person until the fire is extinguished," an alderman is not justified in arresting a person, who, against the directions of the persons in charge of a hose at a fire, persists in crossing, and does cross, said hose, although no unnecessary violence be used in the arrest and the prisoner be not detained an unreasonable time, unless the person crossed the hose without a sufficient excuse. *Ib.*

**4.** Under an ordinance of a city council providing that on the refusal of any person at a fire to obey any order or direction given by a person duly authorized to order and direct, and that "any member of the city council, or fire warden may arrest and detain such person until the fire is extinguished," if any member of the council or foreman of a fire company would justify the arrest and detention of a person who, against orders, drives on the hose of a fire company in his presence, must show that he took him without unnecessary delay before a magistrate or delivered him to a peace officer, and an omission to do so is not excused by the fact that such officer was, as a fireman, engaged in actually suppressing a fire, and that, in his judgment, the public safety required him to remain at his post. *Ib.*

## ASSAULT WITH INTENT TO COMMIT RAPE.

(See CRIMINAL LAW, 153.)

## ASSAULT WITH INTENT TO DO GREAT BODILY HARM, ETC.

(See CRIMINAL LAW, 27, 154.)

## ASSAULT WITH INTENT TO MURDER OR MAIM.

(See CRIMINAL LAW.)

## ASSAULT AND BATTERY.

**1.** When B. approaches G. with a cane raised in a hostile manner, G. may strike or use a sufficient degree of force to prevent the intended blow, and need not retreat, or wait till B. strikes him. The degree of force is for the jury to determine. *Gallagher v. State*, 3 Minn. 270.

## ASSIGNMENT FOR BENEFIT OF CREDITORS.

(See ASSIGNMENTS, II.)

## ASSIGNMENTS.

[SCOPE NOTE.—All matters properly falling under the subdivision of this title are, it is thought, here arranged. Matters somewhat connected therewith but more directly related to other titles, and hence arranged under those titles, will be found in the index.]

### I. ASSIGNMENTS IN GENERAL.

1. *Generally.*
2. *Assignee, rights of.*
3. *Judgments, assignment of.*
4. *Notes, assignment of.*

### II. ASSIGNMENTS FOR BENEFIT OF CREDITORS.

1. *Generally.*
2. *Construction of.*
3. *Assignor, rights of.*
4. *Assignee.*
5. *Assignment by partner.*
6. *What will vitiate.*
7. *Who may assail.*

(See PARTNERSHIP, 18, 19.)

(See EVIDENCE, 115 *et seq.*)

(See MECHANIC LIEN.)

## I. ASSIGNMENTS IN GENERAL.

### 1. Generally.

**1. What estate necessarily passes.** The provision of statute allowing the assignee of a chose in action to bring suit in his own name, does not necessarily determine that the *legal estate* passes by the assignment, the only object was to permit the real party in interest to sue. *MacDonald et al. v. Kneeland et al.*, 5 Minn. 352.

**2. Assignment of void contract, with assignor's interest in subject matter, good as to the latter.** An "assignment" pretended to convey a certain contract in writing (describing it) "together with all the interest of the said company in the bonds mentioned in the contract or agreement, and the bonds mentioned therein," and certain other bonds not mentioned in the contract. *Held*, that though the "contract" had become void, still its assignment would not render nugatory that part of the assignment conveying the debt itself in apt and sufficient terms, and though the assignee took no title to the bonds by virtue of the contract assigned, still the interest of the assignor in the bonds passed. *Ib.*

**3. What is assignable.** It seems, that whatever rights of action or of property, survive to an executor, or administrator, are assignable. *Tuttle v. Howe, et al.*, 14 Minn. 145.

### 2. Assignee, rights of.

**4. If a debtor pays to the assignor without notice of the assignment,** the latter will be held as a trustee for the assignee; and even a judgment obtained against the debtor as garnishee, before payment, will not defeat the rights of the assignee, at least where the facts proved in an action brought to set aside the judgment disclose superior equities in the assignee. *MacDonald et al. v. Kneeland et al.*, 5 Minn. 352.

**5. An absolute assignment of a chose in action** carries all the assignor's interest, and a subsequent attaching creditor or assignee can acquire no interest therein. *Ib.*

**6.** P. C. & Co., had contracted with the M. & C. V. R. R. Co., by which the R. R. Company was to deposit with P. C. & Co., forty-three R. R. bonds, and receive from the firm a certain contract. The firm of P. C. & Co., was dissolved by death of C., whereupon it was agreed, that, R. M. S. Pease should execute the contract in place of the firm, and the same be guaranteed by the surviving members, two of which were east. While the original contract was sent east for the signature of the guarantors, R. M. S. Pease gave the R. R. Co. another contract of same terms signed by himself and two others, the only surviving members present, which was to be surrendered on the return of the other contract signed by all the guarantors. The R. R. Co. failed to surrender the contract first received on the return and delivery to them of the other; but, assigned it to the plaintiffs. *Held*, the plaintiffs took nothing by the assignment "of the contract," the R. R. Co., having no interest to convey. *Ib.*

### 3. Judgments, assignment of.

**7. An assignee of a judgment** takes subject to all equities existing at the time, between the judgment debtor and the assignor, whether he has notice of them or not. *Brisbin et al. v. Newhall et al.*, 5 Minn. 273.

**8. Right of set off attaches to judgment in hands of assignee.** I. obtained judgment for costs against M. & Co., in the Supreme Court, the case being retried when M. & Co. obtained judgment on the merits against I., when I. assigned his judgment for cost to H. *Held*, H. took the assignment with notice of the judgment in favor of M. & Co., it being matter of record in same action and held it subject to the equitable right of Myers & Co., to have it set off against their judgment. *Irvine et al. v. Myers*, 6 Minn. 562.

#### 4. Notes, assignment of.

**9. An assignment of a promissory note after due**, on which the assignor had a right of action against certain bankers by reason of the negligent discharge of an endorser for want of due notice of non-payment, does not it would seem, carry with it said right of action. *Borup et al. v. Nininger*, 5 Minn. 523.

**10. Assignment of note already converted carries right to sue for the conversion.** S. had placed a promissory note he owned in the hands of an agent, and in selling his interest in the same to plaintiff, gave the latter an order on his agent for the same, at time of the sale the note had been converted by defendant. *Held*, the sale to plaintiff carried the right to sue defendant for conversion of the note, distinguishing this from *Borup et al. v. Nininger*, 5 Minn. 274. *Nininger v. Banning*, 7 Minn. 274.

## II. ASSIGNMENTS FOR BENEFIT OF CREDITORS.

### 1. Generally.

**11. What is?** The Minneapolis & Cedar Valley R. R., by resolution "delivered into the possession of Sibley" certain bonds "for the protection of the creditors of the company, so far as they can be applied to that object." Said Sibley was authorized to pay them out to the creditors at the rate of 95 cents on the dollar, and draw on the company for the balance due any creditors who, after receiving a *pro rata* share, were not wholly paid. If there remained in Sibley's hands at a certain time any bonds they were to be returned to the company. Payment of certain debts was otherwise provided for. *Held*, this resolution did not constitute an assignment for the benefit of creditors—and had it been so intended it was void. But Sibley was thereby constituted the agent of the company for specified purposes, and he held the bonds as such agent, and his possession was the possession

of the company. *Banning v. Sibley*, 3 Minn. 389.

**12. Fraudulent intent not necessary to constitute legal invalidity.** The invalidity of an assignment for the benefit of creditors as a *matter of law*, by reason of something appearing on the face thereof, is not inconsistent with an honest intention on the part of the assignor. *Mower et al. v. Hanford et al.*, 6 Minn. 535.

### 2. Construction of.

**13. It is a general rule** in the construction of assignments containing general words of transfer, as "all the debtor's property," that subsequent words of description, or reference to a schedule setting forth the property particularly, will operate to limit the general clause of transfer, and nothing will pass not specified or set forth. *Guerin v. Hunt et al.*, 6 Minn. 375.

### 3. Assignor, Rights of.

**14. May pay and become subrogated to rights of a mortgage on the assigned property.** A debtor assigned all his property for the benefit of creditors, among which was a piece of land which he had mortgaged to secure a debt; after the assignment, and to avoid a suit on the part of the mortgagee, he paid the mortgage debt. *Held*, he became subrogated to the rights of the mortgagee, and could enforce the mortgage against the assignee—no fraud being shown in his purchase. *Baker v. Terrell et al.*, 8 Minn. 195.

**15. Resulting trust.** An assignor for the benefit of creditors, who has a resulting trust in the property, has such an interest therein as entitles him to defend it when attached for his debts. *Richards et al., v. White*, 7 Minn. 345.

### 4. Assignee.

**16. What interest he takes.** Belle Plain Company and defendant being tenants in common of a certain mill, and parties to a contract for the running of the same, certain disputes between them were referred to arbitrators, but before the de-

termination of the same, the former assigned its interest in the mills for the benefit of creditors. *Held*, the assignee took the property free from any lien by virtue of the award at the time of assignment—and the assignee was not bound to complete the erection of other mills under the contract between the assignors and defendant, nor continue to run the mill with defendant as partner, and might have the copartnership in running the mills wound up. *Moody v. Rathbun*, 7 Minn. 89.

5. *Assignment by partner.*

**17. Without assent of copartner, may be ratified by the latter.** An assignment of all the partnership property by one partner, without the assent of his copartner, for the benefit of creditors, though void at the time, may be ratified by the non-assenting partner, but not so as to affect rights of others which have vested prior to the ratification. *Stein et al. v. La Dow et al.*, 13 Minn. 412.

6. *What will vitiate.*

**18. Power to sell on "reasonable credit."** A trust deed for the benefit of creditors authorizing the trustee to "sell either at public or private sale, forthwith for cash or on reasonable credit, as trustee may think proper," conflicts with Sec. 1, Chap. 64, R. S., p. 269, and is void. *Greenleaf v. Edes*, 2 Minn. 270.

**19. Intent to defraud, when implied.** The intent of the debtor to hinder or delay his creditors must always be implied when such is the necessary effect of any provision in the instrument of assignment, or of the exercise of any power which the instrument confers. *Ib.*

**20. Part void, the whole void.** If a provision in a trust deed for the benefit of creditors, authorizing the trustee to sell on credit, be void, it destroys the whole deed, and the rest cannot stand on the rule "*Ut res magis valeat quam pereat*," for the statute makes every conveyance made to hinder, delay or defraud creditors void as against them. *Ib.*

**21. Resulting trust to assignor without paying all creditors.** An insolvent debtor sold, assigned, etc., by Bill of Sale to one of his creditors, all his property "not exempt by law from execution," the creditor executing with the debtor, at the same time, and as a part of the same transaction, a written agreement binding the creditor to "dispose of the goods in the ordinary course of business," and to hold "to the order of the debtor" any "surplus that might remain" after paying the creditor's claim with interest. *Held*, the two instruments must be construed together, and, 1st, That they constitute, not simply a transfer of property to satisfy a debt, nor a mortgage or pledge to secure a claim, but a general assignment for the benefit of creditors. 2d, As it provided for a resulting trust to the assignor without paying all the creditors, it is of itself evidence of an intent to hinder, delay and defraud creditors, and void as to them, under Sec. 1, Chap. 51, Statutes Comp. 3d, This effect would be given to it solely by the clause empowering the assignee to dispose of the property in the ordinary course of business. 4th, Whether it would be void under the 1st Sec. of Stat. Frauds, Comp. St., (458th page), doubted. *Truitt Bros. & Co. v. Caldwell*, 3 Minn. 364.

**22. Provision that the assignee shall and do, as soon as convenient, sell, etc.** An assignment for the benefit of creditors providing that the assignee "*shall and do, as soon as convenient, sell and dispose of*," etc., is not void on its face as tending to hinder, delay or defraud creditors—it being in substance a stipulation that he shall do so as soon as he reasonably can do so—which the law would allow him without any words to that effect. *McClung v. Bergfeld*, 4 Minn. 148.

**23. Intent to prevent a forced sale.** An intent on the part of the assignors, at the time of making a voluntary assignment for the benefit of creditors, thereby to prevent a forced sale of their property in order that the business might be continued and the goods sold at retail, ren-

dered the assignment void. No matter whether the assignee was ignorant of such intention, nor how it appeared—whether from the face of the assignment or by means of evidence *aliunde*. *Gere v. Murray*, 6 Minn. 305.

**24. Conditions imposed on the assignee, etc.** If an assignment for the benefit of creditors shows on its face an intent to hinder, delay or defraud creditors, as by providing that the property may be sold on credit, or the debtor reserves a part when required to assign the whole, or requiring the creditors to discharge their debts in full as a condition of sharing in the benefits of the conveyance, or by showing that the debtor was solvent at time of assignment, it will be declared void as to creditors without the examination of facts *aliunde* by a jury. *Burt v. McKinstry et al.*, 4 Minn. 204.

**25. Assigned property worth three times amount of debts.** An assignment for the benefit of creditors showed on its face that the property assigned was worth three times the amount of the assignor's indebtedness. Held void, as conclusive evidence of an intent to hinder and delay creditors appeared from the instrument. *Ib.*

**26. The intentional selection of an incompetent assignee** is regarded in law as a badge of fraud. If the purpose was to enable the assignor to control the administration of the estate, the assignment will be declared void, as a fraud on creditors, but if it was from no improper motive, the assignment will be sustained and a competent assignee substituted by the court. An assignee who cannot read or write will not be competent, though possessed of a large estate, if lacking in intelligence and ability to carry on business, and the manner of his conducting the estate may be inquired into to ascertain his competency. *Guerin v. Hunt et al.*, 6 Minn. 375.

**27. The insertion of fictitious claims** in an assignment for the benefit of creditors, and giving them a preference, is a badge of fraud. *Ib.*

**28. The conveyance by a partner of his individual property** on a secret trust immediately preceding a general assignment by the copartnership for the benefit of creditors, does not affect the validity of the latter. *Ib.*

**29. Excess of assets unreasonably large.** In case of an assignment for the benefit of creditors, where the excess of assets is so unreasonably large as to force the conclusion that the assignment is made in the interest of the assignor, and to protect him from the sacrifice attending a forced sale, rather than the benefit of creditors, then the assignment will be deemed fraudulent. The question of reasonableness of the assets depends on many circumstances, among which is the convertibility of the assets into money—nor is the amount fixed in the schedule regarded as conclusive evidence of the value of the goods assigned. *Guerin v. Hunt et al.*, 8 Minn. 477.

**30. Delay in execution of trust.** In an assignment for the benefit of creditors, where the intention of the assignor is in good faith to devote the property assigned to the payment of debts, and not to defraud creditors, the necessary delay attending the execution of the trust will not vitiate the assignment. *Ib.*

#### 7. Who may assail.

**31. Creditor of fraudulent grantor** may elect to confirm the conveyance or avoid it, but cannot do both. He can't receive a benefit under it, and then claim it is fraudulent and void. *Lemay v. Bibeau*, 2 Minn. 293.

**32. Where a creditor receives a benefit** under an assignment, or becomes a party to it voluntarily, with a full knowledge of its provisions, or circumstances rendering it fraudulent as to creditors, he is thereby estopped from afterwards impeaching it. *Scott v. Edes*, 3 Minn. 377.

**33. Where one accepts dividends** under an assignment for the benefit of creditors, he is estopped from questioning its validity. *Ib.*

**34.**—Where one has received dividends under an assignment for the benefit of creditors, he must pay back all he has received before he can question its validity, and generally a party who would disprove a fraudulent contract must return whatever he has received under it. *Ib.*

**35.**—When a creditor is notified by the debtor of an assignment for his benefit together with other creditors, and consents that the assignee shall make a given disposition of the property, he is estopped from questioning the validity of the assignment on the ground of ignorance of certain clauses in the deed of assignment making it void, he having had notice of enough to put him on inquiry, and is presumed to have been informed of the contents of the instrument before approving it. *Ib.*

## ASSESSMENTS.

(See MUNICIPAL CORPORATIONS, IV.)

## ATTACHMENTS.

- I. GENERALLY.
- II. REQUISITES OF.
- III. WHAT IS SUBJECT TO.
- IV. WHO CAN ISSUE THE WRIT.
- V. THE AFFIDAVIT.
- VI. WHEN IT WILL ISSUE.
- VII. HOW EXECUTED.
- VIII. DISSOLUTION OF ATTACHMENT.

(See JUSTICE OF THE PEACE, VI.)

(See PARTNERSHIP, 37.)

(See PLEADINGS, 28.)

(See PRACTICE, II., 5.)

### I. GENERALLY.

**1. One service exhausts the writ.** When an officer holding property under writ of attachment, loses possession of the same in proceedings to recover the property (replevin) he cannot again attach the property and obtain possession by virtue of the original attachment, its virtue be-

ing exhausted by the first taking. *Vanderburgh et al. v. Bassett*, 4 Minn. 242.

### II. REQUISITES OF.

**2. Bond—amendment.** A bond with a penalty and condition and two or more sureties is necessary to the validity of proceedings in attachment under sec. 131, p. 467 G. S., but where an undertaking signed by the principal and one surety was filed, the same proceeding may be amended *nunc pro tunc* under sec. 105, p. 463, G. S. *Blake v. Sherman*, 12 Minn. 420.

### III. WHAT IS SUBJECT TO ATTACHMENT.

**3. The interest of one partner in a debt**, not due, belonging to his copartnership, is attachable in an action against him individually—see. 133, ch. 66, G. S. *Day et al. v. McQuillan*, 13 Minn. 205.

### IV. WHO CAN ISSUE THE WRIT.

**4. Clerk of Court.** Sec. 142, p. 550, Comp. St., so far as it authorizes Clerks of Courts to allow warrants of attachments is in conflict with sec. 1, art. 6, constitution of State. The allowance being a judicial act. *Morrison et al. v. Lovejoy et al.*, 6 Minn. 183.

**5.**—The issuing of an attachment is a judicial act and the Clerk of Court has no authority to grant it. *Following Morrison et al. v. Lovejoy et al.*, 6 Minn. 183. *Zimmerman v. Lamb et al.*, 7 Minn. 421.

**6.**—An attachment allowed by the Clerk of the District Court is void and no protection to an officer executing it. *Following Morrison et al. v. Lovejoy et al.*, 6 Minn. 183. *Guerin v. Hunt et al.*, 8 Minn. 477.

**7.**—A warrant of attachment issued by a clerk without an allowance thereof by a judge is unauthorized, and parties who instruct a sheriff to levy under such writ (fair on its face) are trespassers. *Merritt v. City of St. Paul*, 11 Minn. 223.

### V. THE AFFIDAVIT.

**8. Legal proof required.** Under the territorial law of 1849, p. 155, sec. 3, con-

cerning the commencement of suits by *attachment* the proof there required is *legal proof*, and it is not sufficient to base an affidavit on mere hearsay or belief; for they are not *circumstances* within the meaning of the law which are competent proof of the facts necessary to entitle the party to a writ. *Pierse v. Smith*, 1 Minn. 83.

**9. That cause of action existed at date of alleged act.** An affidavit to ground an attachment under Comp. St. p. 550, which fails to state that the cause of action had occurred at time of alleged act, or that defendant was at the time of the commission of the same a creditor, is insufficient. *Morrison et al. v. Lovejoy et al.*, 6 Minn. 183.

**10. Defendant's solvency at date of the alleged fraudulent transfer.** An affidavit for an attachment dated Sept. 22d, 1863, alleged that plaintiff became owner of debt on May 20, 1863, that on May 23d, 1863, defendant owned, etc., free of incumbrances etc., 120 acres of land, that on said 23 May defendant, with intent to defraud his creditors, particularly this deponent, conveyed etc., without consideration, 40 acres of same to his daughter, and held the remaining 80 acres as homestead, and that he *has* no other real estate out of which deponent's demand can be satisfied. Further that said defendant has no property not exempt from execution, except 150 bushels grain and that he is about to dispose of said grain and has made a fraudulent sale thereof, so as to defraud his creditors, particularly this deponent, and with intent, etc. *Held*, nothing appears but what he was solvent when he conveyed the lands to his daughter, and if he had means to pay all his debts the transfer, even without consideration, was no evidence of fraud. As to the grain, the allegation that he was "about to dispose of," and "had disposed of," was contradictory. and could not be made in the alternative—must be one thing or the other when it is one item of property—otherwise it cannot "appear" within the statute that either fact existed. and no facts are alleged from which the

fraudulent intent appears—the allegation that it was done "with intent" etc., being a conclusion of law, which must be deduced from facts set up in the affidavit. *Hinds v. Fagebauk*, 9 Minn. 68.

**11. Fraudulent representations.** An affidavit for attachment, which states that defendant is indebted to plaintiffs in sums of, etc., for goods sold, etc., between 3d Sept. and 7th Oct., 1864, that in May, 1864, at plaintiff's store, defendant as an inducement to plaintiffs to sell him goods on credit, represented to plaintiff that he was doing business in his own name, did not owe anything, had \$1,000 stock in trade, that plaintiffs relied entirely on such representations and sold him the goods. That all such representations were false, etc., setting forth his indebtedness and that he did not have \$1,000 stock in trade, show *prima facie* fraud, and will authorize an attachment under Comp. St., p. 550, sec. 144. *Lewis et al. v. Pratt*, 11 Minn. 57.

**12. Existence of an action.** It is not necessary that an affidavit for attachment should contain any statement as to the commencement of the action under sec. 130, p. 466, G. S. *Blake v. Sherman*, 12 Minn. 420.

**13. Averment as to fraudulent transfer must be positive.** An affidavit of an attachment under sec. 130, ch. 66, G.S., as amended by sec. 1, Laws 1867, p. 110, which states "that the defendant, as deponent verily believes, is about to assign, secrete, or dispose of his property, with intent to delay or defraud his creditors," is insufficient. The statement must be positive. The words "as deponent verily believes" introduced by the amendment applies only to the departure from the State with intent to defraud, etc. *Murphy v. Purdy*, 13 Minn. 422.

**14.**—An affidavit for an attachment alleging that "the deponent further says, that he verily believes that the said defendant F. has assigned, secreted or disposed of his property with intent to delay and defraud his creditors." *Held*, insufficient, it must be averred without qualification, fol-



lowing. *Murphy v. Purdy*, 13 Minn. 422.  
*Ely v. Titus*, 14 Minn. 125.

**15. Two grounds in the alternative.** An affidavit for an attachment under ch. 76, Laws 1867, p. 110. states as the ground thereof that the "defendant has assigned, secreted or disposed of, or is about to assign, secrete or dispose of his property with intent to delay or defraud his creditors." *Held*, states two separate grounds of attachment in the alternative, and therefore bad. *Guile v. McManny*, 14 Minn. 520.

## VI. WHEN IT WILL ISSUE.

**16. Issue in an action.** An attachment in the District Court differs from the same writ in a Justices' Court in this, that in the former the proceeding is *in* an action but can issue only on bond filed—in the latter court, it is the commencement of the action and issues without bond (under the Comp. St.) *Davidson v. Owens, et al.* 5 Minn. 69.

**17. All actions for recovery of money.** Sec. 142 and 144 Comp. St., p. 550, allows an attachment to issue in all actions for the recovery of money, whether sounding in tort or contract, or for liquidated or unliquidated damages—in this respect differing from the writ in a justices' court. *Ib.*

**18.**—It is sufficient for the purposes of an attachment under Comp. St., p. 550, sec. 142, 144 that the claim be for the "recovery of money" following—*Davidson v. Owen*, 5 Minn. 69. *Morrison et al. v. Lovejoy et al.*, 6 Minn. 183.

**19. Fraudulent representations as affecting subsequent dealings.** P. in May, 1864, to obtain credit with S. falsely represented that he was out of debt; S., on the strength of such, and other representations credited P. with goods which were afterwards paid for. In September, 1864, S. without further communication credited P. with other goods. *Held*, P.'s false representation in May as to his pecuniary ability was kept alive and carried along, as it were, so that the wrong impressions created could be treated as operating upon and inducing the credit in September. The

course of dealing having its origin in fraud and deceit, the party should be held responsible for the natural consequences of his wrong as business is ordinarily conducted, and the sale in September was on false representations within the meaning of the statute authorizing attachment when debt was fraudulently contracted. Comp. St., p. 551, sec. 144. *Lewis et al. v. Pratt*, 11 Minn. 57.

**20. Fraud or fraudulent intent when necessary.** Under sec. 144, chap. 60, Comp. St., it is not necessary that, except in the case of a foreign corporation or non-resident, either fraud or fraudulent intent on the part of the debtor must exist in all cases before an attachment can issue. But to authorize its issue under the sub div. allowing it when for any other good and sufficient reason he (affiant) will be in danger of losing his debt unless it be granted, the affidavit must state facts from which the officer can, in the exercise of a sound discretion, come to that conclusion. *Keigher et al. v. McCormick*, 11 Minn. 545.

**21. Presumption as to time of its issue.** Where the statute allowed a writ of attachment to issue "*at the time of issuing a summons, or at any time afterwards,*" and the record is silent as to when it issued. *Held*, it will be presumed that the attachment was issued at a proper time. *Blake v. Sherman*, 12 Minn. 420.

**22. For a statement of facts which will sustain a writ of attachment under the statute see.** *Ib.*

**23. Pendency of action at time of issuing not necessary—it may issue with the summons.** It is not necessary under our statute that an action be pending at the time an attachment issues. It may issue at the time of the summons or afterwards, whereas the action is not commenced until the summons is served, or at least delivered to the officer with the intent that it be served, sec. 128, ch. 66, G. S. In an action in a court of superior jurisdiction it will be presumed the summons issued at or before the issuing of the attachment—*prima facie*. *Blackman v. Wheaton*, 13 Minn. 326.

## VII. HOW EXECUTED.

**24. On personal property.** Under sec. 40, sub div. 2, Comp. St. 551, which provides that "personal property capable of manual delivery to the Sheriff, must be attached by taking it into his custody." *Held*, the statute must be strictly construed, and an attachment of Minnesota State R. R. bonds must be made by the officer taking them into his *actual possession*, they being personal property capable of manual delivery. *Caldwell v. Sibley*, 3 Minn. 406.

## VIII. DISSOLUTION OF ATTACHMENT.

**25. Of property in hands of assignee.** An attachment against property in the hands of an assignee for the benefit of creditors, on ground of fraudulent assignment, will be dissolved when it appears the attachment creditors appeared and received benefits under the same. *Following Lemmy v. Bibeau*, 2 Minn. 291. *Richards et al. v. White*, 7 Minn. 345.

## ATTORNEYS.

- I. GENERALLY.
- II. ATTORNEY'S POWER.
- III. ATTORNEY'S LIEN.
- IV. ATTORNEY'S LIABILITY.
- V. STIPULATION BETWEEN ATTORNEYS.
- VI. SUBSTITUTION OF ATTORNEYS.

## I. GENERALLY.

**1. The recognition of signatures of attorneys** does not extend beyond their professional acts done in performance of their duties as attorneys at law. *Masterson et al. v. Leclair*, 4 Minn. 163.

## II. ATTORNEY'S POWER.

**2. Power to admit service of original process on client.** An attorney at law cannot, without special authority, admit service of an original process by which the

court obtains jurisdiction for the first time of the party—the relation of attorney and client does not arise until after service of process. *Id.*

**3. Power to bind client until final notice of substitution.** One M. appeared for defendant in the Justice's and District Court, and was so recorded. In the latter court C. was associated with him, and took charge of the case in the Supreme Court on appeal. No written notice of substitution of C. as attorney in place of M. was given to respondent. In the District Court after having been once in Supreme Court, where C. had acted and been recognized, respondent moved to dismiss the appeal, which was done, with the consent of M., who was present. *Held*, appellant was bound by M.'s action, he being attorney of record. The statute is imperative. Sec. 14 Comp. St. 687. *McFarland v. Butler*, 11 Minn. 72.

**4. Presumption as to authority.** It is not to be presumed that an attorney acts without authority. *Gemmell v. Rice et al.*, 13 Minn. 400.

**5. By admission to bind client.** The admission of *attorneys of record* bind their client in all matters relating to the progress and trial of the cause, and are generally conclusive, and unless a clear mistake is shown they are not relieved against, and if the opposite party has been induced to alter his condition it is doubtful whether they can be relieved against. In case of mistake, it must have been one against which ordinary care and attention would not have guarded against. *Rogers v. Greenwood*, 14 Minn. 333.

## III. ATTORNEY'S LIEN.

**6. Merger in judgment.** When a party recovers judgment, and assigns it to his attorney, the attorney's lien is merged in his more general title by assignment. *Dodd v. Brott*, 1 Minn. 274.

**7. Requisites of notice of lien.** A notice of attorney's lien served on the adverse party must specify the amount of the

lien. *Forbush v. Leonard et al.*, 8 Minn. 303.

**8. No lien in absence of agreement for compensation.** Where there has been a special agreement for compensation between attorney and client, the statute gives a lien after notice for the amount of the agreed compensation, but in the absence of agreement the attorney has no lien, for the "costs" referred to in the statute consist only of the amount allowed as indemnity for employing an attorney—Comp. St. Chap. 62, Sec. 1 and 9—all other expense being taxable as "disbursements" and "charges,"—but by S. L. 1860, p. 244, these "costs" were abolished, thus taking away all lien of an attorney for "costs." Sec. 16, Sub. 4, Chap. 82, Comp. St. *Ib.*

**9. Lien in the action essential.** Under Sec. 16, Chap. 82, Comp. Statutes, where an attorney is given a lien upon money in the hands of an adverse party, or upon a judgment, it must be for services rendered in the particular action in which judgment is rendered or money found in the hands of the other party. *Ib.*

#### IV. ATTORNEY'S LIABILITY.

**10. For authorizing levy on property of a stranger.** Where an attorney in an execution directs the sheriff to make a levy and sale of personal property in the possession of the defendant or his agent under circumstances which create a *prima facie* presumption of ownership in the defendant, but which really belongs to a third person, who has omitted to make and serve upon the sheriff the affidavit required by Sec. 1, Ch. 24, Law 1865, the attorney is not liable for the taking and conversion of the property. *Wilson, Ch. J., dissents. Barry v. McGrade et al.*, 14 Minn. 163.

#### V. STIPULATION BETWEEN ATTORNEYS.

**11. When set aside.** A written stipulation between the attorneys of record will not be set aside when no fraud or collusion

appears, and even when fraud and collusion is alleged it is extremely doubtful whether such relief could be granted without showing the insolvency of the attorney. *Bingham v. Board of Supervisors of Winona County*, 6 Minn. 136.

#### VI. SUBSTITUTION OF ATTORNEYS.

**12. After judgment.** After more than a year had expired from the entry of judgment, the judgment creditor employed a new attorney to conduct a garnishee proceeding, without any regular change of attorneys on the record. *Held*, he could do so under Sec. 10, Chap. 82, Comp. St. *Hinckley et al. v. St. Anthony Falls Water Power Co.*, 9 Minn. 55.

#### ATTEMPT TO EXTORT PROPERTY, ETC.

(See CRIMINAL LAW, 26.)

#### AWARD.

(See ARBITRATION.)

#### BAILMENT.

##### I. GENERALLY.

##### II. PLEDGE OR PAWN.

##### III. BAILMENT BY HIRING.

1. *Locatio custodio*, or hiring of custody.

2. *Locatio rei*, or hiring of a thing.

##### IV. MANDATUM.

##### V. COMMODATUM OR LOAN.

(See COMMON CARRIER.)

##### I. GENERALLY.

**1. Compensation to bailee not requisite.** All bailments, whether with or without compensation to the bailee, are contracts founded on a sufficient consideration. To support the contract it is not necessary

the bailee should derive some benefit from it—the latter fact determining only the character of the bailment, consequently the bailee's degree of liability. *McCauley v. Davidson et al.*, 10 Minn. 418.

## II. PLEDGE OR PAWN.

**2. Pledgor's interest subject to execution sale.** The pledgor of personal property has an interest in the pledge equal to its value after discharging the sum for which it is pledged, and we cannot see why that interest is not subject to levy and sale upon execution, if the pledgee is willing to surrender the possession. If the pledge be a promissory note, and be surrendered to the officer under a levy, it is no defense for the maker that the pledgee need not have surrendered the possession. *Mower v. Stickney*, 5 Minn. 397.

**3. Pledgee cannot transfer the pledge without the debt.** S. contracted to "assume and pay" O.'s promissory note, payable to the order of C., then held by F. as collateral security for a debt of C.'s, having been transferred by delivery, without endorsement. S. promised F. to pay it also; afterwards F. transferred O.'s note to plaintiff, but did not assign the debt which it was held to secure. *Held*, F. held the note in pawn and could transfer no interest or title to the same, separate and distinct from the debt due from C., and plaintiff took no title, the same having been transferred after due, and without endorsement from O., and possession was no evidence of ownership. *Van Eman v. Stanekfield et al.*, 13 Minn. 75.

**4.**—The lien or special property which the pawnee has in the pawn, is by reason of his ownership of the debt for which he holds it as security. He cannot separate the lien from the debt so that the chose in action may be owned by one man and the lien held by another. The lien is not a distinct and independent right of property, capable of being transferred or assigned. *Id.*

**5. Pledgee may sue on a promissory**

**note pledged, on default of pledgor.**

When a promissory note, payable to order, is pledged after the same is due, to secure a debt of the pledgor, the pledgee, on default of the pledgor, may without demand sue the maker thereof in his own name, under Sec. 26, Ch. 63, G. S. *White v. Phelps*, 14 Minn. 27.

**6. Liability of pledgee of promissory note.** It seems that the pledgee of negotiable paper as collateral security is bound to ordinary diligence in preserving the legal validity of the pledge, and answerable for a loss through a corresponding degree of negligence to the extent of such loss, and this even though demand and notice be necessary. *Lamberton et al., v. Windom et al.*, 12 Minn. 232.

**7. Fraudulent pledgor may redeem.** Though property is transferred as a pledge, in fraud of creditors, it is redeemable by the party so transferring or those claiming under him. *Jones v. Rahilly*, 16 Minn. 320.

## III. BAILMENT BY HIRING.

**1. Locatio custodio, Hiring of custody.**

**8. A warehouseman acquires no lien on goods for charges advanced by him, in the absence of authority from the owner, unless by special custom, which must be pleaded.** *Bass & Co. v. Upton*, 1 Minn. 408.

**2. Locatio rei. Hiring of a thing.**

**9. Among the engagements of a party taking a thing to hire are to use it well, to take care of it, to return it, and to pay the price of hire, and if not expressed the law implies them, and a breach of any of them is a breach of the contract between the letter to hire and the hirer, for which the party injured is entitled to recover such damages as are the natural and proximate consequences of the breach, provided by reasonable endeavors and expense he could not prevent such damage.** *Graves et al., v. Moses et al.*, 13 Minn. 335.

**10. Duties and liabilities of livery-**

man and hirer where the latter's neglect, etc., makes the horse sick. Where A. lets to hire a horse to B., and the same is made sick by the misconduct or neglect of B., A. is required to use all reasonable exertions to cure him and prevent his death. The expense to which he is put, the trouble and attention he is obliged to bestow for this purpose, are occasioned by the breach of B.'s engagement, and are natural and proximate damages resulting from it, for which he is entitled to recover, as well as the value of the horse in case his death is caused by such bad usage or want of care on the part of B. *Ib.*

#### IV. MANDATUM.

**11. Contract to transport goods without compensation.** Defendant contracted with plaintiff to transport, without compensation, plaintiff's goods to a certain place and there deliver them in good order and condition, as addressed—(unavoidable damages of fire, navigation and collision only excepted). *Held*, the acceptance of the goods by defendant—though without a compensation—was a sufficient consideration to support this contract, and imposed upon him the obligations of a mandatory—*i. e.*, bound him to slight diligence and made him responsible for gross negligence. *McCauley v. Davidson et al.*, 10 Minn. 418.

#### V. COMMODATUM OR LOAN.

**12. What is a contract of loan.** An agreement by which B. "has this day lent to W. 259 ewe sheep, etc., in consideration of which letting said W. covenants with said B. to keep said sheep three years for the increase therefrom, and deliver annually, etc., to said B. 950 pounds wool, and at expiration of said three years said W. shall return, etc., to said B. as many sheep as were lent to him. \* \* \* W. to pay all taxes assessed on the sheep, and if any die or become lost or sold, or if W. unfaithfully performs his agreement, or fails

to take proper care of or shear said sheep, or neglects to pay taxes, B. may take immediate possession of the sheep in W.'s possession without working forfeiture to damages sustained by reason of loss, etc. Said B. to be restored in all respects to same position he would be in if this agreement had been fully performed," is a bailment and not a contract of sale. *Williams v. McGrade*, 13 Minn. 174.

### BANK BILLS.

(See EVIDENCE, 94 *et seq.*)

#### BANKS.

(See PLEADINGS, 31.)

**1. Power to contract, and how exercised.** Sec. 9 of the Banking Law of this State (Comp. Statutes, 854,) which provides that "contracts made by the bank or banking association established under the provisions of this act, and all notes and bills issued and put in circulation as money, shall be signed by the President and cashier thereof." *Held*, that the bank could contract, within the limits of its charter, without the signature of the officers mentioned; although, in such case, proof of the authority of the person purporting to act as agent for the bank lies on the party dealing with such agent; whereas, if the contract be signed by the President and cashier, that is enough to bind the bank, for they are constituted agents of the bank by the statute, and nothing but proof of their signature is necessary. *Dana et al. v. The Bank of St. Paul*, 4 Minn. 385.

### BENEFIT OF CLERGY.

(See CRIMINAL LAW, 40.)

### BILLS OF EXCHANGE.

(See NOTES AND BILLS.)

## BILLS OF LADING.

1. When a bill of lading consigns property to M. unqualifiedly, he is presumptively the owner of the same. *McCauley v. Davidson et al.*, 13 Minn. 162.

## BOARD OF EDUCATION OF THE CITY OF ST. ANTHONY.

1. Has power to complete payment of purchase money for land annexed by operation of law. Plaintiff gave bond for deed to School Dist. No. 3, which thereupon occupied and built thereon a school house. The legislature by act afterwards included this property within the limits of the district, composed of the city of St. Anthony. The law declared the title to all such property within the limits of the city to be in the Board of Education, and made it the duty of the board to manage and control all the houses, lands and appurtenances within the limits, etc. Defendant took deed from plaintiff, promising to pay him in installments. Plaintiff alleges non-payment, and asks payment or cancellation of deed. *Held*, defendant by operation of law took the equitable title to the land formerly held by School Dist. No. 3, and under the power to manage and control had the power to pay or contract to pay the purchase money due on the premises—it being the performance of an original agreement, and not a contract to purchase, which the law restrained defendants from doing. (An act incorporating Board of Education of City of St. Anthony, approved Feb. 28, 1860.) *Connor v. Board of Education of City of St. Anthony*, 10 Minn. 439.

2. Bonds of the Board, what a sufficient execution thereof. An act that provided that "the Board of Education shall issue their bond or bonds, executed in their name of office, binding themselves and their successors in office, etc., \* \* \* which bonds shall be attested by the clerk of said school district." The obligatory portion

of the bonds is in the name of the "Board of Education of the town of Minneapolis, and their successors in office,"—the concluding or en sealing clause runs: "In witness whereof, the President, Inspectors, and Secretary of said Board of Education, have hereunto set their hands and seals the fourth day of," etc., to which is signed the names of one person as "President," four as "Inspectors," and one as "Secretary."

*Held*, more accurate to have used the corporate style of the defendant in the en sealing clause, but nothing in the language used makes it inconsistent with the body of the bond—it names no individuals but only certain officers by their titles, and is binding as bond of defendant. Under the act there being no "clerk" of the district, the Secretary performs his duty. The annexation of a separate scroll or seal to each name does not vitiate the bond, nor render the signers personally liable, it being unnecessary. *Wiley et al., v. Board of Education of the Town of Minneapolis*, 11 Minn. 371.

(See ST. ANTHONY, CITY OF.)

## BOARD OF CANVASSERS.

(See ELECTIONS.)

## BONA FIDE PURCHASER.

(See MECHANIC'S LIEN, 4; PARTNERSHIP, 29.)

1. To constitute a bona fide purchaser for a valuable consideration, there must be paid money or its equivalent, (not the cancellation of an indebtedness,) in entire ignorance of the existence of other claims and equities. This ignorance must exist at time of payment, not at time of making contract simply. *Minor v. Willoughby*, 3 Minn. 225.

2. One who takes, without the payment of any consideration, from a fraudulent vendee, is not a bona fide purchaser as

against the creditors of the original vendor. *Hicks v. Stone et al.*, 13 Minn. 434.

**3. Vendee's wife.** B.'s wife loaned to B. money, her separate property, upon an agreement that B. might invest the same in land, or otherwise, and be the owner of such land or other purchase in his own name, but, when requested, B. was to account to his wife for said loan, and transfer to her the property purchased therewith. With a portion of this money B. purchased three land warrants, the assignments on which were forged, though unknown to B. Afterwards B. bought land of A., for which he paid in part with the land warrants, representing, innocently, that he was the owner of them, and A. believing such representations to be true. Afterwards B., at the request of his wife, conveyed to her this land, to apply on said loan, at an agreed valuation. Afterwards A. discovered the invalidity of the assignments on the land warrants, and that he had acquired no title thereto. *Held*, B.'s wife was not a purchaser for value, within the rule that the equitable lien of the vendor for unpaid purchase money will not be enforced against a *bona fide* purchaser, for value, without notice. *Duke v. Balme et al.*, 16 Minn. 306.

## BOATS AND VESSELS.

**1. To what contracts the statute applies.** The provisions of Chap. 86, R. S., relating to the liability of boats "used in navigating the waters of this territory," &c., does not apply to contracts made without the limits of the State—and the remedy in such cases is against the owner or officers. *Steamboat Reville v. Landreth*, 2 Minn. 179.

**2.** Under Chap. 86, Comp. Statutes, entitled "boats and vessels," causes of action arising wholly without the State are not entitled to the benefits of this act, and if parties seek the courts of this State as the forum to enforce their rights in such cases, they must adopt the common law remedies.

*Irvine v. Steamboat Hamburg*, 3 Minn. 192.

**3.** Under Chap. 86, Comp. Stat., concerning boats and vessels, causes of action arising upon contracts made and broken within the State; and contracts made within, and broken without the State; and contracts made without to be performed within the State, are entitled to the benefits of this chapter; and the same principle governs causes of action mentioned in the statute not arising out of contracts. *Ib.*

**4. An action lies against a boat "by name,"** under Comp. Stat. p. 647, for causing the death of a person; and the action may be brought under Comp. Stat. 610, by the administrator for the benefit of the widow and next of kin—he being a "personal representative" within the meaning of the statute—it is not necessary that the deceased should have commenced the action—the word "maintain" in the Statute is not so restricted in signification. *Boutiller, administrator v. The Steamboat Milwaukee*, 8 Minn. 97.

**5. Who may proceed against a boat.** Under Chap. 76, Comp. Stat., all persons, whether original creditor or assignee of the claim having a demand against a boat may proceed thereunder. *Reynolds v. Steamboat Favorite*, 10 Minn. 242.

**6. Title how transferred.** A bill of sale or some written instrument is not necessary to pass the title of a boat. *McMahon v. Davidson, impleaded &c.*, 12 Minn. 357.

**7. Jurisdiction of State courts under the Statute.** Though an action under Chap. 76, Comp. Stat., regarding "boats and vessels," should be determined to be *in rem*; it is not necessarily a proceeding or cause in admiralty, but is a proceeding according to the course of the common law having a trial by jury—which is unknown in admiralty—thus bringing it clearly within the exception in the judiciary act of 1789, which leaves a concurrent jurisdiction in such cases in State Courts. *Reynolds v. Steamboat Favorite*, 10 Minn. 242; *Morin v. Steamboat F. Sigel*, 10 Minn. 250.

**8.** The courts of this State have no pow-

er under Chap. 83, G. S., to proceed against a boat by name for breach of a contract of affreightment which was made within the State, and was to have been performed wholly on the Minnesota River. Such remedy is to all intents and purposes such a remedy as is administered by courts of admiralty, and can only be administered by the District Courts of the United States (except on the lakes and connecting waters) it not being a "common law remedy where the common law is competent to give it" within the act of 1789. *Griswold v. Steamboat Otter*, 12 Minn. 465.

## BONDS FOR DEED.

(Sec BONDS, III.)

### BONDS.

#### I. GENERALLY.

#### II. BONDS GIVEN IN JUDICIAL PROCEEDINGS.

#### III. BONDS TO CONVEY.

#### IV. "FIRST MORTGAGE BONDS" OF R. ROADS.

#### I. GENERALLY.

**1. An obligor in a bond becomes a "debtor,"** from the time of signing and executing the bond, and not from the day of default in its condition—the condition simply providing how he may avoid his obligation. *Stone v. Myers*, 9 Minn. 303.

**2. What is notice to purchasers of Stolen bonds.** The County of Scott issued certain bonds due at a given time with interest at 7 per cent. due annually, on the presentation to the County Treasurer, of the coupon attached to each bond, and representing the interest for each year. Before maturity of the bonds, but after several years interest had become due plaintiff purchased one of said bonds *with all the interest coupons attached*, from a party who had no title. *Held*, the fact that it appeared on the face of the bond that the in-

terest for several years was overdue and unpaid, was a circumstance sufficient to put the plaintiff on its guard, and the bonds being dishonored on their face, plaintiff took no title. *First National Bank St. Paul v. County Commissioners Scott Co.*, 14 Minn. 77.

#### II. BONDS GIVEN IN JUDICIAL PROCEEDINGS.

**3. An arbitration bond** bound the obligor to "submit, and stand to, and abide by the decision of the arbitrator." *Held*, the obligor was thereby bound to pay any award made against him, and on failure to do so his sureties were liable. *Washburne et al. v. West*, 4 Minn. 466.

**4. A "claim and delivery" bond** conditioned to be void if plaintiff appeared and prosecuted to judgment, and returned the property if so adjudged and paid all costs and damages adjudged, is not broken when on failure of plaintiff to appear, defendant takes judgment for costs simply on dismissal, he should have taken judgment for the return of the property or damages. *Clark v. Norton, et al.*, 6 Minn. 412.

**5. An appeal bond only operates to stay**, not supercede the proceedings, and if a levy has been made prior to an appeal the judgment creditor is only prevented from proceeding further on the execution until the determination of the appeal—the property is not discharged from this levy. *First National Bank of Hastings v. Rogers et al.*, 13 Minn. 407.

**6. Sureties in an appeal bond are bound to take notice of state of a prior levy.** Where a levy had been made upon sufficient personal property to satisfy the judgment and released to the debtor prior to the filing of the appeal bond. *Held*, the sureties in the bond were bound to inquire into the condition of affairs affecting their rights and liabilities, and the levy having been released at that time, they must be presumed, as to the creditor to have known that such was the fact. *First National Bank of Hastings v. Rogers et al.*, 15 Minn. 381.



### III. BONDS TO CONVEY.

**7. Reservation void for uncertainty does not destroy bond.** A reservation of "two acres on the west side of the creek," in a bond for a deed if void for uncertainty would not destroy the bond. *Baldwin v. Winslow*, 2 Minn. 216.

**8. Authority to execute need not be under seal, may be implied.** A bond for a deed from E. by his attorney in fact, O., to W. & P., is not void by reason of O. having no authority under seal to execute it. The bond is an executory contract for the conveyance of land; such contract must be in writing under the Statute of Frauds but need not be under seal; and the contract requiring no seal, the power to enter into it requires none, and may be given without a seal (and without writing?) and may be implied from the relation of principal and agent, as if they be partners?) *Minor v. Willoughby, et al.*, 3 Minn. 225.

**9.—is not a mortgage.** A bond for a deed, courts of equity have ordinarily construed as a contract to convey land. It is not a mortgage. *Dahl et al. v. Pross*, 6 Minn. 89.

**10. Tender of deed.** In a bond for a deed, conditioned to convey on certain payments being made, the obligee is not entitled to a tender of a deed until payments are made in accordance with the condition of the bond. *Ib.*

**11. On decree of foreclosure time given to perform.** On terminating the equities of an obligee in a bond for a deed, when he is in default, the time allowed him to comply after the decree is, in analogy with a strict foreclosure of a mortgage, discretionary with the court and not renewable, except in cases of manifest abuse. *Drew et al. v. Smith*, 7 Minn. 301.

### IV. FIRST MORTGAGE BONDS OF RAIL ROADS.

**12. Do not give State prior lien.** The amendment to Sec. 10, Art. 9, of the State Constitution 15th of April, 1858, does

not require that the "first mortgage bonds" to be issued to the State on certain conditions should give the State a prior lien on the Road, &c., but only such lien as all holders of that class of mortgages would have. Flandran J. dissenting. *Minn. & Pacific R. R. Co., v. Governor Sibley*, 2 Minn. 13.

(See EQUITY, 27.)

(See PLEADINGS, 29, 30.)

### BROKERS.

**1. I. S. & McC.** received money of W. "to account to him for the principal and interest less our charges, &c., not to exceed two and one-half per cent. per annum," loaned the same, taking note as security, which afterwards became worthless though good at time. *Held*, they were brokers, and liable only in case of want of proper care and circumspection — and if they loaned the money to a party, solvent at time of loan, they are protected. *Wyckoff v. Irvin et al.*, 6 Minn. 496.

### BURDEN OF PROOF.

(See EVIDENCE, VI.)

### CANCELLATION OF INSTRUMENTS.

(See EQUITY, VI.)

(See EVIDENCE, 199.)

### CATTLE RUNNING AT LARGE.

(See RAILROAD, II.)

**1. Under Sec. 2 and 23, Chap. 11, R. S.** (1851,) the common law being the law of this territory, every man was to keep his cattle on his own land, and a tenant of a close was not obliged to fence, but against cattle which were lawfully on the adjoining

ing land, nor against the highway. *Locke v. First Div. St. P. & P. R. R. Co.*, 15 Minn. 350.

**2.** By the common law every man was bound to keep his cattle upon his own land, and if he suffered them to escape and go upon the land of another, he was a trespasser. *Ib.*

**3.** Under Chap. 10, Sec. 14, sub. 6, and Chap. 19, Title 3, G. S., (all former law having been repealed by Chap. 122, G. S.,) the common law regulating the running at large of cattle is in force from April 1st to October 15th, where the town has taken no action in the premises, and the prohibition against them going at large from October 15th to April 1st, is but an affirmance of the common law. Hence if the town does not authorize, it is as unlawful for cattle to run at large in summer as it is in winter, although the owner of land not legally fenced, can recover nothing for damages done in the day time by cattle over two years old and not breachy, and this though it be in winter, when all running at large is expressly prohibited by statute. *Ib.*

## CERTIORARI.

(See JUSTICE OF THE PEACE, VIII.)

(See PRACTICE, II, 15, A, b.)

**1. Who must join as plaintiffs.** Where the relief asked for affects all the tax payers and residents of the town equally with the plaintiffs, the writ of *certiorari* will not issue ordinarily and bring up the proceedings for the purpose of arresting the collection of a tax, without all the tax payers being joined. *Query*, whether if they were all joined, the writ should be allowed. Its allowance is a matter of sound legal discretion. *Libby et al. v. The Town of West St. Paul*, 14 Minn. 248.

**2. When it lies.**—When necessary in furtherance of justice. The Supreme Court, under the Statute, has the power to issue the writ of *certiorari* with an enlarged office, if not as a common law writ, strictly speaking, yet as some "other writ \* \* nec-

essary to the furtherance of justice and the execution of the laws," Sec. 1, Chap. 63, G. S. *The Minnesota Central R. R. Co., v. McNamara*, 13 Minn. 508.

**3.**—on the trial of a criminal complaint under a city charter, where the fine is so small that no appeal is allowed, a *certiorari* lies, and brings up the record, the proceedings in the nature of a record, the rulings of the inferior tribunal, and so much of the evidence as is necessary to the determination of the questions involved. *City of St. Paul v. Marvin*, 16 Minn. 102.

**4.**—summary action of Court. When a court acts in a summary manner, or in a new course different from the common law, in the absence of legislative restriction, a *certiorari* lies. *Tiernay v. Dodge*, 9 Minn. 166.

**5. Expiration of time to appeal, on good reason.** W. feeling aggrieved at the proceedings of the Probate Court and commissioners appointed by that court to adjust claim, had allowed the time to pass in which an appeal could be taken to the District Court from the decision of either the commissioners or court. He now applies to the Supreme Court for a common law writ of *certiorari*, to remove the proceedings for review. *Held*, although cases might arise in which the court would so review proceedings in an inferior tribunal after the expiration of time for appeal, some good reason must be shown why the ordinary course was not pursued. Writ denied. *Wood v. Myrick*, 9 Minn. 149.

**6. When no appeal is allowed—condemning mill property.** In a proceeding unknown to the common law—as in a proceeding under the statute to condemn land for mill and mill dam purposes—where the Statute allows no appeal (as from the judgment of District Court on appeal from the commissioners to the Supreme Court) a *certiorari* lies following *Tiernay v. Dodge*, 9 Minn. 166. *Faribault et al. v. Hulett et al.*, 10 Minn. 30.

**7. What will the writ bring up for review.** On petition to Supreme Court for a writ of *certiorari* directed to the District

Court, it appeared that the errors complained of were not of record, but consisted in erroneous rulings of the court as to the admission of evidence, charges, &c., but in a proceeding from which the law allowed no appeal *i. e.* trial of appeal from the award of commissioners to assess damages to respondent for land taken by the petitioner under its charter for railroad purposes. *Held*, the record, proceedings in the nature of a record, rulings of the inferior tribunal upon the admission or rejection of testimony, instructions given and refused to the jury, with the exceptions taken, together with so much of the evidence as may be proper to show the bearing of such rulings and instructions, and the prejudice to the petitioner, may be brought up on the return for examination and revision. *The Minnesota Central R. R. Co. v. McNamara*, 13 Minn. 508.

**8. After expiration of time for appeal.** Although cases might arise in which the Supreme Court would review the decision of other courts by means of a common law certiorari after the expiration of the time prescribed by statute for appealing them, such cases would be exceptional, and some good reason would have to be shown why the ordinary manner was not resorted to. *State v. Milner*, 16 Minn. 55.

**9.** There is no statutory provision for the writ of certiorari. If it is to be sustained at all, it must be under the constitutional powers of this court to issue the common law certiorari. *Ib.*

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## CERTIFICATE OF ELECTION.

(See OFFICE AND OFFICER, 4.)

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## CESTUIS QUE TRUST.

(See TRUSTS AND TRUSTEES.)

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## CHATTEL MORTGAGE.

(See NOTICE, 2.)

1

**1. Mortgagee's interest on default.** The rule is well settled that on the forfeiture of a chattel mortgage, the property on which the mortgage is a lien, becomes absolutely the property of the mortgagee. *Gates v. Smith*, 2 Minn. 31.

**2.**—it seems that after default in the conditions of a chattel mortgage, the mortgagee holds the absolute title of the property, which cannot be divested even by a payment or tender of the money. *Eddy, Fenner & Co. v. Caldwell*, 7 Minn. 225.

**3. Filing.** Chattel mortgage executed March 6th, 1860, was governed as to filing and all other respects by the law then in force, and not affected by the new act approved that day, for its operation was deferred thirty days after its passage, and was to affect only mortgages executed subsequent to its passage. *Lienau v. Moran et al.*, 5 Minn. 482.

**4.**—Where a chattel mortgage was executed under Comp. St. p. 348, sec. 3, which makes such an instrument *prima facie* fraudulent when filed if no change of possession take place; and absolutely void if neither filing or change of possession takes place, as against third persons; and the same was filed under the new act of March 6th, 1860, which was restrained in its operation to mortgages, afterwards executed, and no change of possession took place until afterwards and immediately before a creditor was about to levy upon the property, when the parties went through the form of delivery. *Held*, void. *Ib.*

**5.**—Session Laws 1860, p. 189, changing the former law as to filing of chattel mortgages requiring them to be filed with the town or city clerk instead of the Register of Deeds did not have a retrospective operation, and a mortgage filed under the former law is notice as prescribed by that law—Comp. St. p. 348, sec. 3. *Foster v. Berkey et al.* 8 Minn. 351.

**6.**—E. held a chattel mortgage on property duly filed under a statute making such filing notice to all of its existence and terms for one year from filing, but no longer, against such persons as defendant, unless

within 30 days preceding the expiration of the year a copy, etc., was filed, sec. 3, ch. 33, Laws 1860. Three months after the filing thereof, defendant attached the property, and eight months thereafter the same were sold by him. Eighteen months after the filing, no copy in the meantime having been filed, plaintiff brings this action to recover the value thereof. *Held*, Plaintiff's cause of action accrued while his mortgage was in life, and could not be affected by his subsequent failure to keep the mortgage alive, and the sale by defendant was a conversion. *Edson v. Newell*, 14 Minn. 228.

**7. Description of property.** A chattel mortgage which purports to convey among other property "ten horses" in the possession of the mortgagor is valid—especially when the pleadings make no issue as to its certainty and definiteness. *Eddy, Fenner & Co. v. Caldwell*, 7 Minn. 225.

**8. Validity.** The existence of a provision, whether in or out of a mortgage, giving the mortgagor a right to sell, would invalidate it as a matter of law. *Chopard et al. v. Bayard et al.*, 4 Minn. 533.

**9.—mortgage for purchase money of exempt property, wife's signature.** B. sold personal property (household furniture) to K., a married man, and as a part of the contract of sale he was to take, and did take back a chattel mortgage on the property sold to secure the balance of the purchase money. K. claims the mortgage to be void for want of his wife's signature under Sub. 10, sec. 100, p. 560, Comp. St., which provides that mortgages on exempt property shall be void unless signed by the wife, etc. *Held*, the mortgage being given as part of the agreement on the purchase of said property, the sale not being made until the giving the mortgage, the statute of exemption did not attach so as to invalidate the mortgage. *Allen v. Jones*, 8 Minn. 202.

**10. Notice to attaching officer.** The owner of a chattel mortgage filed under ch. 33, Laws 1860, was not required by sec. 2, ch. 41, Laws 1862 to convey express no-

tice thereof to an officer attaching the property covered by the same. *Edson v. Newell*, 14 Minn. 228.

**11. Who may enforce.** The taking of property under a chattel mortgage is not an official duty or act of a sheriff, but a mere private act authorized by the mortgage, which can be performed by the mortgagee or any person for him. *Dorr v. Mickley*, 16 Minn. 21.

## CIVIL ACTION.

[SCOPE NOTE.—A Civil Action under our code is the remedy prescribed in the District Courts for the enforcement or protection of private rights, and the redress of private wrongs, and in it, is merged all actions that formerly existed either at law or in equity. Under this title will be found, under a system of arrangement heretofore blocked out by the Messrs. Abbotts of New York, every action whatever so far as it has received illustration by the adjudication of the court of last resort in this State, with reference to, 1st, ITS REQUISITES; 2d, WHEN IT LIES; 3d, WHEN IT DOES NOT LIE, and 4th, THE DEFENSE. For the evidence admissible in any action the title *Evidence* must be examined. Under the title *Pleading* will be found all those cases showing where a complaint or answer in any particular action was sufficient or insufficient, hence that title will throw great light on the subject matter of this one, and should be examined with it.]

### I. WHAT IT IS.

### II. ACTIONS ON CONTRACT.

1. *Generally.*
2. *Defenses.*

### III. ACTIONS FOR MONEY PAID, ETC.

1. *When it lies.*
2. *When it does not lie.*
3. *Defenses.*

### IV. ACTIONS FOR GOODS SOLD.

1. *Requisites of.*
2. *Defenses.*

### V. ACTION FOR USE AND OCCUPATION.

1. *When it does not lie.*

### VI. ACTIONS FOR WORK, LABOR AND SERVICES.

1. *Requisites of.*
2. *When it lies.*
3. *When it does not lie.*

## VII. ACTIONS ON BILLS AND NOTES.

1. *When it does not lie.*
2. *Requisites of.*
3. *Defenses.*

## VIII. ACTIONS ON NON-NEGOTIABLE INSTRUMENTS FOR THE PAYMENT OF MONEY.

1. *Arbitration bond.*
2. *Bonds given in suit.*
  - a. *Requisites of.*
  - b. *When it does not lie.*
3. *Undertakings.*

## IX. ACTION FOR UNLIQUIDATED DAMAGES FOR BREACH OF CONTRACT.

1. *Covenants.*
  - a. *Requisites of.*
  - b. *When it lies.*
  - c. *Defenses.*
2. *Employment.*
3. *Indemnity.*
4. *Sales of real property.*
  - a. *When it lies.*
  - b. *Defenses.*
5. *Quantum Meruit.*
  - a. *When it lies.*
  - b. *When it does not lie.*
6. *Warranty.*
  - a. *Requisites of.*
  - b. *When it lies.*

## X. ACTION FOR DECEIT.

1. *Requisites of.*
2. *When it lies.*

## XI. ACTIONS FOR NEGLIGENCE.

1. *Requisites of.*
2. *When it lies.*
3. *When it does not lie.*
4. *Defense.*

## XII. ACTIONS FOR INJURIES TO PERSONAL PROPERTY.

1. *Generally.*
2. *Requisites of.*
3. *When it lies.*
4. *When it does not lie.*
5. *Defenses.*

## XIII. ACTIONS FOR CLAIM AND DELIVERY OF PERSONAL PROPERTY.

1. *Requisites of.*
2. *When it lies.*
3. *When it does not lie.*
4. *Defenses.*

## XIV. ACTIONS FOR INJURIES TO THE PERSON.

1. *Assault and Buttery.*
  - a. *Generally.*
  - b. *Defenses.*
2. *False Imprisonment.*
  - a. *Requisites.*
  - b. *When it does not lie.*
  - c. *Defense.*
3. *Libel.*

## XV. ACTIONS FOR INJURIES TO REAL PROPERTY.

1. *Trespass.*
  - a. *Requisites of.*
  - b. *When it lies.*
  - c. *Defense.*
2. *Nuisance.*
  - a. *Requisites of.*
  - b. *When it does not lie.*

## XVI. ACTIONS FOR THE RECOVERY OF THE POSSESSION OF REAL PROPERTY.

1. *Generally.*
2. *Requisites of.*
3. *When it lies.*
4. *When it does not lie.*
5. *Defenses.*
6. *Second trial by Statute.*

## XVII. ACTIONS GIVEN BY STATUTE.

1. *Action by personal representative of person killed by wrongful act of defendant*

2. Action against one of two or more joint associates on an obligation of all.
3. Action to determine adverse claims arising from an obligation.
4. Action to determine adverse claims to land entered in trust for occupants.
5. Action by officer in aid of an execution.

## XVIII. ACTION FOR EQUITABLE RELIEF.

1. Specific performance.
2. Action to enforce trusts.
3. Cancellation of deeds, mortgages, notes, bonds for deed, assignment, foreclosure proceedings, and removal of clouds from title.
  - a. Cancelling deeds and mortgages.
  - b. Cancelling notes.
  - c. Cancelling bonds for deed.
  - d. Cancelling fraudulent assignment.
  - e. Cancelling foreclosure proceedings.
  - f. Removing clouds from title.

## XIX. ACTION TO DETERMINE ADVERSE CLAIMS TO REAL PROPERTY.

1. Generally.
2. Requisites of.
3. When it lies.
4. Defenses.

## XX. ACTIONS FOR FORCIBLE ENTRY AND DETAINER.

## XXI. ACTIONS FOR CONTRIBUTION.

## XXII. DEMAND, TENDER, ETC., BEFORE SUIT.

1. Demand.
2. Tender.

## XXIII. PARTIES TO ACTIONS.

1. Generally.
2. Parties plaintiff.

- a. Real party in interest.
- b. In particular actions.

### 3. Parties defendant.

- a. Generally.
- b. In particular actions.
- c. Misjoinder of defendants.

### 4. Substitution of parties.

### 5. Defect of parties.

See EVIDENCE, XI.

PLEADINGS, B., VII., d.

“ B., VIII., o.

LIMITATION OF ACTIONS.

PARTNERSHIP, IX.

JUSTICES OF THE PEACE.

## I. WHAT IT IS.

**1. Definition.** The act of 1853 totally abolishes the Court of Chancery as a distinct institution, and vests all its powers in the Law Courts, making all remedies attainable by one form of proceeding denominated a civil action. *Gates v. Smith*, 2 Minn. 32.

## II. ACTIONS ON CONTRACT.

### 1. Generally.

**2. Where securities have been taken and proved insufficient—creditor need not pursue them.** Under act of March 8, 1860, p. 216, when a party takes any of the securities mentioned in that act, he must first exhaust them before he can bring suit on the original debt. But where a creditor takes an assignment of a partner's interest as security for an individual debt and is satisfied that after the payment of partnership debts nothing will remain to apply on his claim, he may at once bring suit on the original debt, but he takes on himself the burden of proving that the interest assigned was worthless if the defendant sets up the facts in defense: following *Moss v. Pettingill*, 3 Minn. 217. *Schalck et al. v. Harmon*, 6 Minn. 265.

**3. On breach of a continuing executory contract** the injured party may bring an action at once, or hold himself in readiness to perform or bring an action from

time to time, or at expiration of contract, for damages sustained at time of bringing suit. *Morrison et al. v. Lovejoy*, 6 Minn. 319.

## 2. Defenses.

**4. Equitable defenses.** It is incompetent for a defendant in a civil action to set up, as a defense, matters of an equitable nature, and for which, under the old practice, he would have had an adequate remedy at law—unless he goes farther and shows that his remedy by a separate action (or formerly *at law*) would by reason of some peculiar circumstances prove inadequate—*e. g.*, insolvency of plaintiff, etc. *Gates v. Smith*, 2 Minn. 33.

**5.**—Any equities in favor of a defendant which by the aid of the court of chancery, could have been used to defeat a recovery at law, can now be set up by answer to the action at law as a defense thereto, and such judgment rendered in the action and relief given, as either or both courts could have awarded on the same facts and equities before the blending of the two jurisdictions. *Ib.*

**6.**—The test of the sufficiency of any particular defense equitable in its nature, must be, whether had the same facts been presented by bill in chancery, would that court have entertained the case and granted the relief sought. If it would the defense is good, if not it must fail. *Ib.*

**7. That the act of defendant was unlawful.** It seems that a defendant (corporation in this case) cannot avoid liability for an injury it has committed on the ground that it was committed while endeavoring to do some act unlawful or—as in this case—beyond its powers. *Gould v. Sub. Dist. No. 3 of Eagle Creek School District*, 7 Minn. 203.

**8. Statute of frauds.** Where a contract which when made was within the statute of frauds and might have been avoided thereby, has been fully executed the statute furnishes no defense. *McCue v. Smith et al.*, 9 Minn. 252.

**9. Facts insufficient to authorize a**

**correction** of a written agreement cannot be set up in defense to an action thereon, and if there were, certainly not without being pleaded. *Day et al. v. Riguet et al.*, 14 Minn. 273.

## 10. Excuse for non-performance.

Where the plaintiff's contract was to deliver wheat at Ottawa, and defendant was to transport it to Milwaukee by a given time or deliver other No. 1 wheat at that time and place, the defendant cannot excuse a breach of such contract by showing that prior to the time of performance he offered to deliver No. 1 wheat at said place *on condition* that plaintiff would deliver to him at St. Paul "wheat receipts" for wheat in store at Ottawa with a *written guaranty* that the said wheat should pass as No. 1 at said place of delivery. *Cowley v. Davidson*, 13 Minn. 92.

**11.**—Defendant contracted to transport and deliver certain wheat at Milwaukee on or before May 20, 1864. *Held*, no excuse for non-performance that the navigation of the river made it impossible to transport the wheat prior to the spring of 1865, at which time he offered to receive and transport it, but plaintiff refused to deliver. Time was of the essence of the contract, and the failure to perform at time specified is a breach. *Ib.*

**12. On contract of hiring, that one of the defendants was a guest.** When it is sought to charge defendant jointly on breach of a contract of hiring, on the ground that he accompanied the other defendant and took charge of the team, it is competent for him to show that he went along as an invited guest on the understanding between the defendants that it should cost him nothing. *Graves et al. v. Moses et al.*, 13 Minn. 335.

**13. Stranger to contract not liable, though breach caused by his negligence.** In an action against defendant for an injury to a horse let to him by plaintiff on the ground that the same was a breach of the contract to hire, a co-defendant who was no party to the contract is not liable, al-

though the acts constituting the breach were caused by his own carelessness or negligence. *Ib.*

**14. Defendant may show that plaintiff should recover in a representative capacity.** Plaintiff sued in his own name. *Held*, defendant might show that recovery should be had in a representative capacity, for though no bar to an action he had a right to show in what capacity a recovery was had against him. *Bond v. Corbett*, 2 Minn. 256.

### III. ACTIONS FOR MONEY PAID, LENT, HAD AND RECEIVED.

(See PLEADINGS, B. VII., d. 2.)

#### 1. When it Lies.

**15. Money received from authorized sale of another's property.** If one holding money derived from the authorized sale of another's property, refuse to pay it over, upon reasonable demand, or contrary to agreement, he would be liable for money had and received; or if the proceeds are property other than money, on like refusal, he would be held to a conversion of the same to his own use, and the measure of damages would be the value of the property received in exchange. *Chase et al. v. Blaidsell*, 4 Minn. 90.

**16. Money paid under protest, in excess of amount due on redemption.** When a mortgage was foreclosed by advertisement and the mortgagee claimed in his notice and bid the premises in for a sum nearly twice the amount actually due, and the second mortgagee although conscious the amount was in excess of the amount due, but being unable to obtain knowledge of the facts from the first mortgagee, and the mortgagor being a non-resident, paid under protest on redemption the whole amount for which it was bid in and afterwards discovered the actual amount due. *Held*, money had and received lay for the excess so paid to the first mortgagee. *Bennett et al. v. Healey*, 6 Minn. 240.

**17. Money paid on an agreement void by the statute of frauds which the defendant cannot or will not complete** may be recovered back, as it seems that generally an action will lie to recover back money paid by one party in contemplation of some act to be done by the other, which is the sole consideration of the payment and the thing stipulated to be done is not performed. *Bennett v. Phelps et al.*, 12 Minn. 326.

**18. Where principal's money is loaned in agent's name.** Defendant received from plaintiff money to be loaned in the name, for the benefit and on account of the plaintiff, but appropriated the money to his own use, and converted the same by loaning it in his own name. *Held*, plaintiff entitled to sue for and recover it at once without demand, and the right of action being then perfect, the statute of limitations commenced to run against a suit on the contract within sec. 6, sub. 1, G. S., ch. 66, but the facts showing conduct fraudulent in the eye of the law, make a case for relief within sub. 6 *ib.* which is not barred for six years after the discovery of the acts constituting the fraud. *Cock v. Van Etten*, 12 Minn. 522.

**19. Surplus moneys bid by a mortgagee on sale of the mortgaged premises.** Money had and received lies, without previous demand, against a mortgagee who fails to pay over to the sheriff or mortgagor the surplus bid by him on the mortgage sale. *Bailey v. Merritt*, 7 Minn. 159.

**20. Surplus bid by mortgagee—no demand necessary.** When a mortgagee bids in the mortgaged property for more than the mortgage debt and costs and fails to pay the surplus over to the sheriff or mortgagor, he is liable to the latter for money had and received without a demand. So too would the sheriff have been liable had he received the money. *Ib.*

**21. Rent collected by mortgagee's agent prior to expiration of redemption.** R. mortgaged the land to B., and afterwards conveyed the fee to plaintiffs. B. foreclosed his mortgage under a law leav-



ing the right of possession for one year thereafter to the mortgagor or his assigns. Before the period of redemption had expired, B.'s agents (defendants) collected \$600 rent from tenants on the premises, and on demand of plaintiffs refused to pay it over, although then holding it, not having yet paid it over. *Held*, plaintiff's entitled to recover. *Spencer et al. v. Levering et al.*, 8 Minn. 461.

**22. Money bet upon an illegal wager** may be recovered by the loser of the stakeholder, if before paying it over to the winner, the stakeholder has been notified by such loser, not to pay it over, and the loser has demanded its repayment to himself. *Wilkinson v. Tousley*, 16 Minn. 299.

2. *When it does not Lie.*

**23. Money handled by a public officer.** Defendant as a public officer received, in obedience to orders of his superiors, certain bounty money from one B., to be paid to plaintiff when he was mustered into the army as a substitute. Prior to his muster in and by order of government he was discharged, and defendant afterwards returned the money to B. under order from his superior. *Held*, he acted as a public officer and could not be held for money had and received to plaintiff's use. *Gates v. Thatcher*, 11 Minn. 204.

**24. Tenant in common of judgment bids in land on execution sale.** Plaintiff and defendant were owners as tenants in common of judgment under an assignment which authorized either to collect the same to their joint use. Defendant issued an execution which was levied on real estate, and at sale purchased the same, receiving in due time sheriff's deed—no money being paid on the sale. *Held*, it no where appearing that there was any fraud or bad faith in the purchase, or that the same was not necessary to protect the assignees, although defendant took title in his own name, still equity presumes defendant intended to act in pursuance of his trust and not in violation of it, and defendant took title in trust

for plaintiff in proportion to her interest and is not liable to plaintiff for money had and received. *Holmes et al. v. Campbell*, 10 Minn. 401.

**25. When property was sold under agreement with owner.** When a party comes into possession of property under an agreement with the owner, and afterwards sells it in pursuance to the terms of the agreement, for the sole use and benefit of the owner, he cannot, by any possibility, be guilty of converting the property, and his only responsibility results from the disposition he may make of the proceeds. *Chase et al. v. Blaisdell*, 4 Minn. 90.

**26. Interest collected on Mortgage sale, in excess of legal rate, but according to contract.** When a maker of a note includes therein a penal clause (as for payment of interest at rate of 5 per cent. per month after due till paid) secures it by mortgage and power to sell on default, suffers a foreclosure by advertisement to be made against him without objection, and the mortgagee purchases the land at full amount, penalty and all, no action at law lies to recover back the amount thus paid in excess of principal and interest at 7 per cent. per annum. *Emmett, C. J., dissents. Bidwell v. Whitney*, 4 Minn. 76. *Banker v. Brunt*, 4 Minn. 521.

**27.**—If a party executes an instrument to which he has a good defense, and cuts off that defense by voluntarily executing a mortgage with power of sale, or confessing judgment, his only relief lies in an application to the equity side of the court, for an injunction, order for resale, opening of judgment, etc., according to the circumstances—but in no case will money had and received lie for money thus collected. *Ib.*

**28.**—Although the statute requires contracts for the taking of interest beyond 7 per cent. to be in writing, otherwise declares them void, still, interest in excess of that amount voluntarily paid on a verbal contract cannot be recovered back. The effect of such a provision may always be waived by the promising party failing to take advantage of them, and a payment

without objection is the highest evidence of waiver. *Nutting v. McCutcheon*, 5 Minn. 382.

**29.**—Promissory note bearing interest at  $2\frac{1}{2}$  per cent. per month was due, and the same was secured by mortgage—to put off payment at maturity the maker at the end of each quarter paid to the holder the current rate of interest, without any agreement of forbearance. *Held*, the want of mutuality would not authorize a recovery of the money so paid as interest, the same having been voluntarily paid in accordance with an executed agreement. *Ib.*

**30. Money paid for back taxes, to procure record of a conveyance.** Plaintiff being the owner of a given piece of land, the Register of Deeds refused to file or record his deed on the ground, solely, that the Auditor had not certified thereon that the taxes on the land had been paid; plaintiff thereupon demanded of the auditor that he endorse over his official signature the words "taxes paid" or "not entered for taxation," or such other endorsement according to the facts as would entitle his deeds to be recorded; the auditor endorsed thereupon "taxes not paid on the whole of this land for 1866, am't \$172.14 to date, Dec. 28, 1868;" said amount consisting of taxes for 1866 with interest and charges, for which the lot had been sold at tax sale heretofore, and refused to make any other endorsement until the said sum was paid the County Treasurer, this defendant. Plaintiff, to procure his deed to be recorded, paid the amount necessary to redeem from said tax sale, said amount being demanded by defendant as a condition precedent to the issuing of his receipt for said taxes, interest and charges, serving upon defendant at same time a written notice and protest stating that he paid the amount for alleged and pretended taxes, &c., on said premises, *for the purpose of enabling him to get his deed recorded*, and that the County Auditor and Register each refused, as heretofore stated, and plaintiff further notified defendant not to pay said money, &c., into the treasury or to any one who had pur-

chased the premises, as he intended to bring suit to recover it, &c. *Held*, under Sec. 40 and 41, Chap. 11, G. S., before the amendment of Chap. 83, Laws of 1869, the Register had no right to insist upon a certificate that the taxes *were paid* before recording a deed, for under the Statute an endorsement of "Taxes paid by sale of lands described within," would have entitled plaintiff's deed to record, so that both the Register and Auditor were in the wrong, and the payment was not necessary to procure his deed to be recorded as stated in his notice, nor was there any compulsion on part of defendant, for he had a right to insist upon payment of the money before issuing his receipt, and the wrongful act of other officers cannot affect defendant. No matter whether or not a tax deed, which by statute was *prima facie* evidence of title, was about being recorded, since the notice to defendant put the payment on another ground to which plaintiff is confined. Whether or not the taxes were illegal is immaterial. *Smith v. Schroeder*, 15 Minn. 35.

**31. Money paid on forged draft.** Money paid under a mistake of fact may be recovered. But money paid by the drawee of a forged draft is an exception and cannot be recovered. *Bernheimer v. Marshall & Co.* 2 Minn. 81.

**32. Specific sum received.** Money had and received will not lie unless defendant has received a specific sum to plaintiff's use. *Van Hoesen v. The Minn. Baptist State Convention*, 16 Minn. 96.

**33.**—A. was indebted to plaintiff in over \$800, which he had expressed his willingness to cancel for \$400, in such payments and at such times as the friends of A., (a University Corporation,) might choose. Defendant voted to raise from the friends of A., \$3300, in three equal annual installments, \$400 to be paid to plaintiff in satisfaction of his claim, and notified plaintiff "of the acceptance of his proposition to receive \$400 in full for his claim, and that they would pay it in three annual installments," to which plaintiff assented.

Defendant during next three years collected money from A's friends (various Baptist churches,) for its general purposes, among which was the payment of plaintiff's \$400, to an amount exceeding \$1100 for each year, by voluntary contributions. *Held*, defendant not liable to plaintiff for money had and received for said \$400, or any part thereof. *Ib.*

### 3. Defenses.

**31. Money loaned.** It is no defense to an action for the recovery of money loaned that the plaintiff received the money from a third person under an illegal contract. *Wintermute v. Stinson*, 16 Minn. 468.

**35. Payment by surety of debt of principal barred by statute.** In an action by surety against principal for money paid on a promissory note, against which the statute of limitations have run, the maker cannot avail himself of that defense by pleading that the cause of action did not accrue within six years—for plaintiff's cause of action accrued at time of payment of note. *Barnaback v. Reiner*, 8 Minn. 58.

## IV. ACTION FOR GOODS SOLD.

(See PLEADINGS, B. VII, d. 3.)

### 1. Requisites of.

**36. Liquors.** Where the complaint shows that the articles sold are of such a character (liquors) that a sale of them would be invalid without a license, the court knowing the law, then it is incumbent on the plaintiff to show his authority to sell. *Solomon v. Dreshler*, 4 Minn. 278.

### 2. Defenses.

**37. Express contract of sale, warranty and representation as to quality.** When the answer set up an express contract, warranty and representation as to the quality of the goods sold. *Held*, under the pleadings the defendants are bound to establish either an express warranty or fraud or contract as to quality, in reference to the different sales before they will be entitled to

any deduction by way of recongment or counter claim. *Day et al. v. Raguel et al.*, 14 Minn. 273.

## V. ACTIONS FOR USE AND OCCUPATION.

(See PLEADINGS, B. VII, d. 4.)

### 1. Does not lie.

**38. Agent holding premises to rent.** B. appointed V. his agent to take charge of certain premises, to rent them, collect the rent and account. V. took and assumed the sole and exclusive control of said premises for twelve months. It not appearing that V. could have rented the premises or that he had, or could have collected any rent, he was not liable to B. for the value of the premises. *Burpe v. Van Eman*, 11 Minn. 327.

**39. Contract express or implied requisite.** Complaint alleged on actual use and occupation of plaintiff's undivided moiety of land, but did not show that such use and occupation was unlawful, but alleged that it was without plaintiff's consent and against her will. *Held*, any contract express or implied, is expressly negatived, and assumpsit for use and occupation did not lie. *Holmes v. Williams et al.*, 16 Minn. 164.

## VI. ACTIONS FOR WORK, LABOR AND SERVICES.

(See PLEADINGS, B. VII, d. 5.)

### 1. Requisites of.

**40. Where the answer denies services set up in complaint but admits nominal services.** When the consideration of a contract on which the action is brought is substantial, meritorious and material services to be performed by plaintiff, performance of which is averred in the complaint, and the answer sets up a different contract about same subject matter and admits performance of the nominal services required by the contract set up in the answer, but denies all services set up in the complaint, the performance of the services set

up in the complaint must be proved. *Becker v. Sweetzer*, 15 Minn. 427.

2. *When it lies.*

**41. Claim disallowed by County Commissioners.** Where a Board of County Commissioners have allowed only part of plaintiff's claim, he may commence an original action to recover the balance thereof, and is not compelled to resort to an appeal from their proceedings as provided in Sec. 81 and 82, Chap. 8, G. S., the latter remedy being only cumulative. *Murphy v. The County Commissioners Steele Co.*, 14 Minn. 67.

3. *When it does not lie.*

**42. Gratuitous services.** Where services are rendered or materials furnished gratuitously, no subsequent change in the relationship of the parties will authorize an action to be maintained for them. *Bond v. Corbett*, 2 Minn. 257.

## VII. ACTION ON BILLS AND NOTES.

(See PLEADING, B. VIII. d. 6.)

1. *When it does not lie.*

**43. Note made on Sunday.** Under Sec. 19, p. 730, Comp. Stat., no action can be predicated upon a note made on Sunday, it being *contra bonos mores*. *Brimhall v. Van Campen*, 8 Minn. 13.

**44. Transferee of pledgee of note.** A party to whom the pledgee of a promissory note transfers the same, without an assignment of the debt secured thereby, takes no interest on which he can maintain an action. *VanEman v. Stanchfield et al.*, 13 Minn. 75.

**45. Where everything but illegal interest had been collected on mortgage securities.** When the holder of a note drawing 5 per cent. interest per month after due till paid, forecloses a mortgage given to secure it, and realizes enough to pay the principal and interest at 7 per cent. per annum—but there is a balance due by reason of 5 per cent. interest penalty clause, no action lies to recover that balance. Em-

met C. J. dissents. *Culbertson v. Lennon*, 4 Minn. 51.

**46. Where mortgage security remains unexhausted.** Under the act of March 8, 1860, the owner of a note secured by mortgage could not prosecute the note until he had exhausted his mortgage security. *Johnson v. Lewis, et al.*, 13 Minn. 364.

2. *Requisites of.*

**47. Note made by Trustees of School District.** Where an action is brought on a promissory note made by the Trustees of a School District organized under Sec. 6, p. 358, Comp. Stat., it must be shown affirmatively, by the party pleading it, to have been given for a debt which the Trustees were authorized to contract. There is no presumption in favor of its validity, but rather the contrary; and where the plaintiff fails to allege or prove that the debt for which the note was given, was contracted in the usual course of the proper legitimate business of the Trustees, he cannot recover. *Query?* Whether a note of Trustees of a School District would be valid in any case? Whether they can under the statute make one? *School District No. 7, of Wright County, v. Thompson*, 5 Minn. 280.

**48. Production of note.** In an action on a bill or note, plaintiff must produce and file it, before he can be allowed to recover on it; except when it has been lost or destroyed, in which case he must file the bond required by Sec. 69, Chap. 73, G. S. *Armstrong v. Lewis*, 14 Minn. 406.

3. *Defenses.*

**49. That surety signed on parol condition which has been violated.** A surety on a note cannot defend in an action by the principal, on the ground that "he signed the notes as surety upon the express condition, known to the plaintiff, that the notes should run but a short time only"—no such condition appearing in the note, nor any other instrument in writing of equal obligation with the note, for parties to written instruments cannot extend or

lessen their liabilities by verbal understandings before or at the time of the execution of the same. *Huey v. Pinney*, 5 Minn. 310.

**50. Equities in favor of maker.** Under act of March 5, 1853, (Comp. Stat. 480) a maker of a promissory note in a suit against him for the same, must interpose by way of defense, any equities he may have and cannot resort to another action to restrain the first. *Fowler et al. v. Atkinson*, 6 Minn. 503.

**51. Want of delivery or consideration.** In defense to an action on a promissory note between the original parties, it may always be shown that it was never delivered or without consideration. *Ruggles et al. v. Swanwick et al.*, 6 Minn. 526.

**52. Want of consideration.** An answer charged that the note on which the action was brought was given by the maker, (defendant,) "as collateral security for a pretended precedent debt," due from the defendant to the payee and "that no such debt did in fact exist at the time of the making and delivery of the note, and that he was not indebted in any sum to the payee, and note was given without consideration." *Held*, a good defense. *Dunning v. Pond*, 5 Minn. 302.

## VII. ACTIONS ON NON-NEGOCIABLE INSTRUMENTS FOR THE PAYMENT OF MONEY.

(See PLEADINGS, B. VII., d. 7.)

### 1. Arbitration Bond.

**53. Where the arbitrators had designated no one to carry out the award.** Complaint on arbitration bond, showed that the award directed sale of certain property in defendant's possession, the proceeds to be applied in defraying expense of arbitration and then liquidation of a debt due from plaintiff to defendant, that defendant had wrongfully converted and disposed of the property, that none of it had been appropriated as directed by the award, to plaintiff's total loss, etc. *Held*, defendant liable on the bond, though no

person was appointed to carry out the award, for defendant had placed it beyond the power of any one to do so by his conversion. *Daniels v. Willis et al.*, 7 Minn. 383.

### 2. Bonds given in suit.

#### a. Requisites.

**54. Alias execution as proof of no existing levy.** In an action on an appeal bond, where there had been a levy on sufficient personal property to satisfy the judgment, but the same had been released to the debtor prior to date of filing the bond, it was unnecessary to issue an *alias* execution to be returned unsatisfied as proof of no subsisting levy, for the release of the property had destroyed the levy. *First Nat. Bank of Hastings v. Rogers et al.*, 15 Minn. 381.

#### b. When it does not lie.

**55. Judgment for costs.** N. replevied certain property from plaintiff, who held it as an officer under an attachment in favor of K, N. and J. being sureties in replevin bond, which was conditioned to be void in case N. appeared and prosecuted to judgment and return the property if so adjudged, and pay all costs and damages adjudged. Plaintiff alleges that N. made no appearance, and judgment for costs was entered for plaintiff on dismissal, and prays judgment against N. and J. for the amount of the judgment in the attachment suit and costs. *Held*, the obligation was not to pay that judgment, and as plaintiff obtained no judgment for the return of the property or damages, but only for costs, the condition of the bond was not broken. *Clark v. Norton et al.*, 6 Minn. 412.

#### c. Undertakings.

**56. Prior issue of execution not necessary in replevin.** In the absence of statute, it is not necessary to issue execution upon a judgment in replevin, prior to commencement of suit on an undertaking given in such action. *Robertson v. Davidson*, 14 Minn. 554.

## IX. ACTIONS FOR UNLIQUIDATED DAMAGES FOR BREACH OF CONTRACT.

(See PLEADINGS, B. VII. d. 8.)

### 1. Covenants.

#### a. Requisites of.

**57. On warranty of title eviction actual or constructive necessary.** It seems it is essential to a right of action for a breach of covenant for warranty of title, and equally so to authorize the retention of the purchase money, that there should be an eviction either actual or constructive. *Maxfield v. Bierbauer*, 8 Minn. 413.

#### b. When it lies.

**58. On covenant of seizin.** Breach of covenant of seizen has always been regarded by the courts as a sufficient cause of action, eviction not being a pre-requisite in order to sustain it, nor can it be defeated by showing that the grantor had acquired title previous to the commencement of the action. *Lowry v. Hurd et al.*, 7 Minn. 356.

#### c. Defense.

**59. That plaintiff as grantee took title in trust for another.** S. conveyed by warranty deed to the wife of G., and in an action for breach of warranty. *Held*, he could not show that the sale was made to her for the use and behoof of her husband, he having paid the purchase money, etc., for in the absence of fraud, mistake or accident on part of defendant in executing the deed, he is estopped from showing that any other person than the one named in the deed is the grantee intended in the conveyance. *Gray et al., v. Stockton*, 8 Minn. 529.

#### 2. Employment.

**60. On an entire contract—requisites.** Action on breach of an entire contract by which plaintiff was to perform work and labor for defendant for one year for the sum of \$350. Breach, that defendant at,

etc., discharged plaintiff without cause and against his will and consent, and that plaintiff offered to perform, etc., during all the time subsequent, etc. Defense denied the offer and readiness to perform of plaintiff subsequent to discharge, and averred that plaintiff entered into service of another at large monthly wages and for a specified and agreed length of time. *Held*, plaintiff to recover must show performance, or offer and readiness. If defendant showed plaintiff had incapacitated himself for performance, and neither offered nor was ready to perform, he would only be entitled to nominal damages. *Williams v. Anderson*, 9 Minn. 50.

### 3. Indemnity.

**61. On bond of indemnity against legal liability, actual damages necessary.** Defendants executed to plaintiff a bond conditioned "to indemnify (plaintiff) against any legal liability which he may have incurred" concerning a certain matter. Plaintiff was afterwards sued and judgment recovered against him, whereupon he brings action on the bond. *Held*, he cannot recover without proving actual damages. *Weller v. Eames et al.*, 15 Minn. 461.

### 4. Sales of Real Property.

#### a. When it lies.

**62. Recovery of purchase money.** Plaintiff was in occupation of government land as claimant, and surrendered possession to defendants, they promising verbally to pay him \$600 for his rights and improvements—the surrender of the possession was the consideration of defendants' agreement. Plaintiff had previously quit-claimed his interest, by mistake, to one C., which fact defendant knew at time of this agreement. Plaintiff promised to correct the mistake, and when so corrected he would convey to defendants. Plaintiff afterwards corrected the mistake in the quit-claim deed, and tendered conveyance, and defendants have ever since been in possession, and never in any manner disturbed.

*Held*, plaintiff entitled to recover the purchase money, the defendants took to the possession with full knowledge of plaintiff's rights, and no covenants of plaintiff are broken to afford defendants a ground for retaining the purchase money—no matter whether the interest plaintiff had at time of surrendering possession would have entitled him to a title from the United States. *Maxfield v. Bierbauer*, 8 Minn. 413.

*b. Defenses.*

**63. When grantee has covenants for title, defect of title in absence of fraud, no defense to action for purchase money.** In the absence of fraud, if the grantee in a conveyance of land *with covenants*, etc., has obtained any benefit or acquired any estate under the conveyance, he cannot, in defense to an action for the purchase money, set up defects in the grantor's title, nor rescind the contract and recover back what he has paid; but must rely on his covenants—for such covenants are inserted for his protection in such an event. *Brown v. Manning*, 3 Minn. 35.

**64. Grantor conveyed to stranger after part payment.** When a vendor of land has received part of the purchase money under a contract, in which time is not of the essence thereof, and then conveys to another, he cannot, in an action by the original vendee to recover back the purchase money so paid, defend on the ground that the plaintiff's failure to pay in full was a breach of the contract; before any such defense could be set up, he should have tendered a deed and demanded the purchase money. *Bennett v. Phelps et al.*, 12 Minn. 326.

*5. Quantum Meruit.*

*a. When it does lie.*

**65. Work under void contract.** A verbal contract to work and labor for a compensation in land is an entire contract, and being void in part, under statute of frauds, is void *in toto*, and the party performing the work may sue on a *quantum*

*meruit*. *Mackubin v. Clarkson*, 5 Minn. 247.

**66. When defendant prevented plaintiff from performing an express contract.** When plaintiff by a contract was to have a certain price for drawing plans, and 2½ per cent. for superintending the building, and defendant would not allow plaintiff to superintend the building, then plaintiff could consider the contract rescinded, and sue for what his services were worth. *Marcotte v. Beaupre*, 15 Minn. 152.

*b. When it does not lie.*

**67. Unrescinded express contract.** Parties cannot recover for services on a *quantum meruit*, where there is an unrescinded express contract covering them. *Ib.*

*6. Warranty.*

*a. Requisites of.*

**68. Where horse which defendant warranted sound communicated disease to another animal.** In an action for false warranty and deceit, whereby the horse defendant sold to plaintiff as sound, being diseased, gave the same to another horse of plaintiff's, the burden is on the plaintiff to show that the disease was communicated without his fault; hence it is error to charge that if defendants knowingly and falsely represented to plaintiff said horse (sold) to be sound and free from disease, and that said horse was then unsound and afflicted with an incurable disease, and communicated such disease to another horse of plaintiff, whereby said last mentioned horse was rendered worthless, they may find for plaintiff the value of the other horse—nor is it cured by a subsequent charge presenting a different statement of facts, and entirely independent of the former, though it contained the element of due care on the part of plaintiff. *Johnson v. Wallower et al.*, 15 Minn. 472.

*b. When it lies.*

**69. Warranty as to amount of interest due on note assigned.** Defendant as-

signed, by an instrument in writing, a promissory note to plaintiff, wherein he warranted the sum of \$1,625, to be due at that time, and interest accruing at  $2\frac{1}{2}$  per cent. per month. Plaintiff having sued the maker and recovered only the principal sum with interest at 7 per cent. per annum, claimed to recover the balance of interest that had accrued at the time of the assignment, and subsequent thereto of defendant on his warranty. *Held*, he could recover. *Hendricks v. Banning*, 7 Minn. 32.

## X. ACTIONS FOR DECEIT.

### 1. *Requisites.*

**70. Fraud essential.** In an action based on alleged fraudulent representations of the defendant in sale of certain property, fraud is an essential ingredient of the cause of action, and if the defendant made the representations innocently, in good faith, without any intent whatever to deceive or injure the plaintiff, though not true in fact, he is not liable. *Faribault v. Sater et al.*, 13 Minn. 223.

### 2. *When it lies.*

**71. Capacity of mill and character of dam foundation.** When the vendor of mill property represented that the mill was capable of grinding a certain number of bushels of wheat per hour, and that the mill dam was firmly founded upon the rock below the bed of the stream. *Held*, the vendee might rely upon the truth of such representations, without making an investigation, they being matters not open to the purchaser's observation, and the vendor being in possession and having caused the dam to be built, if such representations were false and fraudulent, the vendor would be liable for deceit. *Ib.*

## XI. ACTIONS FOR NEGLIGENCE.

### 1. *Requisites of.*

**72. Discharge of indorser by neglect of bankers to give notice.** In an action against defendant—bankers—for negligently discharging an endorser on a prom-

issory note left with them for collection, by failure to give due notice of non-payment, the plaintiff must make out the insolvency of the maker, and the solvency of the indorser at any time from maturity of note to time of bringing suit. *Borup et al., v. Nininger*, 5 Minn. 523.

**73. Contributory negligence matter of defense.** Where plaintiff seeks to charge defendant on account of his negligence, he need not do more than prove such negligence affirmatively. If he contributed to the injury by his own negligence, it is matter of defense—the *onus* of establishing plaintiff's contributory negligence is on defendant. *The City of St. Paul v. Kuby*, 8 Minn. 154.

**74. Plaintiff must not have contributed.** Plaintiff, in the occupation of his own house, was injured by the falling of walls standing on defendant's land adjoining. *Held*, plaintiff must have been entirely free from any want of care, or from any degree of negligence, which contributed to the injury, or defendants are not liable—if plaintiff with ordinary care might have avoided the injury, he cannot recover. Although a man cannot be driven from his own property by the negligence of another, and may use and enjoy the same although in an exposed position, yet he has no right to invite peril or run into danger even on his own property. If, for instance, plaintiff, at time he entered his premises, knew there was danger of the wall falling, he was not justified in encountering the danger. *Schell v. The Second National Bank, St. Paul*, 14 Minn. 43.

### 2. *When it lies.*

**75. A cashier of a bank is liable over to his employers for any damages resulting to the latter by reason of the former's negligence in omitting to present for payment, and make due protest for non-payment, or service of notice of non-payment on the indorser, whereby they are discharged.** *Bidwell et al., v. Madison*, 10 Minn. 13.



## 3. When it does not lie.

**76. Falling wall.** Where a wall fell and injured plaintiff, the owners thereof are not liable if they exercise ordinary care to make the same safe, and after such care believed it to be safe. *Schell v. The Second National Bank, St. Paul*, 14 Minn. 43.

**77. Contributory negligence.** If an injury has been caused *proximately*, partly by the negligence or unskillfulness of defendants and partly by the negligence or unskillfulness of the plaintiff or others, no recovery can be had. *Chamberlain v. Porter*, 9 Minn. 260.

## 4. Defenses.

**78. Payment of salary to a clerk.** An employer may pay a clerk his salary, and hold him for damages arising from his negligence afterwards—the fact that nothing was said about the claim for negligence at the time when the salary was paid, would only go to show that the matter was not then adjusted. *Bidwell et al., v. Madison*, 10 Minn. 13.

**79. That a third party contributed to the injury.** When plaintiff has been injured in his person or property by the wrongful act or omission of the defendant, or through his culpable negligence, the fact that a third party, by his wrong or negligence, contributed to the injury, does not relieve the defendant from liability. *Griggs v. Fleckenstein*, 14 Minn. 81.

**80.** In an action against bankers for negligently discharging an endorser by failure to give due notice of non-payment of a promissory note, it is incompetent for the bankers to show a previous agreement between plaintiff and endorser that his contract was different from what it appeared on the note—following *Walton v. Armstrong*, 5 Minn. 448. *Borup et al., v. Nivinger*, 5 Minn. 523.

## XII. ACTIONS FOR INJURIES TO PERSONAL PROPERTY.

(See PLEADING, B. VII. d. 9.)

## 1. Generally.

**81. Conversion** may be inferred from the taking of property, and neglect to return it, as well as sale of the same. *Stickney et al., v. Smith, Baker & Co.*, 5 Minn. 486.

**82. Levy on exempt property.** The levy of an attachment on property absolutely exempt from such levy is necessarily wrongful, unless the owner tacitly or otherwise waived his right to the exemption. *Lynd v. Pickett et al.*, 7 Minn. 184.

## 2. Requisites of.

**83. Affidavit of ownership where third person sues an officer.** Where an officer levies upon or takes property from the possession of the defendant in the process or his agent, under circumstances which would create a presumption, *prima facie*, of ownership in him, then, under Sec. 1, Ch. 24, Laws 1865, p. 63, no action can be maintained by any person except the defendant or his agent against the officer, unless the affidavit mentioned in said act is made and served before the sale, or other legal disposition of the property by the officer; and in an action by such person, it is incumbent on him to show the making and service of the affidavit—no matter if plaintiff had no notice until after the sale. *Barry v. McGrade et al.*, 14 Minn. 163.

## 3. When it lies.

**84. Trespass de bonis asportatis.** Trover may be maintained when an action of trespass *de bonis asportatis* would lie; and to maintain it, there must be property (general or special) in plaintiff, and conversion by defendant. *Vanderburgh et al., v. Bassett*, 4 Minn. 242.

**85. Exempt property knowingly taken.** Under Sec. 99 and 103, p. 570, Comp. St., when exempt property is mingled with other of the same kind not exempt, or when the debtor's property is so situated that the party cannot know that it is exempt, there may be justification for a levy, and liability therefor only arise, upon

proper demand for the exempt property. But when a separate and distinct article, expressly exempt by statute, is taken, and the party holding or directing the service of the writ knows before or at the time of such service, that the property seized is exempt, he is liable from the time of levy as as a wrong doer, without demand and refusal—qualifying the rule laid down in *Tullis v. Orthwein*, 5 Minn. 184. *Lynd v. Pickett et al.*, 7 Minn. 184.

**86. Conversion of note.** S. owned a promissory note, but had placed it in the hands of an agent. S. sold his interest in the note to plaintiff, and gave plaintiff an order for the same, but at that time the note had been converted by defendant. *Held*, plaintiff had an action against defendant for the conversion, as the owner of the note, the transfer of the title carrying the right to bring this action—distinguishing the case from *Borup et al. v. Nininger*, 5 Minn. 523. *Nininger v. Banning*, 7 Minn. 274.

**87. Runaway team.** Defendant's team, through his negligence, ran away, striking the team of M., which was securely hitched, thereby started it to running, and struck plaintiff's horse, thereby causing its death. *Held*, all the consequences resulting from the running away of defendant's team might reasonably have been expected to occur by the running away of a team under similar circumstances, in the principal business street of a town, and the running away of defendant's team was the efficient cause of the injury to plaintiff's horse, because it put in operation the force which was the immediate and direct cause of the injury, and defendant liable. *Griggs v. Fleckenstein*, 14 Minn. 81.

#### 4. When it does not lie.

**88. Bona fide purchaser.** Trespass does not lie against a *bona fide* purchaser of property of one who was in possession, though having only a lien instead of the general title. *Coit v. Waples et al.*, 1 Minn. 134.

#### **89. When defendant drove plaintiff's team at request of plaintiff's daughter.**

Defendant, at the suggestion of plaintiff's daughter, who had plaintiff's team in charge, consented to drive her to a funeral—the horses took fright, ran away, destroyed the vehicle, and killed themselves. Plaintiff claims damages for wrongful taking and conversion of the property. *Held*, defendant not liable, as he did not take nor have under his control the property—he was a passenger—and plaintiff's daughter had custody and possession, and authority, arising from the domestic relation, to so use the property. *Bennett v. Gillette*, 3 Minn. 423.

#### 5. Defenses.

**90. Special damages.** In an action for damages for seizing exempt horses—no special damages for loss of services being claimed—defendant offered to show in mitigation of damages that plaintiff suffered nothing by loss of their service. *Held*, inadmissible, as no claim for such damage was made. *Lynd v. Pickett et al.*, 7 Minn. 184.

**91. Defendant acted under a writ as United States officer.** In trespass *de bonis*, defendant justified the taking as United States Marshal, under a writ issuing out of a United States Court, etc. *Held*, that fact constituted no defense; it must further appear that the goods belonged to the defendant in the writ under which he justified—distinguishing this case from *Lewis v. Buck*, 7 Minn. 104. *Buck v. Colbath*, 7 Minn. 310.

**92. Re-delivery to person, not the owner, from whom it was received.** When property seized by defendant belonging to A., but not (apparently) in his possession, nor in the possession of defendant in the writ, the wrongful taking of the officer in so seizing is not terminated by a re-delivery to the person from whom he took it—when it does not appear the officer notified the owner of the re-delivery, nor that the individual to whom it was so delivered was authorized to receive it from

the officer. *Caldwell et al., v. Arnold*, 8 Minn. 265.

**93. Taking on execution against a third party.** Where an officer justifies the taking of goods by virtue of an execution against a third person, it is incumbent on him to prove the writ and judgment on which it is based. *Williams et al. v. McGrade et al.*, 13 Minn. 46.

**94. Goods were subsequently lawfully attached.** In an action for damages for the wrongful taking and detention of personal property, although the original taking may have been wrongful, yet if the next day, by virtue of attachments in his hands, the defendant (sheriff) attach the goods, his detention of the same from the time they were so attached would be lawful, and such facts competent in evidence. *Blackman v. Wheaton*, 13 Minn. 326.

### XIII. ACTIONS FOR CLAIM AND DELIVERY OF PERSONAL PROPERTY.

(See PLEADING, B. VII. d. 10.)

#### 1. Requisites.

**95. Plaintiff's right to possession.** In replevin plaintiff must recover on his own right to possession, and cannot prove title in another. *Howland v. Fuller*, 8 Minn. 50.

**96. Value.** In an action for the claim and delivery of personal property, the possession of which has been surrendered to plaintiff before trial under a stipulation waiving bonds, etc., the question of value becomes immaterial—except with regard to the question of damages. *Foster v. Berkeley et al.*, 8 Minn. 351.

**97. Identity of Goods.** In an action for the claim and delivery of personal property, the plaintiff cannot recover the goods unless he can identify them. He cannot recover others of same kind and number. He is driven to a judgment for the damages in the absence of identification, excluding from consideration the doctrine of "confusion of goods." *Ames v. Mississippi Boom Company*, 8 Minn. 467.

**98. Right of immediate possession.**

In "claim and delivery," the right of immediate possession of the property sought to be recovered is a "*sine qua non*." *Bert-hold v. Holman et al.*, 12 Minn. 235.

**99. Wrongful taking** is sufficient in this action and a forcible taking is not necessary. *Coit v. Waples et al.*, 1 Minn. 134.

#### 2. When it lies.

**100. When defendant controls but does not possess the property.** Plaintiff sought to recover of defendant the possession of certain property which had been placed in his hands by the pretended owner for sale, and which the defendant had placed in the hands of a third person "for the pretended owner," subject to his order. *Held*, defendant still had control over the property for all the purposes of the action, and on demand and refusal was liable. If the third party had parted with the possession it was matter of defense. *Bradley v. Gamelle*, 7 Minn. 331.

#### 3. When it does not lie.

**101. Joint action.** Where A. and B. sought to recover specific property as joint and sole owners against C., who levied upon the property as partly owned by F., under an execution against F., and it appeared that H. at the time of the levy, declared to C. that F. owned part of the property. *Held*, that this joint action must fail for its success depended on A. and H., being sole owners, while H. declared that F. was part owner, and thereby estopped himself from saying F. had no interest, consequently that interest might be levied on by C. *Caldwell v. Augur, et al.*, 4 Minn. 217.

**102. Exempt property.** The seizure of exempt property and holding the same under an execution for a *reasonable* time, being authorized by statute, an officer so siezing on Saturday a lot of printing materials, a portion of which were exempt, is not in *wrongful* detention of the same the Monday following. *Tullis et al. v. Orthwein*, 5 Minn. 377.

**103. Timber severed by mortgagor in possession.** When the law allows the

mortgagor to remain in possession after sale or foreclosure until expiration of redemption, the mortgagee has no such interest in timber severed from the land and converted into logs as to maintain "claim and delivery," for them prior to expiration of the period of redemption—his remedy is by injunction to stay waste. *Berthold v. Holman et al.*, 12 Minn. 235.

**104. Timber taken from mortgaged land.** A mortgagee having neither the possession nor right of possession of the mortgaged premises, cannot maintain "claim and delivery," for the recovery of timber taken from the mortgaged premises. *Berthold v. Fox et al.*, 13 Minn. 501.

#### 4. Defenses.

**105. Property belonged to a stranger.** In an action for the recovery of possession of personal property, it is a good defense to aver that the property mentioned was not the property of said plaintiff, but was the property of some third person. *Loomis v. Youle*, 1 Minn. 178.

**106. Counterclaim.** On default and refusal to deliver mortgaged property, the mortgagee brings suit to recover the possession. *Held*, defendant cannot set up a partial failure of consideration of the mortgage and a claim for board bill and money loaned greater in amount than the balance due on the mortgage, as a counter claim, under Secs. 5 and 6, Act of 1853.—Practice act, and ask the court to annul the mortgage because he has an adequate remedy at law, and only equities which would have warranted a court of equity in granting the relief asked on a bill filed, may be set up by answer as a defense. *Gates v. Smith*, 2 Minn. 33.

**107. Defendant acted as United States Marshal.** Action for claim and delivery of personal property. Defendant denied title and right of possession in plaintiff, and alleges that he being U. S. Marshal, attached, by virtue of a writ of the U. S. District Court, against E. W. L., the property as the property of said E. W. L., and

demands a return. *Held*, ordinarily such facts would constitute no defense, but in this case defendant was entitled to a return of the property or the value, on the ground that the jurisdiction of the United States, having first attached as to the specific property, the Marshal was entitled to the possession for the time being, and no State court could interfere—following *Freeman v. Howe*, 24 How 450—this to avoid an embarrassing conflict, although the State Court has jurisdiction both of the subject matter and person. *Lewis v. Buck*, 7 Minn. 104.

#### XIV. ACTIONS FOR INJURIES TO THE PERSON.

(See PLEADING, B. VII. d. 11.)

##### 1. Assault and Battery.

###### a. Generally.

**108.** Husband and wife complained that defendants on etc., "assaulted and beat, wounded and terrified" the wife, "forcibly and unlawfully turned her out of her house, fastened her out, and hindered and prevented her thereafter from re-entering or returning thereto, whereby she suffered injury etc., claiming damages." *Held*, although an assault and battery is charged, still other matters are stated which if proved, entitle the plaintiff to damages, though there was no evidence of either assault or battery. *Jacobs v. Hoover et al.*, 9 Minn. 204.

###### b. Defenses.

**109. Justification.** The infliction by A. of injuries on B. will not justify the latter in injuring A's wife. *Ib.*

**110.** It seems that, an injury inflicted by B. on A. cannot be justified by showing previous misconduct of A., where there has been time for the blood to cool; and even where there has been no such interval of time, such evidence is only admissible to mitigate the *exemplary* damages which can be given—but not the actual damages. *Ib.*

2. *False Imprisonment.*a. *Requisites.*

**111. Malice requisite—how shown.** In an action for the illegal arrest and confinement of plaintiff, claiming damages of defendant therefor. *Held*, the plaintiff must prove malice to sustain the prosecution, but it may be implied from an unjustifiable arrest. *Judson v. Reardon*, 16 Minn. 431.

b. *When it does not lie.*

**112. A guardian can never be held guilty of false imprisonment, simply from the fact that he takes charge of his ward's person.** *Townsend v. Kendall*, 4 Minn. 412.

c. *Defense.*

**113. Fire ordinance.** In an action for an injury to the person of plaintiff by an unlawful arrest and detention on the part of defendant, the defendant set up that he was an alderman and foreman of a fire company in the City of St. Paul; that at a fire in that city plaintiff, against orders, crossed a hose in use at said fire with his horse and buggy, and defendant, then on duty, arrested plaintiff and took him to the city prison and told the jailor that he gave the plaintiff into custody and to lock him up, and that the jailor thereupon locked him up for two and a half hours, when he was released by order of the Chief of Police; and further set up a city ordinance providing a fire department (Sec. 14,) providing a fine when without excuse a person refuses to obey any order or direction given by a person duly authorized to order or direct, and further providing that any member of the common council or fire warden may arrest and detain such person until "the fire is extinguished." *Held*, no defense! The clause above quoted is repugnant to the constitution. Art. 1, Sec. 4 and 7, and void, and no justification, though defendant acted in good faith. *Judson v. Reardon*, 16 Minn. 431.

3. *Libel.*

(See SLANDER AND LIBEL.)

## XV. ACTIONS FOR INJURIES TO REAL PROPERTY.

(See PLEADING, B. VII. d. 12.)

1. *Trespass.*a. *Requisites.*

**114. Possession, whether founded on good title or not, will support trespass *quare clausum fregit* against a stranger or wrong doer.** *Wilder v. City of St. Paul*, 12 Minn. 192.

**115. Right of possession for a limited time only is sufficient to sustain an action for damages sustained by defendant's flowing the land and destroying a house thereon,—although the *quantum* of damages might be less than if plaintiff owned the fee.** *Rau v. The Minnesota Valley R. R. Co.*, 13 Minn. 442.

b. *When it lies.*

**116. R. R. incumbering the street.** Complaint shows that defendant wrongfully and without authority filled a certain street, on which plaintiff's property fronted, with stone and dirt to the height of eight feet above the level of said lots and the grade of said street, and that the defendant's road did not run along said street but across the same at a distance from the plaintiff's premises, and these acts were performed outside of defendant's right of way, whereby plaintiff was damaged, &c. *Held*, states a cause of action. *Farrant v. The First Division St. Paul & Pacific R. R. Co.*, 13 Minn. 311.

c. *Defense.*

**117. Strict compliance with the statute is no excuse for the commission of an act which is determined to be a trespass by reason of the unconstitutionality of that statute.** *Merritt v. City of St. Paul*, 11 Minn. 223.

2. *Nuisance.*a. *Requisites.*

**118. Title in fee not necessary.** In an

action for damages caused by the flowing of plaintiff's land by defendant's mill dam, it is not necessary that a person charged with erecting the nuisance should be the owner of the freehold, or any part upon which the dam is erected—it is sufficient if he is a party to the erection of the obstruction claimed to be a nuisance. *Dorman v. Ames & George*, 12 Minn. 451.

*b When it does not lie.*

**119. No special damages.** One member of a community has no remedy individually for an injury which affects the community alike, he having sustained no special injury. *Conklin v. The County Commissioners of Fillmore Co.*, 13 Minn. 454.

**120. Removal of nuisance, injuries occasioned by.** If no damages have occurred or must necessarily occur to the plaintiff's premises by reason of the erection of the dam (nuisance) no action can be maintained for the removal of the dam. *Id.*

(See WATERCOURSE.)

## XVI. ACTIONS FOR THE RECOVERY OF THE POSSESSION OF REAL PROPERTY. (EJECTMENT.)

(See PLEADING, B. VII. d. 13.)

*1. Generally.*

**121. An action of ejectment** is not an action for the purpose of testing the validity of an assessment or tax sale. *Baker v. Kelley*, 11 Minn. 480.

*2. Requisites.*

**122. Notice to quit.** Where defendant claims adversely to plaintiff in ejectment no notice to quit is necessary. Nor as between vendor and vendee though the latter enter into possession under a contract to purchase with the consent of the former. *McLaine v. White*, 5 Minn. 178.

*3. When it lies.*

**123. A complaint alleges a good cause of action, by stating the fee in the plain-**

tiff, and that the defendant unlawfully and unjustly holds possession, alleging entry after plaintiff acquired the fee. In such a case demand and refusal is not necessary. *Id.*

*4. When it does not lie.*

**124. Mortgagee in lawful possession.** Ejectment does not lie against a mortgagee in possession of mortgaged premises, lawfully acquired after condition broken. *Pace v. Chadderdon*, 4 Minn. 499.

*5. Defenses.*

**125. Defendant's equities.** In ejectment under the code, an equitable title in defendant to prevail over plaintiff's legal title must be so strong, clear and decisive as to entitle the former to a conveyance on a bill for that purpose. *McLaine v. White* 5 Minn. 178.

**126. Verbal promise to convey without consideration.** When a defendant originally enters upon land as a trespasser, and makes improvements on the same, with full knowledge of law and fact, and without any inducements or promises on the part of any one claiming title, or having a show of right to deal with the *locus in quo*, but obtains from a former owner a verbal promise to convey without consideration, and the former owner afterwards becomes possessed of the title, and conveys to plaintiff who verbally agrees to carry out the promise to the defendant. *Held*, the defendant could not protect his possession by setting up the verbal promise of plaintiff, nor on the ground that he bought with notice of defendant's agreement with the former owner, both being void. *Towlerton v. Davidson*, 7 Minn. 408.

**127. Lien for purchase money at guardian's sale.** In ejectment against the purchaser at a guardian's sale, if the sale is found to be void, the lien created in favor of the purchaser for his purchase money, taxes and interest, by "an act to protect purchasers of real estate at guardian's sale etc., approved March 3, 1864," by directing a re-sale, etc., is no bar to a recovery of the

possession in this action—although that lien, (if constitutional,) may still attach to the land. *Montouer v. Purdy, et al*, 11 Minn. 384.

#### 6. Second trial by Statute.

**128. Second trial may be reviewed for error.** Sec. 7, p. 595, Comp. Stat., which declares that the second judgment in ejectment shall be the final determination of the rights of the parties, only cuts off the common law right that the defeated party had to contest the right of possession until arrested by a court of chancery—like all other judgments, it may be reviewed for errors committed on the trial. *Baze v. Arper*, 6 Minn. 220.

**129. Payment of costs, effect of.** The receiving of costs due the plaintiff, by his attorney, or their payment to the clerk, who gave the plaintiff's attorney credit for them, even if they were paid for the avowed purpose of obtaining a second trial under Sec. 5, Chap. 75, G. S., as amended 1867, will not estop the plaintiff from resisting such application for a new trial. *Whitaker v. McClung, et al.*, 14 Minn. 170.

**130. Who entitled thereto.** In an action for the recovery of real property, the plaintiff is not entitled to a second trial as a matter of right on paying costs under Sec. 5, Chap. 64, Comp. Stat. 595. *Howes v. Gillett*, 10 Minn. 397.

**131. Conditions precedent to a re-trial.** Under Sec. 5, Chap. 75, G. S., as amended by an act approved March 7th, 1867, (Session Laws, 1867, p. 117,) either party in an action for the recovery of real property, has a right to a second trial of the action upon complying with the terms of the law, by paying the costs and damages recovered by the judgment and serving upon the adverse party, within six months after receiving written notice of the judgment, a demand for such second trial, and these conditions are precedent to the right to a second trial. *Davidson v. Lamprey*, 16 Minn. 445.

**132. Costs and damages, how paid.** The payment of costs and damages recov-

ered in an action for the recovery of real property and demand of a second trial therein provided for by S. L. 1867, p. 117, is not complied with by paying such costs and damages to the clerk of the court, in the absence of a rule or order of court requiring or authorizing such payment into court, nor is such payment, without such order, a payment into court. *Davidson v. Lamprey*, 16 Minn. 445.

**133. Payment of costs etc., to clerk insufficient, when?** A statement or recital by the clerk in his record of the satisfaction of a judgment for damages and costs in an action for the recovery of real property, to the effect, that, the plaintiff this day paid into court the amount of the judgment for costs etc., does not on a motion or rule, in said action, to cancel such record, show a payment into court, and upon an order in said action to show cause why such satisfaction should not be cancelled and the plaintiff's demand for a second trial be set aside, based upon a credible and uncontradicted affidavit denying the truth of the facts stated in the satisfaction of the judgment, and showing substantially that the payment into court was not such, but a mere payment to the clerk, without any authority from the court, and that no portion of the judgment had ever been paid to the defendant, the relief sought by the defendant should have been granted. *Davidson v. Lamprey*, 16 Minn. 445.

**134. Notice of re-trial may be set aside.** The service of a notice of a demand for a second trial in an action for the recovery of real property, under the Statute, is a proceeding in the action, and if the notice is invalid it may be set aside by the court upon motion or rule to show cause. *Davidson v. Lamprey*, 16 Minn. 445.

## XVII. ACTIONS GIVEN BY STATUTE.

(See PLEADINGS, B. VII, d. 14.)

1. Action by Personal Representatives of person killed by the wrongful or negligent act of defendant.

(See EVIDENCE, 198.)

**135. What is a wrongful act or omission.** Any act or omission in violation of the obligations which common carriers assume towards passengers would be a "wrongful act or omission" within the meaning of Sec. 3, Chap. 68, Comp. Stat. which allows an action in favor of the personal representative of a person killed by the wrongful act, etc., of another for damages. The term wrongful is not used in the sense of malicious. • *McLeon, administratrix, v. Burbank, et al.*, 12 Minn. 530.

2. *Actions against one of two or more joint associates on an obligation of all.*

(See EVIDENCE, 197.)

**136. Requisites.** To hold one of two or more joint associates *alone liable* for the "obligations of all," under Sec. 38, p. 536, Comp. Stat., there must absolutely appear an *existing indebtedness*, that two or more persons, of which defendant was one, were *associated* in business, and that they transacted that business under a common name. *Cooper v. Breckenridge*, 11 Minn. 341.

3. *Actions to determine adverse claims arising from an obligation.*

**137. Promissory note.** Sec. 35, p. 629 Comp. Statutes, covers the case of a defendant who holds the note of the plaintiff which the latter claims is over-paid, and the former claiming there is still due upon it a considerable balance. An action lies to settle this adverse claim. *Miller v. Rouse* 8 Minn. 124.

4. *Action to determine conflicting claims to land entered in trust for occupants.*

**138. Defense.** In an action between adverse claimants to a conveyance from corporate authorities who have entered a town site in trust for occupants under Chap. 33, Comp. Stat., defendant cannot rest on a denial of plaintiff's right, but must set up title in himself. *Castner v. Gunther*, 6 Minn. 119, following *Cathcart v. Peck, et al.*, 11 Minn. 45.

5. *Action by officers in aid of execution.*

(See SHERIFF, IV.)

**139. Where the title to property taken by an officer is in issue.** Where the title to property taken by an officer is directly in issue, the judgment, being essential to the execution, must be proved by him who claims under it; while an execution alone protects the officer against the judgment debtor, yet where he is asserting a *quasi* title by virtue of the levy as against a stranger the judgment is essential to the perfection of that title, and if put in issue must be proved. *Mower v. Stickney*, 5 Minn. 406.

**140.** Where an officer holds a promissory note by virtue of a levy on an execution issued on a judgment in favor of W. F. & Co., and brings suit under the Statute to collect the note, (Comp. Stat. 552, Sec. 156,) and the maker denies the existence of the judgment and execution under which the officer claims, the judgment must be proved as well as the execution, and the execution will not prove the judgment, though regular on its face. *Ib.*

## XVIII. ACTIONS FOR EQUITABLE RELIEF.

(See PLEADING, B. VII, d. 15.)

1. *Specific Performance.*

(See EQUITY, II.)

**141. Defense.** H. being empowered by S. to sell, &c., any premises in which S. "had or may have an interest," executed as attorney of S. a bond for a deed of the land in question to plaintiff. *Held*, S. could show he had no interest in the property at the date of the execution of the instrument, and such defense would not be affected by an allegation in the answer that at the time of making the bond he (S.) with others, "claimed the land," under an act of congress on the ground that such claim will be presumed to be legal, when the answer also shows other facts which made that claim unfounded; nor by the



tact that he acknowledges a surveying and platting with a denial of possession which the act made necessary to give him any rights; nor the fact that he afterwards proved his claim before the proper judge who thereupon conveyed to him; nor by any deeds of the property executed by S. subsequent to the making of the bond; nor by any deeds to parties other than the plaintiff. *Carson et al. v. Smith et al.*, 12 Minn. 546.

## 2. Actions to enforce trusts.

**142. When it lies.** Complaint showed that W. O'K. had fraudulently disposed of personal property belonging to plaintiff, that he has converted the proceeds into land, placed the title to the same in the name of his wife—the other defendant, and that said W. O'K. is insolvent and plaintiff has no remedy at law. *Held*, entitled to have the wife declared his trustee to the amount for which his personal property sold and that the land be sold to pay that amount and costs. *Ramsden v. O'Keefe*, 9 Minn. 74.

**143. Defense.** Plaintiff complains against the corporate authorities of Le Sueur and K. Peck and D. Peck, that the town entered certain land under chap. 33 Comp. St., in trust for the occupants, and conveyed a certain portion, to which plaintiff was entitled to defendants K. P. and D. P. praying cancellation of that deed and conveyance from town to plaintiff. The town did not answer. *Held*, K. P. and D. P. could not defend on ground that plaintiff had not paid or tendered to the town a just proportion of the expense of entering as required by statute. The town having placed it out of its power to convey, and made a resort to the courts necessary, a payment or tender was not a condition precedent to bringing suit. *Cathcart v. Peck et al.*, 11 Minn. 45.

3. *Cancellation of Deeds, Mortgages, Notes, Bonds for Deed, Assignments, Foreclosure Proceedings, and Removal of Clouds from Title.*

## a. *Cancelling Deeds and Mortgages.*

(See EQUITY, VI.)

**144. When it will lie.** Plaintiff alleging title in fee simple, asks to have a certain deed purporting to be executed by him to one H. (defendant, who has conveyed thereunder to other defendants, Hart & Co., who are in possession) cancelled, on the ground that the same was forged. *Held*, that although plaintiff was not in possession he could maintain the action for this equitable relief, but when an action is brought under sec. 1, p. 595, Comp. St., the plaintiff must be in possession. But the statute does not cut off or in any manner interfere with the remedies furnished by equity. *Hamilton et al. v. Battin et al.*, 8 Minn. 403.

**145. Mistake in the piece of land conveyed—error in description.** Complaint showed that plaintiff occupied and cultivated a piece of land bounded on the east by a lake, and on the west by a fence, which started from a stake resembling a monument stake, on the shore of said lake, thence running north on a line fourteen rods west of the house in which plaintiff lived; that defendant represented to plaintiff that said piece of land contained 11 acres, and that she was the owner thereof, and that it included the strip between said house and fence, that it had been theretofore surveyed, and the aforesaid stake was the corner stake of her said tract, and that said fence indicated the true boundary on that side, and that another stake on the shore of said lake was the north-east corner; that the same being desirable building premises, plaintiff purchased the tract for that purpose, paying defendant \$3,000 therefor, and taking deed. Complaint then sets forth description in the deed, and avers that said description does not correspond with the boundaries of the tract as represented by defendant, but the westerly line, instead of being as indicated by the fence, actually runs through said house, and that the desirable portion of the piece is thereby lost, and asks for recession of

the contract of sale. *Held*, there being no allegation that defendant at time of conveyance had not, and has not still, a good title to the premises not included in the deed, nor that said representation as to survey and lines was untrue in fact, nor any defect of title to any portion conveyed, or incumbrance thereon, it simply alleging that defendant represented and plaintiff fully believed that the deed covered the land in question, and nothing showing that defendant was not honestly mistaken, there is no fraud, but a simple mistake in the identity of the subject of the conveyance, and it comes within the rule of *caveat emptor*, and is not such an innocent misrepresentation as, though no ground for a personal action for fraud, will some time authorize the recession of the contract—plaintiff showed want of diligence, being in possession. *Brooks v. Hamilton*, 15 Minn. 26.

**146. Wife's mortgage.** It would seem that if a wife signs a mortgage in ignorance of its contents, without any attempt to conceal it from her, or to mislead her regarding its object and purpose, or any fraudulent practices, she cannot be relieved therefrom. *Lawver v. Slingerland*, 11 Minn. 447.

*b. Cancelling Notes.*

**147. Promissory note fully paid, but outstanding.** In the absence of statute, a court of equity will not interfere where a note has been fully paid and is past due, to have it delivered up for cancellation—a complete remedy at law existing by way of defense. *Miller v. Rouse*, 8 Minn. 124.

*c. Cancelling Bonds for Deed.*

**148. After default.** A complaint which sets up the execution by plaintiff's grantor of a bond for a deed to defendant, conditioned on the payment of four promissory notes, the acknowledgment and record of the bond, non-payment of two of the notes a long time due, though demanded, tender of performance of conditions precedent, and offer to bring notes into court to be cancelled, and praying the bond may

be cancelled, states a good cause of action. *Dahl et al., v. Pross*, 6 Minn. 89.

**149.** A complaint which states that plaintiff gave a bond for a deed and possession of premises to one of the defendants, who assigned the same to the other defendant, conditioned that certain payments should be made by the defendants, that the last of such payments, though long due, remains unpaid, though plaintiff has been ready and willing to execute a deed on completion of such payments, and now brings the deed into court to be delivered in case of payment, and praying a decree that defendants pay by a day certain, or be barred of all interest or estate in the premises, sets forth a good cause of action. *Yoss v. De Fruedenrich et al.*, 6 Minn. 95.

**150. Defense.** Complaint prayed that by reason of non-payment, etc., a certain bond for a deed be cancelled, unless defendants, by a certain day, completed payments, etc. The answer admitted the facts in complaint, and set up great depreciation in value of the land, stringency in money market, impossibility of raising money in a short time, that in one year the property would sell to better advantage, and in three years defendant would be able to redeem under a sale, that property is ample security for all principal and interest that can accrue in four years, and asking a decree of sale in nine months, with power to redeem in three years. *Held*, no defense to the relief sought. *Ib.*

*d. Cancelling Fraudulent Assignment.*

**151. By judgment creditor.** Plaintiff's judgment against defendant was docketed at 10.20 o'clock A. M. on the 6th July. On same day an assignment by defendant of all his property, for benefit of his creditors, was left for record at 8.20 o'clock A. M., in proper office, but was not in fact filed or entered on the reception book in said office until about 12 o'clock said day. Plaintiff levied on some of the real estate included in the assignment, but finding that the assignment was a cloud on the title, and if a sale was had the land levied

on would not sell for enough to satisfy the judgment, asked to have the assignment cancelled as to his judgment, alleging it was made with intent to hinder, delay and defraud him. *Held*, plaintiff entitled to the relief demanded, without having an execution returned *nulla bona*, for if he had with knowledge of these facts gone on and sold, he could not then have asked to have the sale set aside, cloud removed, and re-sale ordered; and as defendant had no other property not covered by the assignment, the relief was necessary. *Banning et al., v. Armstrong*, 7 Minn. 40.

**152. Plaintiff in danger of losing his debt.** When plaintiff sought to set aside certain conveyances as fraudulent, and to induce the court to relieve him, charged that one of the defendants had fraudulently disposed of the rest of his property, and plaintiff was in danger of losing his debt unless relief was granted, etc., and defendant joined issue. *Held*, a material issue, which defendant had a right to have tried, for without such an averment it would not appear but what plaintiff could satisfy his claim out of other property of defendant's, and if he could he was not injured by the alleged fraudulent conveyance. *Johnson et al., v. Piper*, 4 Minn. 192.

*e. Cancelling Foreclosure Proceedings.*

**153.** The complaint sought (among other things) to have declared null and void a certain mortgage foreclosure and sheriff's certificate under which certain of the defendants (M. and McL.) claimed the premises in question, on the ground that they did not own the mortgage at time of foreclosure. On demurrer—*Held*, it appears from the complaint that the facts upon which defendants M. and McL. rely constitute no claim whatever, and the complaint does not state facts sufficient to constitute a cause of action, as against them. *Bolles v. Carli et al.*, 12 Minn. 113.

*f. Removing Clouds from Title.*

**154. Plaintiff's possession.** In an action to remove a cloud from plaintiff's title,

where it appears that the plaintiff is owner in fee, it is not necessary that plaintiff be in possession of the same. *Donnelley v. Simonton et al.*, 7 Minn. 167.

**155. Instrument void on its face.** An action to remove a "cloud on plaintiff's title," it seems would not lie when the instruments under which title must be claimed by the adverse party are void upon their face; but a complaint alleging that "the city of St. Paul is, by its duly authorized officers and agents, about to give a tax deed of said premises, and that the period of redemption is about expiring,"—such tax deed being by law *prima facie* evidence of title—states a good cause of action. *Weller v. City of St. Paul*, 5 Minn. 95; *Morrison v. City of St. Paul*, 5 Minn. 108.

**156. Personal representative, when not entitled to bring this action.** A personal representative who has not taken possession of the real estate of his deceased, nor obtained a license from the Probate Court to sell, has no right to maintain an action to remove a cloud from the title of the same, consisting of an outstanding contract of sale unperformed by defendants. *Query*, if he could maintain the action after a license obtained to sell the property, see Sec. 13, G. S., p. 391. *Paine v. The First Division St. Paul and Pacific R. R. Co. et al.*, 14 Minn. 65.

## XIX. ACTIONS TO DETERMINE ADVERSE CLAIMS TO REAL ESTATE.

### 1. Generally.

**157. Lien not determinable.** A lien upon land is not an estate or interest in it, and is not a proper subject of adjudication in an action to determine adverse claims to real estate, under Sec. 1, Ch. 75, G. S. *Brackett v. Gilmore*, 15 Minn. 245.

### 2. Requisites.

**158. Plaintiff must be in possession.** Under Sec. 1, Chap. 74, R. S., p. 388, the only facts necessary to constitute a cause of action are the actual possession of the

land by plaintiff in person, or by tenant, and some claim by defendant, adverse to him, of all estate or interest in the land—because possession is *prima facie* evidence of title. *Steele v. Fish*, 2 Minn. 153.

**159.**—In an action under Sec. 1, Comp. Stat. 595, to settle adverse claims to real estate, the plaintiff must be in possession, the object being to enable one in possession to bring an action to determine any adverse claim before he is disturbed, thus giving him the same advantage one out of possession has under the action of ejectment; hence, if plaintiff's possession is put in issue, it must be proved. *Meighen et al., v. Strong*, 6 Minn. 177.

**160.**—In an action under Sec. 1, Ch. 75, G. S., to determine adverse claims to real property, actual possession of plaintiff is essential to maintain it. *Murphy v. Hinds*, 15 Minn. 182.

**161.**—An action under Chap. 75, Comp. St., to determine adverse claims to real estate, can be brought only by one in possession thereof, which possession must be proved—if defendant holds adversely, ejectment is the proper remedy. *Eastman et al., v. Lamprey*, 12 Minn. 153.

**162. Land must be vacant, or plaintiff in possession.** In an action under Sec. 1, Ch. 75, G. S., as amended in 1867, proof that the land is "vacant and unoccupied," or that plaintiff is in actual possession, as the case may be, is necessary to maintain the action. *Conklin v. Hinds*, 16 Minn. 457.

**163. Title in fee immaterial.** When, in an action to determine adverse claims to real estate, under the statute, plaintiff's title in fee is alleged in the complaint and denied in the answer, the issue thus formed is immaterial and need not be tried. *Wilder v. City of St. Paul*, 12 Minn. 192.

**164. Rights of plaintiff against third persons immaterial.** Possession of the plaintiff (by himself or tenant), and an adverse claim by the defendant, are the only facts which are required to constitute a cause of action under Sec. 1 and 2, Chap. 75, Gen. St. It is to determine the defend-

ant's claim. Plaintiff must prove his possession—burden is then on defendant to prove his adverse claim. The right or title of a third party cannot be properly litigated; if the defendant's claim is unjust, it should not be supported, whatever may be the rights of the plaintiff as against third parties. Possession, in this action, is good against strangers or wrong doers. *Wilder v. City of St. Paul*, 12 Minn. 192.

### 3. When it lies.

**165. By corporate authorities to settle right of easement.** When land has been dedicated at common law for a landing, the authorities of the village, as representatives of the public, cannot bring suit against one who claims to own the fee to quit the title, when no act hostile to the public use of the land has been committed, for the fee is not in the public, and the ownership of the fee by another is not inconsistent with the public easement; but when defendant denies the existence of the easement, and threatens an invasion of the public rights at a time and under circumstances that may be unfavorable to their defense, the courts will interfere. *The Village of Mankato v. Willard et al.*, 13 Minn. 13.

### 4. Defense.

**166. Defendant in possession.** Plaintiff claimed uninterrupted possession since 1854, survey platting and record of plat, and entry on his occupancy, under U. S. laws—then sets up defendant's adverse claim. The answer alleges that in 1855 plaintiff abandoned the premises, and in 1856 defendant and others caused the lands to be entered, and since that time have had uninterrupted possession. *Held*, sufficient defense. *Weisberger v. Tenny*, 8 Minn. 456.

## XX. ACTIONS FOR FORCIBLE ENTRY AND DETAINER.

(See FORCIBLE ENTRY AND DETAINER.)

(See PLEADINGS, B. VII. d. 15.)

**167. Will not lie.** An action for forcible entry and detainer will not lie by a

mortgagee after sale, against the mortgagee or in possession, when the latter is in no default in paying interest, nor the time of redemption expired. *Heyward v. Judd*, 4 Minn. 483.

## XXI. ACTION FOR CONTRIBUTION.

**168. Defense.** When E. held claim against J. and S. for which they were jointly liable, and J. paid the whole, and brings action against S. for his proportion, it was *error* for the court to refuse to let S. show that J. paid more *than was due*. *Snow et al., v. Johnson*, 1 Minn. 39.

## XXII. DEMAND AND TENDER, ETC.

(See CONTRACT, X. a.)

### 1. Demand.

**169. Where sheriff seizes goods in hands of a stranger.** Where a debtor is in possession of goods belonging to another, and exercising acts of ownership over the same, and his creditor seizes them on execution, the owner must first make demand on the sheriff before bringing an action for their recovery—unless the latter had notice of the real ownership before seizing them. *ATWATER, J., dissents. Vose & Co. v. Stickney*, 8 Minn. 75.

**170. Method of demanding exempt property.** When exempt property may be levied upon, and thus a demand become necessary to entitle the debtor to bring action for a wrongful holding, it is the better way to specify in terms that he demands the property on the grounds that he claims it as exempt. *Lynd v. Picket et al.*, 7 Minn. 104.

**171. Demanding exempt property.** When, to enable a party to bring an action for goods levied upon, it is necessary to make a *demand*, such demand must be made in a reasonable time, and need not be made at time of levy. *Id.*

**172. When defendant came lawfully into possession.** When a person comes lawfully into the possession of personal property, an action cannot be maintained against him to recover possession thereof, until the property shall have been demand-

ed of him, and he shall have refused to give it up. *Stratton v. Allen & Chase*, 7 Minn. 502.

**173. Conversion by defendant.** When one receives from another money to loan in the name of and for the use of that other, if he loans it in his own name and for his own benefit, he thereby converts it and becomes liable without demand. *Far- rand v. Hurlbut*, 7 Minn. 477.

**174. When a justice receives costs not due.** When plaintiff had advanced costs which he was not legally bound to do, but there being nothing illegal or wrong in recovering them on part of defendant (a justice of the peace), the presumption is that he received them for the use of those legally entitled thereto, and in the absence of fraud, wrong or mistake, and nothing appearing which amounts to an abuse of the trust, or inconsistent with the understanding or agreement of the parties, the defendant is not liable without demand. *Ford v. Brownell*, 13 Minn. 184.

**175. Unnecessary.** For evidence which was held sufficient to render unnecessary any demand in an action for damages for the wrongful—though innocent—taking of personal property, see *Clague v. Hodgson*, 16 Minn. 329.

### 2. Tender.

(See CONTRACT, X. b.)

**176. Tender of deed.** In this country the purchaser of land need not prepare and tender a deed, in the absence of stipulation. *St. Paul Divison No. 1 Sons of T. v. Brown et. al.*, 9 Minn. 157.

**177. Who may make.** Plaintiff (corporation) appointed H., T. and B. its agents "to obtain from" (defendants) a "reconveyance" of the premises in question "by a tender of the money due" (defendants), "according to the conditions of" a certain bond, and to receive a title of the property in trust for the plaintiff. *Held*, the act being ministerial, either one was authorized to make the tender. *Sons of Temperance v. Brown et al.*, 11 Minn. 356.

**178. When defendant has disabled himself for performance.** When defendant has placed it out of his power to convey according to his agreement, plaintiff is not required to tender the balance of the purchase money, or make demand for a conveyance, before he can sue to recover back purchase money paid. *Bennett v. Phelps et al.*, 12 Minn. 326.

**179. Tender under a bond for a deed is sufficient without a demand for deed.** When a person's bond requires him to convey on payment of a certain amount of money, a tender of the money is sufficient; no demand of a deed is necessary. *Sons of Temperance v. Brown et al.*, 11 Minn. 356.

**180. When may be coupled with demand.** Generally, a tender, to be sufficient, must be without condition or qualification, but where it is the duty of a creditor on tender of payment to do a particular act, the offer to pay may be coupled with a demand upon the creditor to perform such act; *e. g.* where, by statute, it is the duty of the creditor to give a release, on tender of payment a release may be demanded, for it is the performance of a duty imposed by law. *Balme v. Wambaugh et al.*, 16 Minn. 116.

**181.** A tender to bar subsequent damages and costs must be kept good. *Ib.*

**182. Tender of U. S. legal tender notes good.** A tender of United States legal tender notes in payment and discharge of a contract executed subsequent to the passage of the legal tender act of Congress (1862 and 1863), not specially payable in coin, but payable generally in dollars, is good. *Breen v. Dewey*, 16 Minn. 136.

### XXIII. PARTIES TO ACTIONS.

#### 1. Generally.

**183. Married women.** Under sec. 30, R. S. (1851) as amended, p. 8 of amendments, a married woman, in an action concerning her separate estate, may or may not join her husband. If she does not join her hus-

band, she must have a *next friend*. *Wife and wife v. Banning et al.*, 3 Minn. 202.

**184.**—Under sec. 30, R. S. (1851) p. 333 as amended on p. 8 of amendments, a married woman can appear without either husband or next friend *only* when the action is between herself and husband. *Ib.*

**185.**—When a married woman sues for her separate property the husband is not a necessary party plaintiff or defendant. Comp. St. 535, sec. 30. See *Furlong v. Griffin*, 3 Minn. 204. *Nininger v. Commissioners of Carver County*, 10 Minn. 133.

**186. Objection to plaintiff's capacity to sue must be taken by demurrer or answer.** Plaintiff being a married woman, an objection to her legal capacity to sue not having been taken by answer or demurrer, is waived. *Tapley v. Tapley, et al.*, 10 Minn. 448.

#### 2. Parties Plaintiff.

##### a. Real party in interest.

**187.** An assignee cannot sue on the following writing in his own name either at common law or under the statutes, 1852. "I do agree to cut, etc., on, etc., on or before, etc., to be delivered to Elliott Adams or bearer. Dated Feb. 18, 1850. W. Woodbury." *Speneer v. Woodbury*, 1 Minn. 105.

**188. An assignee of a bankrupt** need not produce record proof of his acceptance of his appointment in writing to enable him to sue as such assignee, nor of the publication of notice of such appointment in some St. Paul newspaper,—no order of the District Court to that effect appearing—nor of the recording of such appointment in the Registry of Deed for a given county, when it does not appear that the bankrupt owned land in such county. *Rogers v. Stevenson*, 16 Minn. 68.

**189.**—An assignee of a chose in action may sue on it in his own name. *Russell v. Minnesota Outfit*, 1 Minn. 162.

**190.**—Sec. 29 R. S., p. 333, permits an assignee of a chose in action for the benefit of others to sue without joining the cestuis

*que trust. St. Anthony Mill Co. v. Vandal, 1 Minn. 251.*

**191.**—An assignment of a chose in action by A. to B. to pay a debt, and any balance, after paying debt, to be returned to A. vests the bill in B. so he can bring an action alone against the maker and the non-joinder of A. is not a good defense to an action by B. against the principal. *Castner v. Sumner, 2 Minn. 44.*

**192.** One who holds for the joint use and benefit of another. An averment, that one holds property in his own name for the "joint use and benefit" of himself and another, is such an allegation of interest or property in such other, as to make him a necessary party plaintiff in an action to recover such property. *Hawks and wife v. Banning et al., 3 Minn. 67.*

**193.** The indorsee of a non-negotiable note must bring suit in his own name under our statutes as the real party in interest, but must plead the facts constituting the transfer to himself as they exist. *Helper v. Alden et al., 3 Minn. 332.*

**194.** Real party in interest. An action can only be sustained by the real party in interest, and although the defendant admits that he owes the demand to some one, he has a perfect right to insist that no one but the true owner of it shall recover a judgment against him, and this is necessary to protect himself against a further suit by the true owner. *Rohrer v. Turrill, 4 Minn. 407.*

**195.** Executor. Plaintiff in his will bequeathed certain specific personal property to his daughter, then ordered his executors to sell the balance of his personal estate, and then makes specific devises of real estate to his sons, and finally orders all the balance of his property to be divided between his two sons. During progress of foreclosure suit plaintiff died, and on motion, his executor was substituted as plaintiff under sec. 37, p. 535, Comp. St. On appeal it being objected that by terms of the will the last clause made his sons the real parties in interest and they should have been substituted instead of the exec-

utor. *Held*, construing the whole will together it clearly appears that the executor was vested with the title to all personal estate for purpose of sale, though the proceeds were to be distributed among the sons, and the executor was properly substituted on motion. *Landis v. Old et al. 9 Minn. 90.*

**196.** Assignee of guaranty. Where certain land warrants are sold together with a guaranty of their genuineness, and after they have been entered, but before they are finally accepted by the government, the party who owns them at date of entry assigns his interest in the warrants and guaranty, he, the second assignee, is the real party in interest, and when the commissioner refuses to accept them on ground of invalidity, etc., a cause of action on the guaranty accrues to him directly. The warrant is not cancelled until accepted, and title remains in locator or his assigns until that time. *Johnson et al. v. Gilfillan, 8 Minn. 395.*

**197.** The principal shipped goods, by an agent, which defendant lost. It being determined that plaintiff was and is the owner of the goods, the fact that his brother had charge of them, and contracted for their transportation without disclosing the name of the owner, does not deprive the owner of his right of action against the carrier for the loss of the goods—it can only be brought by the real party in interest who is the plaintiff—the contract of the agent enures to the principal. *Ames v. The First Div. St. Paul & P. R. R. Co., 12 Minn. 412.*

**198.** The State of Minnesota has legal capacity to sue. *State v. Grant, 10 Minn. 39.*

b. In particular actions.

**199.** Several judgment creditors may join in one action against their common debtor and his grantees to remove impediments to their remedy created by the fraud of their debtor in conveying his property to said several grantees, although the latter taken by separate conveyances, and no

joint fraud in any one transaction is charged against them all. *North & Carl v. Bradway et al.*, 9 Minn. 183.

**200. Creditor's action.** The action known as creditor's bill must be brought by a *judgment creditor*; but a bill for the administration of assets, to enforce the execution of trusts, and to reach property fraudulently disposed of, etc., may be filed by simple contract creditors and on behalf of complainant and all others standing in a similar relation, who may come in under it. *Goncelier v. Foret et al.*, 4 Minn. 13.

**201.**—An assignment by a debtor to a trustee for the benefit of his creditors—the latter having accepted—vests the trustee with the title of the property to be held for the uses created, and when the trustee errs, or acts in bad faith in the administration of the trust, equity will interfere and afford relief to “any person interested in the execution of an express trust,” and all persons interested need not join—sec. 26, Comp. St. 384—though if it were necessary that all should join it would be sufficient for a sole plaintiff to aver that he “sues on behalf of himself and the several other creditors” of the debtor, without naming them in the title of the action. *Ib.*

**202. In an action by a creditor to reach trust property in the hands of administrators or trustees** who have control of it, and whose duty it is to protect it, the other creditors or *cestui que trusts* need not be joined as parties. Although a court of equity will let the other *cestuis que trusts* in as parties when facts exist to justify it, (e. g. collusion between the plaintiff and the trustees), and such facts are made to appear, still it will require the party seeking to be joined to exhibit his ground for relief—or defense in this instance. This relief being discretionary in the court below, its decision will not be reviewed except when abused. *Winslow v. Minnesota & Pacific R. R. Co. et al.*, 4 Minn. 313.

**203. Cancellation of mortgage.** A mortgagor who has conveyed away the mortgaged premises by warranty deed, can maintain an action to cancel a pre-

tended mortgage—claimed to have been executed by him. *Chamblin and wife v. Slichter et al.*, 12 Minn. 276.

**204. Action by master of boat for freight.** The master of a vessel is personally liable both to the owner of the vessel, and owner of goods put on board, for their loss by negligence, as well as for a failure to transport and deliver the same under contract of affreightment; and he may in his own name maintain an action for freight, and for a taking or conversion of, or injury to the goods entrusted to his care. *Houghton v. Lynch*, 13 Minn. 85.

**205. Money had and received against mortgagee for surplus.** A mortgagee bid in the mortgaged premises for an amount exceeding the mortgage debt and costs—failed to pay the surplus over to either the sheriff or mortgagor. Plaintiff (mortgagor) brings money had and received for such excess against mortgagee—on demurrer to complaint, for defect of parties for nonjoinder of sheriff. *Held*, the sheriff was not a necessary party to the action. *Bailey v. Merritt*, 7 Minn. 159.

**206. Action on appeal bond, assignee of prevailing party should sue.** Pending suit, the plaintiff assigned his interest, but the action proceeded without substitution of parties; to stay proceeding defendant on appeal filed a bond in name of original plaintiff. *Held*, in an action on that bond plaintiff's assignee is the real party in interest, and should bring suit in his own name. *Bennett v. McGrade et al.*, 15 Minn. 132.

### 3. Parties defendant.

#### a. Generally.

**207. Defendant's capacity.** If the facts stated in a complaint make the party liable it is unnecessary to inquire in what capacity his liability originated. *Pierse v. Irvine Stone et al.*, 1 Minn. 377.

**208. Voluntary purchaser's pendente lite.** Complainant's failure to appear at the hearing of the petitions of *voluntary purchaser's pendente lite* to be allowed to



come in as co-defendants, will not be construed into a consent or permission that they may be made such—without such consent they cannot come in—and such consent must be positive and directly and affirmatively shown by the record. *Steele v. Tuglor*, 1 Minn. 279.

**209. Voluntary purchasers *pendente lite*** of land in question may or may not be made parties at the election of the complainant, and whether he admits them or not, they are bound by the decree. If under their purchases they have interests or equities requiring a protection against a decree between original parties, they must seek it by an original bill in nature of a supplemental or cross bill. *Id.*

**210. Grantees** under an execution sale of land *pendente lite* are *voluntary purchasers*, in the sense that they have no right to be made co-defendants without consent of the complainants. *Id.*

**211. Married women.** Under sec. 30, R. S. (1851) as amended, p. 8 of amendments, when a wife is sued in an action concerning her separate property, and the husband is not joined, she must appear by next friend or guardian, and the husband may be appointed as such, but if the husband has been joined as defendant, in such an action, and there are any reasons why he should not represent her interests, the court will on application permit them to sever in their defenses and appoint a next friend for the wife. *Wolfe and wife v. Banning et al.*, 3 Minn. 202.

**212.**—Although husband should answer for the wife, if any reasons exist why wife should answer separately, on application to the court, permission will be granted. *Id.*

**213.**—When husband and wife are joined as defendants it is his duty to appear and answer for himself and wife jointly. *Id.*

*b. In particular actions.*

**214. Accounting.** To was indebted to M. & L., the latter holding his property in pledge as security. To meet these obliga-

tions, he borrowed money of B. I. C. and others under an agreement by which M. & L. joined with F. as parties of the first part, and said B. I. C. and others, with B. as trustee, for the other parties of second part. By agreement B. as trustee, was to take a conveyance of the property in trust, sell a portion, rent a portion, and use the proceeds in paying balance due M. & L. and re-paying amount due B. I. C. and others, residue of property to be reconveyed when debts paid. F. was to, and did, insure the property and assigned the policy to B., trustee. The property was burned. F. complains that B. (the trustee) and the other parties of the second part (defendants) compromised the insurance in bad faith and settled for less than was due, and asks an accounting and payment over to him of all that is due him. *Held*, that all the parties who were to be paid or had any interest in the property should have been joined as defendants—the complaint not showing that they had been paid, and this for the protection of the trustee as well as themselves. *Fish v. Berkey et al.*, 10 Minn. 199.

**215. Cancellation of a deed.** Plaintiff sought to set aside an assignment as fraudulent, and charges one of the defendants with having conveyed to another defendant by "what purports to be a warrantee deed"; this defendant only answered. Plaintiff objected he had no right to defend for want of interest as it did not appear that his deed contained covenants which made him liable. *Held*, that the presumption is that the deed was in the usual form, and if so he had sufficient interest to interpose a defense. *Johnson et al. v. Pöper*, 4 Minn. 192.

**216. By stockholder to wind up a corporation.** Complaint charged that one T. R. B. E. became incorporated as "Bank of St. Paul," that said T. R. B. E. became president, one J. H. E. cashier. That the president squandered the capital stock and said T. R. B. E. and J. H. E. made an assignment to one I. for the purpose of defrauding stockholders of which plaintiff

was one, misconduct of the property assigned on part of the president and assignee, and pray that the president, cashier and assignee account, receiver be appointed, assignment declared void, corporation dissolved, etc. On demurrer by the bank, president, cashier each separately. *Held*, the bank and its officers—both president and cashier—were properly joined, and all the different items of relief may be obtained in an action. Had there been too many defendants joined it would be no cause of demurrer on part of those properly sued, and could only be objected to by the party misjoined by demurrer on ground of no cause of action—not defect of parties—following *Lewis & Pickering v. Williams & Son*, 3 Minn. 151.

ATWATER, J., *dissenting*, thinks that the complaint charging the *gravamen* wholly on the president and assignee, and showing only that the cashier participated in the execution of the assignment, shows no cause of action against the cashier, and his demurrer on that ground should have been sustained. *Mitchell v. Bank of St. Paul*, 7 Minn. 252.

**217. Defendant, corporation, had changed its name.** At time the alleged cause of action accrued defendant's corporate name was "School District No. 3," Eagle Township; at time of bringing action its name had been changed by the Legislature to "Sub. Dist. No. 3 of Eagle Creek School District." *Held*, action was properly brought against the corporation under the latter name—the identity being the same. *Gould v. Sub. Dist. No. 3, of Eagle Creek School District*, 7 Minn. 203.

**218. Fraudulent conveyances.** B. being indebted to N. & C. purchased property and took a deed in name of his wife; then conveyed certain property to R. who afterwards conveyed a portion of the same to C. on valuable consideration. The purchase in the name of the wife, and sale to R. was with the intent on the part of all to hinder, delay and defraud N. & C., while C. purchased with notice that R. had so fraudulently received the property. *Held*, N. &

Co. might join B., his wife, R. and C. in an action to set aside such conveyances, and reach the property to satisfy his judgment. *North & Carl v. Bradway et al.*, 9 Minn. 183.

**219. In an action to purchase a mortgage** made by the husband and wife on the separate estate of the wife, the husband is a necessary party. *Wolfe and wife v. Banning et al.*, 3 Minn. 203.

**220. Nuisance.** In an action to remove a dam, as an existing nuisance, if "C. has or pretends to have, some title to or interest in, the land on the east shore of the river at the point where the dam abuts against said shore" and is "aiding and abetting" the defendant in maintaining the dam, he may be made co-defendant. *Eastman v. the St. Anthony Falls Water Power Co.*, 12 Minn. 137.

**221. Replevin undertaking.** The plaintiff in a replevin suit signed an obligor together with two sureties in an undertaking, under sec. 133 p. 549, Comp. St. conditioned in certain events to return the property or its value, etc. *Held*, the plaintiff could be made a co-defendant together with the other sureties in an action on the understanding—he is bound equally with them. *Buck v. Lewis et al.*, 9 Minn. 314.

**222. Specific performance.** In an action to compel specific performance any one may be joined as defendant who claims to have an interest in the land without setting forth his title particularly, and demurrer does not lie for want of facts sufficient to constitute a cause of action in such case. *Seager v. Burns et al.*, 4 Minn. 141.

#### *c. Misjoinder of defendants.*

**223. Striking off the record.** Parties improperly admitted as co-defendants on their own motion, may be struck off the record by motion of the adverse party, for it is his right to have them off—a petition is not necessary. *Steele v. Taylor et al.* 1 Minn. 285.

**224. Remedy for misjoinder.** The remedy of a party improperly joined as defendant is by *demurrer to complaint* for

not stating a cause of action against him. *Lewis & Pickering v. Williams & Sons*, 3 Minn. 15.

#### 4. Substitution of parties.

**225. Assignment pendente lite.** Defendant by supplemental answer set up payment since beginning of the action. Plaintiff replied—assignment of the cause of action previous to payment and that defendant had notice. *Held*, the reply should show that the assignment was *pendente lite*, to enable the assignee to continue the action in name of plaintiff of record. *St. Anthony Mill Co. v. Vandall*, 1 Minn. 250.

#### 5. Defect of parties.

**226. Remedy for.** It seems that, where there is clearly a defect of *necessary* parties, it is perhaps worthy of consideration whether it is not allowable for the court to suggest such defect and continue the cause until the necessary parties are added (when the objection is not taken by demurrer on answer) but when this defect first becomes apparent, or is suggested at the hearing, courts will not on that account absolutely dismiss the complaint. *Cover v. The Town of Baytown et al.*, 12 Minn. 124.

which were still to be examined, allowed and affirmed by the United States, and if found correct, paid by the United States out of funds to be paid to said Indians under treaty with the Sisseton and Wahpaton bands of Sioux Indians, concluded June 19, 1858, and ratified by the Senate March 9, 1859, is a claim "against the United States" within the meaning of "an act to prosecute frauds upon the Treasury of the United States," approved February 26th, 1853, which makes an assignment of such claims void unless attested by two witnesses, after their allowance by the proper department. *Becker v. Sweetzer*, 15 Minn. 427.

## COMMISSIONERS TO ADJUST CLAIMS AGAINST ESTATE.

**I.** After an "omission" to appoint commissioners to adjust claims against the estate, whereby claimants are allowed to prosecute to the personal representatives (Sec. 59, Ch. 44, C. S.,) said claimants are not prohibited from presenting their claims to commissioners, if afterwards appointed. *Wilkinson, Stetson & Co. v. Estate of Winne*, 15 Minn. 159.

## CLAIM AND DELIVERY OF PERSONAL PROPERTY.

(See CIVIL ACTION, XIII.)

(See SHERIFF, II.)

(See PLEADINGS.)

(See EVIDENCE.)

(See BONDS.)

(See PRACTICE, II. 6.)

## CLAIM AGAINST THE UNITED STATES.

**I.** A claim for goods sold and delivered to Indians of the Sioux or Dakotah tribe,

## COMMON CARRIER.

### I. GENERALLY.

### II. OF PASSENGERS.

### III. OF GOODS.

1. *Who are common carriers.*

2. *Liability of common carriers.*

a. *Generally.*

b. *Beyond its own route.*

c. *For goods burned.*

d. *Limitation of liability.*

3. *Carrier's lien.*

4. *Liability of consignee for goods left by mistake.*

## I. GENERALLY.

**1. Common carrier cannot by contract limit his liability for the negligence of himself or servants.** The better and wiser opinion seems to be, that a common carrier cannot modify or limit his common law liability as an insurer so as to exonerate himself from liability for his own negligence, or the negligence of the agents whom he employs to perform the transportation, and he is responsible, notwithstanding a special agreement, for ordinary neglect. *Christenson et al., v. American Express Co.*, 15 Minn. 270.

**2.**—While it would seem very proper to hold that a snag in one of our western rivers is a peril of navigation; still if a vessel is wrecked upon one through the negligence of the carrier, or of those whom he employs, the carrier is not absolved. *Ib.*

## II. COMMON CARRIER OF PASSENGERS.

**3. Liabilities and duties of carrier of passengers—stage companies.** The law imposes upon the common carrier of passengers the greatest care and foresight for the safety of his passengers, and holds him liable for the slightest neglect. This duty and responsibility exists not only in respect to the vehicle, but to every means and instrument used or embraced by the carrier in the transportation, and extends throughout the entire journey. And in case of a stage company, this embraces the duty of giving notice to passengers of places in the road, the passage of which is attended with more than ordinary danger, (as a ferry,) or which requires special care or caution on the part of the passengers; and a neglect of the carrier to give the notice will render him liable in case of injury. *McLean v. Burbank*, 11 Minn. 277.

**4.**—The law imposes upon a common carrier of passengers for hire the utmost human care and foresight, and makes him responsible in damages for the slightest neglect. *Johnson v. Winona and St. Peters R. R. Co.*, 11 Minn. 296.

**5. Carriers of passengers by steam-boat** are required to employ licensed engineers, under the laws of the United States. *McMahon v. Davidson Impled, etc.*, 12 Minn. 357.

**6. Common carrier liable for death of passenger caused proximately by his act or omission, etc.** In an action against a common carrier of passengers for damages for the death of plaintiff's intestate, the defendant is not liable unless the wrongful act or omission of defendant was the "direct" (in the sense of proximate) cause of the injury, although their liability is not limited to "immediate results of their acts or omissions, as distinguished from the consequential results from such acts or omissions." *McLean v. Burbank*, 11 Minn. 277.

**7. Ejection of passenger from railroad car, for non-payment of additional fare.** It was the practice of defendant—common carrier of passengers—to admit passengers into its cars without tickets or prepayment of fare, and to collect the fare on the train, and plaintiff, wishing to go from St. P. to M., entered defendant's cars with the intention, in *good faith*, of going to the latter place, and took a seat without a ticket or prepayment of fare. *Held*, he had a right to retain his seat so long as he complied with the reasonable regulations of the company; and in the absence of qualifying circumstances, his right to retain his seat under the circumstances depended on his paying the rate of fare established by defendant, and on refusal to so pay the defendant would have the right to use such reasonable force as would be necessary to eject him from the train; but this right defendant might waive, and plaintiff having tendered the conductor fifty cents, believing it to be the full fare to M., and that sum being the actual fare when a ticket is procured at the office, but ten cents more when paid on the train, and the conductor having received and retained said sum with a knowledge of the purpose for which it was tendered by plaintiff, such right was waived, and the acceptance and

retention under such circumstances was an acceptance of the sum as full payment of plaintiff's fare to M. To avoid this consequence the conductor should have refused the tender by declining to receive it, or by immediately returning it when advised of the purpose for which it was made. These circumstances do not show that plaintiff was liable under an implied contract to pay the regular fare for whatever distance he should remain a passenger, and that having traveled as far as, according to those rates, the fifty cents paid his fare, the conductor had the right to retain that amount, and prevent him from traveling further by expelling him from the car, though at a point intermediate between St. P. and M. Evidence as to what was the fare from St. P. to place of expulsion that day was immaterial. *Du Laurans v. First Div. St. P. and P. R. R.*, 15 Minn. 49. BERRY, J., *dissents* as to the last point—evidence.

8.—A common carrier of passengers has a right to make any reasonable regulations as to the payment of fare by passengers, and in the exercise of its power a R. R. could make a discrimination between fares paid by passengers in the cars, and those paid at the ticket office by purchasing tickets; and whether such discrimination is made by selling tickets at the office for a stated discount from the regular fare, or in case they are not there procured, by charging a sum beyond the regular fare, is immaterial. But to justify the expulsion of a passenger from the train for refusing to pay the difference between the ticket fare and the regular car fare when a ticket is not furnished, the company must afford passengers a reasonable opportunity to avail themselves of the advantage and to avoid the disadvantage of this discrimination in fare which it publicly offers. *Ib.*

9.—If a ticket office was not open for such reasonable time previous to the departure of the train as to enable plaintiff to procure a ticket, defendant could not demand of him more than the ticket fare,

and plaintiff's expulsion from the cars under such circumstance would be wrongful. What is a reasonable time depends on circumstances, and is a question for the jury, under instructions of the court. *Ib.*

10. The mere fact of a ticket office being closed does not create the presumption in law or fact of the withdrawal of a railroad offer to sell tickets at the office at less than car fare. *Ib.*

### III. COMMON CARRIERS OF GOODS.

#### 1. Who are common carriers of goods.

11. Express companies are such carriers. An express company engaged generally, and publicly, in the business of transmitting for hire goods from place to place, establishing local offices at different points where their business extends, at which an agent is stationed, whose duty it is to receive goods transmitted, and deliver the same to the consignee, as well as to receive goods for transportation; owning no vehicles or other means of transportation, except such as are kept at their local offices, and used solely in carrying goods to and from such offices to and from their customers at the places where such offices are established; but which transmits goods so received on steamboats, railroads, coaches, etc., owned and controlled by other parties, and receiving to its own use the entire charges for such transportation, and always sending a messenger of its own with the goods as they are being transmitted, to take general charge of the same and attend to their transshipment and delivery to the local agent at destination, is a common carrier. *Christenson et al., v. American Express Co.*, 15 Minn. 270.

#### 2. Liability of common carriers of goods.

##### a. Generally.

12. At common law a common carrier is an insurer of the goods entrusted to him, and he is responsible for all losses of the same, save such as are occasioned by the act of God or the public enemy. *Ib.*

*b. Beyond its own route.*

**13. American rule adopted**—mere storage, however, without delivery, notice, etc., no termination of its liability. The “American rule,” that if a common carrier, having no connection in business with another line, and receiving pay for transportation on its own road only, is not liable, in the absence of special contract, for a loss beyond his own line; and the simple receipt of goods directed to a place beyond does not, *prima facie*, create a contract to carry such goods to their destination, adopted in this case. But if at the end of his route the carrier stores the goods in his warehouse without delivery, notice, or an attempt to deliver to the next carrier, he is not, by such mere act of storage, released from liability as carrier. The “English rule,” that the carrier’s liability in such case extends beyond its own line to place of consignment, and the first carrier only liable, repudiated. *Lawrence v. Winona and St. Peter R. R. Co.*, 15 Minn. 390.

*c. Liability for goods burned.*

**14. Goods burned in warehouse of an independent carrier.** Defendants’ railway had been completed only to Waseca, but they transported freight consigned to a point beyond—Mankota. To induce more freight to be shipped over their road, they arranged with one P. as follows: P. took on his teams all the freight marked for Mankato (when not specially consigned by way of Owatonna and Mendota, another connected but more circuitous route,) and for which he should not charge the consignees more than sixty cents per hundred. Defendants had no interest in Phelps’s business except incidentally to increase their freight business. Whenever enough of such freight had accumulated in defendants’ warehouse to make a load, P. was to, and did send a team to take it to Mankato, having no regular times for making trips, nor any place for receiving freight at Waseca, but loading from de-

fendants’ warehouse, where it remained stored, but defendants making no charge for storage. On delivery to P., defendants were either paid by him or charged him with the back charges on the freight, he looking for his pay to the owners or consignees of the goods, and defendants having no interest in P.’s profits. *Held*, P. was an independent common carrier. Further, that defendant, by receiving freight consigned to Mankato, from a common carrier at the eastern terminus of its road, Winona, and storing the same in its warehouse at Waseca, at which place it was consumed by fire, before enough goods had accumulated to make a load for P., were liable as common carriers to the owner of the goods, and occupied, as to the others engaged in the transportation, the position of an intermediate common carrier. *Id.*

*d. Limitation of liability.*

**15. They may by contract modify or limit.** It is competent for a common carrier to modify or limit his common law liability by special agreement with the owner of goods. *Christenson et al., v. The American Express Co.*, 15 Minn. 270.

**16. Contract may be in different forms.** The special agreement limiting a common carrier’s common law liability may be in the form of a special acceptance of the goods by the carrier, as by a unilateral bill of lading or receipt, but to bind the shipper he must assent to it, or it must be brought home to him under circumstances from which his assent is to be implied. *Id.*

**17. Limitation by express companies of their liability to that of forwarders only.** An express receipt ran: “And it is hereby expressly agreed, and is part of the consideration of this contract, that the American Express Co. are not to be held liable for any loss or damages, except as forwarders only.” *Held*, this clause did not absolve defendants from all liability for loss of goods on their showing that they used ordinary diligence in sending on the

goods, by careful, suitable and responsible parties, as would be the case with a "forwarder," nor it does not exempt defendants from liability for their own negligence, or the negligence of the agents employed by them in the transportation of the goods. *Ib.*

**18.**—An express company, by styling themselves in their receipt as "*express forwarders*," and by agreeing to "*forward*" the goods, do not necessarily acquire the character of simple forwarders, nor exempt themselves from being treated as common carriers. And while they agree to forward, "only perils of navigation and transportation excepted," still, while the exception embraces more than "the act of God," it goes no further than to exempt the carrier from liability for such perils as could not be foreseen, or avoided, in the exercise of care and prudence, and does not excuse him from negligently running into perils of the kind mentioned, the proper construction being analogous to that put upon "perils of the sea" or "danger of the lake" in bills of lading. *Ib.*

**19.** Consignor presumptively consignee's agent in taking receipt and shipping goods. When it appeared that simultaneously with the delivery of the goods to defendants (common carriers), a receipt containing an agreement limiting their liability was delivered to plaintiff's consignors, and it was produced in evidence by plaintiffs in an action against defendants for loss of the goods, in the absence of evidence to the contrary, it is presumed that the consignors were plaintiffs' agents to contract for the transportation of the goods, and the delivery of the receipt to the consignors must be held to be equivalent to a delivery to the plaintiffs to whose possession it came; and when no objection is made to the terms of the receipt, or that they escaped attention, the assent of the consignors—plaintiffs' agents—and hence the assent of the plaintiffs to the terms thereof, is to be presumed. *Ib.*

**20.**—not necessarily. Receipts of

common carriers for goods, containing agreements limiting their common law liability, may be given under such circumstances as to repel any presumption of assent to their terms arising from the simple fact of taking such receipts. *Ib.*

### 3. Carrier's lien.

**21.** No lien when they have failed to transport according to contract, without excuse. Neither the master of a boat nor others claiming under him acquire a lien on goods for freight, when they have failed to transport the same according to contract, and show no reason for not fulfilling the contract of affreightment. *Bass & Co. v. Upton*, 1 Minn. 416.

**22.** No lien on goods of United States. A common carrier has no lien upon goods of the United States transported by him. *Dufolt v. Gorman*, 1 Minn. 309.

### 4. Liability of consignee for goods left by mistake.

**23.** When he did not accept them. The master of a boat having on board two packages of freight for defendant, put two packages on the landing, one by mistake, belonging to another person. Defendant took his package and left the other on the levee, and it was the following night destroyed. The circumstances showed no acceptance on part of defendant of the package so left by mistake. *Held*, defendant not liable for its value to the master, on a delivery of the proper package. *Houghton v. Lynch*, 13 Minn. 85.

(See EVIDENCE, 98.)

## COMMISSION TO TAKE TESTIMONY.

(See PRACTICE, II., 9.)

## COMMON LAW.

(See CRIMINAL LAW, 1, 2.)

**I. Operative here.** Unless there is a conflict between the provisions of a statute and the common law relating to the same subject matter, or an evident intent of the legislature to repeal the common law, the latter, so far as it applies to the circumstances, will be recognized by the courts as operative here. *Blackman v. Wheaton*, 13 Minn. 326.

### CONDITIONS PRECEDENT.

(See CONTRACT, V.)

(See EQUITY, 7.)

### CONDITIONS MUTUAL AND CONCURRENT.

(See PLEADINGS, 55.)

### CONFLICT OF LAW.

**I. Polygamous marriages.** Neither *ex comitate*, nor on grounds of public policy, has it been considered that a State is bound to sanction incestuous or polygamous marriages, though valid in another State where they were entered into. Hence, in an indictment for crime of polygamy it would not be necessary to allege that the polygamous marriage was unlawful in another State where contracted. *State v. Johnson*, 12 Minn. 476.

### CONFESSIONS.

(See CRIMINAL LAW, 91.)

### CONSIDERATION.

(See CONTRACT, VII.)

(See EVIDENCE, 99, *et seq.*)

### CONSPIRACY.

(See CRIMINAL LAW, 134.)

### CONSTITUTIONAL LAW.

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(See RAILROADS, III.)

#### I. GENERALLY.

**I.** "Due process of law," within the meaning of the constitution means "law in its regular course of administration through the courts of justice." *Baker v. Kelley*, 11 Minn. 480.

#### II. CONSTRUCTION OF CONSTITUTION.

**2.** Questions of constitutional law must be tried by the court, and original bills on



file and journals of either house may be examined. *Board of Supervisors Ramsey Co. v. Heenan*, 2 Minn. 334.

**3.** To justify the court in declaring a law unconstitutional, the opposition between the constitution and the law should be such as to produce a clear and strong conviction of their incompatibility with each other. *Sanborn v. Commissioners of Rice County*, 9 Minn. 273.

**4.** Constitutions necessarily deal in general language, and in their interpretation words are to be understood in the sense in which they are generally used by those for whom the instrument was intended. *Ib.*

**5.** The debates in the convention that framed the constitution should not influence a court in expounding a constitution in any case. *Taylor v. Taylor et al.*, 10 Minn. 107.

### III. METHOD OF PASSING BILLS.

**6. Majority of all members elected must vote.** The 13th sec. art. 4 of the constitution requiring a majority of all members elected to each branch of the legislature to vote for a bill to make it valid, is mandatory and must be observed. *Board Supervisors Ramsey Co. v. Heenan*, 2 Minn. 334.

**7. Three different readings.** Sec. 20 art. 4 of State Constitution, requiring every bill to be read on three different days in each house except in case of urgency, by two-thirds vote, the rule might be suspended—is *mandatory* and must be observed. *Ib.*

**8. Time within which Governor may sign.** An act of the legislature passed March 7th, 1861, presented same day to the Governor for approval, the legislature adjourning *sine die* on the 8th of March, and signed by the Governor on the 12th of March (one Sunday intervening) was signed within the time prescribed by sec. 11 of art. 4 State Constitution. *Stinson v. Smith*, 8 Minn. 366.

**9. No law shall embrace more than one subject which shall be embraced in**

**its title.** An act entitled "An Act for a Homestead Exemption" is not unconstitutional (Const. of Minn. sec. 27 art. 4) as embracing more than one subject matter where it exempts a homestead proper and personal property from seizure and sale. Both provisions relating to the same subject, and no evidence of an attempt to insert matter foreign to the title, there was no violation of the spirit of the constitutional provision, reviewing and endorsing the Board of Supervisors of Ramsey Co. *v. Heenan*, 2 Minn. 330. *Tuttle v. Stout*, 7 Minn. 465.

**10.**—The act of March 4, 1865, chap. 10, S. L., 1865, p. 48, is void as conflicting with sec. 27, art. 4, State Constitution, which provides that "no law shall embrace more than one subject, which shall be expressed in the title. *Winona & St. Peter R. Co. v. Waldron et al.*, 11 Minn. 515.

MCMILLAN, J., *dissents*.

**11.**—"An Act to amend the charter of the city of St Paul" (ch. 16, S. L. 1865, p. 12) is not in conflict with sec. 27, art. 4, Const., by reason of containing amendments to different sections of the same charter. *The City of St. Paul v. Colter*, 12 Minn. 41.

**12.**—Ch. 112 Laws of 1867, entitled "An Act to change the titles of and regulate the holding of courts for counties unorganized for judicial purposes, and to regulate the manner in which the counties to which they are attached for such purposes, are to provide for the transaction of the business of counties which have no board of commissioners," is not repugnant to sec. 27, art. 4 of the Constitution, which provides that no law shall embrace more than one subject, which shall be expressed in its title. Following *Tuttle v. Stout*, 7 Minn. 465. *State v. Gut*, 13 Minn. 341.

**13.**—"An Act to incorporate the village of High Forest, in the county of Olmstead, Minnesota," approved 23 Feb. 1869, incorporates as a village four sections of land in town of High Forest, and also provides for the division of the town, and the organization, as a new town, of that part in

which said four sections lie. *Held*, so far as the division of the old town, and organization as a new town of that part in which said four sections lie, the act is void, under sec. 27, art. 4 constitution, which provides that "no law shall embrace more than one subject, which shall be expressed in its title. *Stuart v. Kinsella*, 14 Minn. 524.

**14. Expressing subject of Act in its title.** An act entitled "An Act to regulate the foreclosure of real estate," sufficiently expresses in its title the object of a provision which provides that a mortgagor may waive his right to redeem from foreclosure sale. *Atkinson v. Duffy*, 16 Minn. 45.

#### IV. THE JUDICIAL POWER.

**15. Cannot be conferred on County Commissioners.** An act of the legislature empowering the Commissioners of Rice county to "*audit, adjust and fix the claims*" of S. against a school district, and impose a tax to pay such claim when so determined, not providing for any appeal, was an attempt to confer on the commissioners *judicial power* contrary to the constitution which vests it exclusively in the courts; hence unconstitutional. *Sanborn v. Commissioners of Rice County*, 9 Minn. 273.

**16. Taking opinion of Supreme Court on a statement of either House of the Legislature.** Sec. 15, ch. 4, Comp. St., authorizing either house of the legislature to request the opinion of the Supreme Court or any one or more of its Judges upon a given subject, and making it the duty of the Court or Judge to give such opinion in writing, is in conflict with sec. 1, art. 3, State Constitution, for the duty thus imposed is neither a judicial act nor to be exercised in a judicial manner. Any opinion expressed in such way would be an extra judicial act and impose no official responsibility on the Court or Judge. *In the matter of the application of the Senate for the opinion of the Supreme Court*, 10 Minn. 78.

**17. Cannot empower Clerk of Court to issue an attachment.** Sec. 142, p. 550,

Comp. St., so far as it authorizes clerks of courts to allow warrants of attachments, is in conflict with sec. 1, art. 6 Constitution—the allowance being a judicial act. *Morrison et al. v. Lovejoy et al.*, 6 Minn. 183.

#### V. THE LEGISLATIVE POWER.

(See OFFICE AND OFFICER, 6.)

##### 1. Trial by jury.

**18. Power under U. S. Constitution to extend trial by jury to cases involving less than \$20.** Art. VII. amendments to the U. S. Const., did not prohibit the Legislature of the Territory of Minnesota from granting right of trial by jury in cases involving less than \$20; it only prohibited it from denying it in cases involving more than \$20. *Whallon v. Bancroft*, 4 Minn. 109.

**19. Waiver of the right.** Sec. 4, art. I., Constitution of Minnesota refers only to *civil matters*, as it authorizes a waiver of the right of trial by jury in *all cases*, which is not true of criminal cases. *Ib.*

**20. Jury fee.** The statute requiring a party to pay a jury fee to entitle himself to a jury trial is not unconstitutional. *Adams v. Carriston*, 7 Minn. 456.

##### 2. Ex post facto laws.

**21. What is—altering rule of evidence in criminal cases.** Sec. 89, G. S., 531, which authorizes evidence of admission of a marriage by the defendant, general repute, cohabitation or any other circumstantial or presumptive evidence to be received in evidence to establish a marriage in fact, where it is necessary is, so far as the crime of polygamy committed prior to its passage is concerned, *ex post facto*, and void, it being a change in the rule of "evidence by which a less or different testimony is sufficient to convict than was required" within the definition of an *ex post facto* law. *State v. Johnson*, 12 Minn. 476.

**22. What is not—changing place of trial.** The law of 1867, p. 156, approved March 6, 1867, changing the place of trial

from one point in a district to another is not an *ex post facto* law. *State v. Gut*, 13 Minn. 341.

**23.—changing rule for challenge of jurors.** Ch. 86, laws 1868, which allows the State to peremptorily challenge seven petit jurors in certain criminal cases, applies to trial of offenses committed prior to its passage, and is not an *ex post facto* law within the meaning of the constitution. *State v. Ryan*, 13 Minn. 370.

### 3. *Obligation of contracts, laws impairing.*

**24. ∴ retrospective "exemption law"** does not "impair the obligation of a contract" within the meaning of the constitution. *Grimes v. Bryne*, 2 Minn. 97.

**25. Laws affecting the remedy.** The obligation of a contract is not impaired by a law affecting the remedy, but only by the alteration of laws which enter into and become a part of the contract; i. e. such laws as would be enforced by the courts of a foreign jurisdiction. *Heyward v. Judd*, 4 Minn. 483.

**26. Extending time to redeem from mortgage sale, as to pre-existing mortgages, and requiring mortgagor to pay interest in advance.** The act of July 29th, 1858, extending time to redeem from sale of mortgaged premises does not *impair the obligation of contracts*, although operating on pre-existing mortgages, and the stipulation requiring the mortgagor to pay interest for one year, to enable him to retain possession for that time after sale, bound him to pay the whole amount of the year's interest in advance. *Stone v. Bassett*, 4 Minn. 298.

**27.—**The legislature has the power to extend the period of redemption from sales made in judicial proceedings to foreclose, or satisfy mortgages, and extend the operation of such an act to mortgages in force at the time.

FLANDRAU, J., holding that power as to pre-existing mortgages should be confined to sales by order of court in the exercise of their equitable powers, and not to sales

resulting from the express contract of the parties. *Ib.*

**28.—and reducing rate of interest after foreclosure.** At the time of the execution of a mortgage, the law of July 29th, 1858, gave the mortgagor the right to redeem property sold at a mortgage sale within *one year* by repaying the purchase money with interest at 12 per cent. per annum—the interest to be paid in advance—before the mortgage was foreclosed by advertisement, the law of March 10, 1860, was passed, giving *three years* redemption, reducing rate of interest from 12 per cent. per annum to 7 per cent. per annum—and allowing it to be paid at the *end* of each year of redemption. *Held*, that the reduction of interest after sale and permitting it to be paid at the close of each year did not impair the obligation of a contract. Following *Stone v. Bassett*, 4 Minn. 298. *Hayward v. Judd*, 4 Minn. 483.

**29. Repeal of statute regulating protest of bills.** The repeal of a law regulating the protest of promissory notes and bills of exchange affects notes then made as well as those subsequently entered into and does not impair the obligation of a contract. *Levering & Morton v. Washington*, 3 Minn. 331.

**30. U. S. Legal Tender Act.** The acts of Congress of 1862 and 1863 making United States notes a legal tender in payment of debts, so far as they apply to debts contracted after their passage, not specifically payable in coin, but generally in dollars are constitutional. *Breen v. Devey*, 16 Minn. 136.

**31. Retrospective operation of mortgage foreclosure proceedings.** The application of an existing statute to the foreclosure of a mortgage executed before its passage does not impair the obligation of a contract, but affects the remedy. *Atkinson v. Duffy*, 16 Minn. 45.

**32. Repeal of Ferry Franchise where no power so to do was retained.** An act repealing a former act of the legislature granting a ferry franchise to M., which reserved no right of alteration or repeal to

the legislature, is unconstitutional as impairing the obligation of a contract. *McRoberts v. Washburn et al.*, 10 Minn. 23.

**33. Retrospective statute taking away right of mortgagee to possession until expiration of period of redemption.** Under the law in force at date of execution of the mortgage, the purchaser was entitled to the possession immediately after a foreclosure sale, by the act of July 29th, 1858, Chap. 61, laws 1858, it was provided that the mortgagor should be entitled to possession until the expiration of the period of redemption. *Held*, the act had a retrospective action and did not impair the obligation of the contract. Following *Hayward v. Judd*, 4 Minn. 487. *Carwell v. Rossiter*, 10 Minn. 178. *Berthold v. Holman et al.*, 12 Minn. 235.

**34.**—An act of the legislature extending to the mortgagor the right to possession of mortgaged premises during the period of redemption on payment of interest, does not impair the obligation of a contract, in its operation upon prior mortgages. *Berthold v. Fox et al.*, 13 Minn. 501.

**35.** A clause in a redemption law which provided that a certain period shall be allowed for redemption after mortgage sale, "or such other time as may be prescribed by law," is void as an attempt to reserve a right to impair the obligation of contracts, *Goenen v. Schroeder*, 8 Minn. 378.

#### 4. Remedies, laws regulating.

**36. Regulation of order of enforcing remedies valid, but declaration of forfeiture on default void.** Act of March 8th, 1860, G. L. p. 216, which provides that if you hold a note or other personal demand which is secured by mortgage or other collateral stated therein, you shall not sue and obtain personal judgment on the former until you have first exhausted the securities, is not unconstitutional, for the legislature has the power of determining the order in which parties shall pursue their remedies, but Sec. 2 of said act which imposes a penalty of forfeiture of said securities in case they are not prosecuted in the

first instance, is void as an excess of legislative power, and impairing the obligation of a contract. *Swift v. Fletcher*, 6 Minn. 550.

**37. Laws forbidding suit by stranger against sheriff for recovery of property seized until service of affidavit of claim, valid.** Sec. 1, Chap. 24, Laws 1865, which makes the service upon an officer, before sale, of an affidavit by the owner of personal property attached by such officer while in the possession of the execution debtor, under circumstances which create a *prima facie* presumption of ownership in the latter, a condition precedent to maintaining an action against the sheriff for the recovery of the same, is constitutional. It merely regulates the remedy, and does not deprive the plaintiff of any property or any right. *Barry v. McGrade et al.*, 14 Minn. 163.

#### 5. Vested rights.

**38. Act of Congress, approved Aug. 4th, 1854, revoking grant of land to aid Territory of Minnesota in constructing railroad, void.** The Act of Congress approved August 4th, 1854, entitled an act for the relief of Thos. Bunnagh, and for the repeal of an "act to aid the Territory of Minnesota in the construction of a R. R. therein," approved June 29th, 1854, is void and of no effect as far as it relates to the repeal. *United States v. Minnesota and Northwestern R. R. Co.*, 1 Minn. 128.

**39. Legalizing defectively executed conveyances.** The act of the Legislature, 26th July, 1856, (Comp. St. 403-4), declaring all conveyances executed in the presence of one witness (when the general law required two) to be legal and valid, could not give them validity, so as to affect persons who may have subsequently acquired title to the property, and prior to passage of the act. *Meighen et al. v. Strong*, 6 Minn. 177.

**40.**—Act of July 26, 1858, (Comp. St. 403-4,) rendering operative conveyances previously executed with but one witness, cannot operate to the prejudice of

such as have vested rights—it may operate as between the parties and all who take subsequent to its passage. *Thompson et al. v. Morgan*, 6 Minn. 292.

**41. Damages for land taken for road.**

When the rights of a person to damage for land taken for a road have become fixed by the performance of all acts required of the commissioners appointed to assess them, no act of the Legislature can divest them. See Sess. Laws, 1861, p. 225, authorizing a re-assessment of damages. *Daley v. City of St. Paul*, 7 Minn. 390.

**42. Correction of mortgage as against creditors subsequently declared on footing of bona fide purchaser.** Comp. St. p. 400, Lien Law of Aug. 3, 1858, which places judgment creditors upon same footing as bona fide purchasers for value as to conveyances made after the passage of the act, will not prevent a mortgage executed prior to the passage of the act from being corrected as against existing judgment creditors. *Dunwell et al. v. Bidwell*, 8 Minn. 34.

**43. Legalizing defective record of instrument.** Act of March 5, 1863, authorizing instruments attested by only one witness to be recorded, and making prior records valid without another record of them, is valid as respects a mortgagor and his grantee with actual notice of the mortgage. *Ross v. Worthington*, 11 Minn. 438.

**44.**—Sec. 52, Chap. 35, p. 403-4, Comp. St., providing that “all conveyances of real estate heretofore made within the limits of this State, properly sealed and acknowledged, with one subscribing witness thereto, shall be legal and valid to all intents and purposes,” is valid as far as concerns a party who takes, with knowledge of the equities against his grantor (mortgagor), on account of a mortgage so defective. *Id.*

**45. Allowance of an appeal after right has been lost.** The Legislature has no power to allow an appeal in an action when the right to the same has been lost by lapse of time. Chap. 73, p. 112, Laws 1868, which extends the time in which an

appeal may be taken from six months to one year, is retrospective but cannot be applied to actions in which the right to appeal had been lost at time of its passage. *Beaupre v. Hoerr*, 13 Minn. 366.

**6. Right of every person to a certain remedy in the laws.**

**46. Imposing conditions to bring action to set aside assessment, etc.** Sec. 26, Chap. 8, Laws of 1854, p. 37, “Charter, City of St. Paul,” which required as a condition precedent to instituting any proceeding to set aside any assessment, special tax, etc., or deed executed, etc., the paying, or tendering, or depositing with the Treasurer the amount of all State, county and city taxes that remain unpaid, together with interest, etc., is unconstitutional, being in conflict with Sec. 8, Art. 1, Const. *Weller v. City of St. Paul*, 5 Minn. 95.

**47. Suspending right of persons in rebellion from suing in our courts.** The act of the Legislature passed February 14, 1862, entitled “an act suspending the privilege of all persons aiding the rebellion against the United States, of prosecuting and defending actions and judicial proceedings in this State,” as affects citizens of this and sister States, is unconstitutional and void. Const., Art. 1, Sec. 8. *Davis v. Pierse et al.*, 7 Minn. 13; *McFarland v. Butler*, 8 Minn. 116; *Jackson v. Butler, ib.*

**7. Exemption of individuals from general laws.**

**48.** An act of the Legislature (S. L. 1864, p. 370,) required the board of county commissioners of Rice county to “audit, adjust and fix” the claim of S. against School District No. 10, and that the amount of such claim as audited, etc., should be entered on the records, etc., and the board should vote a tax upon the taxable property of the School District to pay it, etc. Held, if S. has a valid claim, he could collect it under the general laws, and this special act granting a privilege and indulgence to one man, by way of exemption from the effect and operation of

such general law, leaving all other persons under its operation, is an excess of legislative power, and void. *Sanborn v. Commissioners of Rice County*, 9 Minn. 273.

8. *Town bounty bonds, laws legalizing.*

**49.** When a town had authority to pay bounties to soldiers, but no power to issue bonds for such purpose. *Held*, the Legislature has power to legalize and make valid such obligations after the same have been issued. Act of 1865. *Kunkle v. The Town of Franklin, in Wright Co.*, 13 Minn. 127. *Comer v. Folsom*, 13 Minn. 219.

9. *County lines, laws changing.*

**50.** Sec. 1, Art. 11. of the Constitution, which provides that all laws changing county lines, etc., in organized counties, or for removing county seats, before taking effect shall be submitted to the electors of the county or counties at a general election, "and be adopted by a majority of such electors," means a majority of the electors voting, and not an absolute majority of those qualified to vote. *BERRY, J., dissenting. Taylor v. Taylor et al.*, 10 Minn. 107.

10. *County seats, law changing.*

**51. Special act must be passed.** The general act of 1858, providing for the removal of county seats, (Comp. Statutes, p. 111,) if on the petition of at least half the number of voters the people shall at the next general election vote for such change, conflicts with Sec. 1, Art. 11, Const. of the State, which provides that "all laws removing county seats shall, before taking effect, be submitted, etc., to the electors, etc., and be adopted by a majority;" under which a special act must be passed, to take effect upon its adoption by the electors of the county at the next general election. *ATWATER, J., dissenting. Roos v. Svenson*, 6 Minn. 428.

**52. What is a constitutional majority.** Under Sec. 1, Art. XI, Constitution of the State, which provides that "all laws \* \* \* for removing county seats shall, before taking effect, be submitted to the elect-

ors of the county \* \* \* to be affected thereby, at the next general election after the passage thereof, and be adopted by a majority of such electors," it is not competent for the Legislature to enact that a law removing a county seat "shall take effect and be in force after its submission to the electors of said county at the next general election after the passage thereof, and its adoption by a majority of such electors voting thereon." A constitutional majority requires that it be a majority of the electors voting at the general election, not on this particular question—reconciling *Taylor v. Taylor et al.*, 10 Minn. 107. *Bayard v. Klinge*, 16 Minn. 249.

**53.**—Under a county seat removal law, Chap. 95, Special Laws, 1867, requiring its submission at the "next general election after the passage thereof, and its adoption by a majority of such electors voting thereon," the fact that at such election there were cast upon said question 1457 legal votes for, and 1074 legal votes against the adoption of said special act, does not amount to an adoption of said special law, for the Constitution requires that it shall be adopted by a majority of the electors voting at such general election. *Ib.*

11. *Exemption laws.*

**54. Reasonable amount exempt from any debt or liability.** Sec. 100, p. 571, Comp. St., which provides that "nothing in this act (statute of exemption) shall be so construed as to exempt any property in this State from execution or attachment for clerks', laborers' or mechanics' wages," conflicts with Sec. 12, Art. 1, Const. of the State, which exempts a reasonable amount of property from "seizure or sale for the payment of any debt or liability." *Tuttle v. Strout*, 7 Minn. 465.

12. *Limitation statutes.*

**55. Owner in possession not bound to commence suit to protect that possession.** The Legislature cannot require a person who is in the possession and uninterrupted enjoyment of his property, to commence

an action for the purpose of vindicating his rights or silencing adverse claims thereto. *Baker v. Kelley*, 11 Minn. 480.

**56. Cannot deny a remedy.** The Legislature has not the power to deny a remedy, or cut off an existing right of action; but subject to this limitation its power to enlarge or lessen the time—at least before the statute has barred a right of action—or to establish a limitation, cannot be questioned. *Cook et al., v. Kendall et al.*, 13 Minn. 324.

**57. One year limitation valid.** The limitation for bringing an action to test the validity of a tax deed prescribed by Sec. 4, Chap. 5, Law 1864, of one year from the time of recording the same, does not infringe upon the Constitution, and is valid. *Hill v. Lund*, 13 Minn. 451.

13. *Taking private property for public use.*

**58. Franchises may be taken.** It seems that, in a proper case, the State may, in the exercise of the power of eminent domain, condemn a franchise equally with any other property, making compensation therefor. *McRoberts v. Washburn et al.*, 10 Minn. 23.

**59. Cannot authorize railroads to build track on land dedicated to public for a public street.** When the dedication of land was made for the purpose of the same being used for public streets or landing, and for no other burden—as a railroad track—the authorization by the Legislature of such use—railroad purposes—would be an interference with the reserved rights of the plaintiff, and an attempt to authorize the taking of private property for public uses without compensation. *Schurmeier v. The St. Paul and Pacific R. R. Co.*, 10 Minn. 82.

**60. Destruction of building to stay conflagration.** The destruction of a building to prevent the spreading of a conflagration is not, it seems, the taking of private property for public use, within the Constitution—if it be, a city is not liable in the absence of statute. *McDonald v. The City of Redwing*, 13 Minn. 38.

**61. Compensation must be first paid or secured.** The charter of the defendant, Sec. 3 and 13, Laws 1857, Extra Session, which provides that private property may be taken by the defendant, for its use, without payment first made or secured, is in conflict with the Constitution of the United States, V. Amendment, which provides that private property shall not be taken for public use without just compensation, under which the same was enacted by the Territorial Legislature. *Gray v. The First Division of the St. Paul and P. R. R. Co.*, 13 Minn. 315.

**62. Compensation must be determined, etc., under the statute—not by suit.** The Legislature, under our Constitution, have not the power to take private property for public use without making provision for a just compensation therefor, to be first paid or secured to the owner, and when compensation is provided for, it must be ascertained and obtained in accordance with the course prescribed by the statute—not by action. *Teick v. Board of Commissioners of Carver County*, 11 Minn. 292.

**63. Compensation, mode of determining discretionary with the Legislature.** When the State Constitution declares “private property shall not be taken for public use without just compensation therefor, first paid or secured,” but contains no express provision as to the mode in which the compensation shall be determined, 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; but that discretion is not an unlimited one. *Langford v. The County Commissioners of Ramsey County*, 16 Minn. 375.

**64. The mode of exercising the right of eminent domain, whether by the State itself, or its delegates, rests in the discretion of the Legislature, in so far as the Legislature is not restrained by the Constitution.** *Wilkin et al., v. The First Division St. P. and P. R. R. Co.*, 16 Minn. 271.

**65. Compensation, how determined.**

When private property is taken for public use, in ordinary cases, and the Constitution prescribes no particular mode in which the compensation therefor shall be ascertained, the owner of the property has a right to require an impartial tribunal to be provided for the determination of that compensation, and in such cases the Government is bound to provide such tribunal, before which both parties may meet and discuss their claims on equal terms. *Langford v. The County Commissioners of Ramsey Co.*, 16 Minn. 375.

**66. State road, law authorizing, void.**

A law authorizing the taking of private property for the purposes of a State road, appointing, without the consent of the persons whose lands are taken, three commissioners with power to determine the compensation due to land owners, requiring no notice of the proceedings before the commissioners, nor making any provision for the appearance of the land owners at any stage of the proceedings for any purpose, is unconstitutional and void, as not providing any just and equitable mode of determining the compensation due for property taken. *Ib.*

*14. Taxation.*

**67. City street assessment is taxation.** The assessment of the expense of grading a street in the city of St. Paul upon lots fronting upon such street, under Sec. 5, Chap. 7, of the city charter, is an exercise of the taxing powers, and not of eminent domain. *McComb v. Bell*, 2 Minn. 306.

**68. Indian reservation not within taxing jurisdiction.** The taxing power of the State does not extend to persons trading with Indians and located upon Indian reservations within the State. Such power is in conflict with Art. 1, Sec. 8, sub div. 3, of the Constitution of the United States, which confers upon Congress power to regulate commerce with Indian tribes. *Foster v. Board of Commissioners, Blue Earth Co.*, 7 Minn. 140.

**69.—It would seem that the United**

States cannot colonize within the limits of an organized Territory or State, a body of savages or any other people not citizens of the United States, without the consent or against the will of the local sovereignty—in any event when the Territory or State—in such a case—quietly allows the same to be done, its validity cannot be questioned by an attempt to extend the assessment of taxes over a reservation thus given them. FLANDRAU. *Ib.*

**70. Legalization of taxes for paying town bounty bonds.** It was competent for the Legislature to legalize the levy and collection of a tax for paying bounties offered by towns to volunteers in the United States service, as per Chap. 8, Ex. Sess. 1868, or to ratify and legalize such tax when levied without authority. *Wilson v. Buckman*, 13 Minn. 441.

**71. Percentage of gross receipts of railroads may be taken in lieu of taxes.** The Legislature had power to exempt the Minn. and Pacific R. R. Co. from the payment of all taxes on the payment of three *per centum* of its gross earnings each year into the treasury of the State, (Sec. 18, act May 27, 1857, organizing said corporation.) Such exemption in its charter became a contract between the Territory and corporation, the consideration of which was the building of its road and three per cent. of its gross earnings, and the power of the Territorial Legislature to bind itself is recognized in the organic act, Sec. 6, and to bind the State also. Nor does such exemption conflict with Sec. 6, organic act of the Territory, which provided that the lands or other property of non-residents should not be taxed higher than the lands or other property of residents—such provision being designed to protect non-residents *in fact*, (which the corporation was not,) from being taxed higher than actual residents *in fact*. Nor was this exemption personal, but passed to the State under the foreclosure proceedings as a right appendant to the land, and from it to the St. Paul and Pacific R. R. Co., and thence to the First Division of the St. Paul and



Pacific R. R. Co., so far as related to land taken by the latter company from the former. Nor were the different acts of the Legislature, or agreements between the last two corporations, such a sale or conveyance, within Sec. 18 of the original charter of the Minn. and Pacific R. R. Co., as to render such lands taxable. *The First Div. St. Paul and Pacific R. R. Co. v. Parcher et al.*, 14 Minn. 297.

**72. Expense in opening road cannot be assessed upon property deemed benefited, in proportion to benefits—property must have a cash valuation.** An act (March 7, 1861,) authorizing the laying out of a road, (Fort Street, in Ramsey county,) providing that the damages and expenses of the improvement should be apportioned and assessed upon the real estate deemed benefited by the commissioners *in proportion to the benefits resulting* thereto from the improvements, conflicts with Sec. 1, Art. 9, State Constitution, which provides that "all property on which taxes are to be levied shall have a cash valuation," said clause applying to all species of taxes raised within the State, including city assessments. *Stinson v. Smith*, 8 Minn. 366.

**73. Property must be assessed at its true value in money.** Sec. 30, Chap. 1, Laws 1860, authorizing the auditor to *add to the value* as returned by the assessor, of all personal property—fifty per cent.—when there has been a neglect or refusal to list, is void, it being in conflict with Sec. 1 and 3, Art. 9, Const., requiring all property liable to taxation to have a cash valuation and be taxed "according to its true value in money." If penalties for non-listing can be imposed, it cannot be embraced in the value of personal property which is the basis of taxation. *McCor-mick et al. v. Fitch*, 14 Minn. 252.

**74. Cash valuation and uniformity.** *Query*, whether since the adoption of the Constitution a tax upon property, of any kind, can be levied or otherwise assessed than upon all the property in the district, and according to the cash value of such

property. *Nash v. The City of St. Paul*, 8 Minn. 172.

**75. Equality in taxation necessary.** Under Sec. 1, Art. 9, State Const., a tax cannot be imposed exclusively on any subdivision of the State, to pay an indebtedness or claim which is not peculiarly the debt of such subdivision, or to raise money for any purpose not peculiarly for the benefit of such subdivision. *Sanborn v. Commissioners of Rice County*, 9 Minn. 273.

**76.**—The general rule laid down for the levying of taxes by Art. 9, Sec. 1, State Constitution, which provides that "all taxes to be raised in this State shall be as nearly equal as may be," etc., requires that *equality shall be aimed at* in every law imposing a tax, but the course to be pursued and the means to be used *in pursuance of this rule*, are necessarily left in the discretion of the Legislature, and the infraction of the rule must be *palpable* to authorize the courts to interfere. A *substantial* compliance is all that can be required—but they must in no case run counter to or disregard it. *Ib.*

**77. Substantial equality only required.** The towns of Amador and Taylor's Falls were classed together, for the purpose of the draft, as "Sub Dist. No. 109,"—the former town having only four men liable to serve. To meet a draft, the town of Taylor's Falls voted and issued bonds for the purchase of substitutes to fill the quota of "Sub Dist. No. 109." *Held*, the incidental benefit which such a course conferred upon the town of Amador does not render void the bonds, perfect equality of taxation not being required. If the taxes imposed are distributed on just principles, applicable alike to all for whose benefit the appropriation is made or intended, substantial equality is attained, and no constitutional right invaded. *Comer v. Folsom*, 13 Minn. 219.

15. *Corporations, legislative control over.*

**78. Power to amend or repeal charters.** The power of the Legislature to amend and repeal a charter when it has

the power reserved to do so in the charter itself, is too well settled to admit of a doubt. *Perrin v. Oliver*, 1 Minn. 206.

**79. Officers can be appointed within cities for specific purposes.** The Legislature has undoubted power in this State to appoint officers within a city for a specific purpose, such as laying out a street, and assessing damages and benefits arising to the property taken for that purpose; and the acts of such officers are the acts of the city, as if appointed under the provisions of the city charter. *Daly v. City of Saint Paul*, 7 Minn. 390.

**80. Power to appoint to vacancies in elective offices.** Art. 11, Sec. 4, Const., providing that provision shall be made for the election of \* \* county \* \* officers is satisfied if provision is made for such election at stated periods, leaving the Legislature power to fill vacancies by appointment, until a next general election, or for the balance of an unexpired term. *State ex rel. Loring v. Benedict, auditor, et al.*, 15 Minn. 198.

**81. Imposing police regulations on railroads.** Under the police power of the State the Legislature has the right to impose upon existing railroad corporations the duty of fencing their roads, making cattle guards, regulating the speed of their cars, the use of signals, etc., and if it can deprive itself of this power in any instance, it certainly can only be done by express grant, and not by implication. *Winona and St. P. R. R. Co. v. Waldron et al.*, 11 Minn. 515.

As to creation of corporations by special act, see *The St. Paul and Pacific R. R. Co.*; *The First Div. St. Paul and Pacific R. R. Co.*

#### 16. *Rights and liberty of the citizen.*

**82.** An ordinance of the city of Saint Paul, establishing a fire department, provided that if in the absence of sufficient excuse, any person refuses at a fire to obey any order or direction given by a person duly authorized to order or direct, any "member of the common council, or any

fire warden, may arrest and detain such person until the fire is extinguished." *Held*, the clause aforesaid is repugnant to the Constitution of the State, Art. 1, Sec. 4 and 7, and void. *Judson v. Reardon*, 16 Minn. 431.

### CONTEMPT.

**1. A failure to plead** is no contempt of court, except where the object of the bill is to compel an answer. *Perrin v. Oliver*, 1 Minn. 202.

**2.** The reading and presentation of an affidavit for change of *venue* on ground of prejudice in the judge, drawn in the words of the statute and not setting forth the facts on which the same is based, is not *per se* a contempt of court. *Ex parte Curtis*, 3 Minn. 274.

**3.** When it does not appear that the defendant had the power to perform the act required by the order, he cannot be punished as for contempt. *Register v. State of Minnesota ex rel.*, 8 Minn. 214.

### CONTRIBUTION.

(See PRINCIPAL AND SURETY, V.)

### CONTRACT TO CONVEY LAND.

(See EQUITY, II., b.)

### CONTRACTS.

- I. GENERALLY.
- II. ABANDONMENT OF CONTRACT.
- III. RESCISSION OF CONTRACT.
- IV. ENTIRETY OF CONTRACT.
- V. CONDITIONS PRECEDENT.
- VI. CONSTRUCTION OF CONTRACTS.

- a. *Rules of Construction.*
- b. *Particular Contracts.*

VII. CONSIDERATION OF CONTRACTS.

- a. *What a sufficient Consideration.*
- b. *What an insufficient Consideration.*
- c. *Rights of a Stranger to the Consideration.*

VIII. PERFORMANCE.

- a. *Place and Time of Performance.*
- b. *Excuse for non-performance.*

IX. PAYMENT.

- a. *By Commercial Paper.*
- b. *Appropriation of Payments.*

X. DEMAND AND TENDER.

- a. *Demand.*
- b. *Tender.*

XI. VOID CONTRACTS.

- a. *For Illegality.*
- b. *For Uncertainty.*

XII. WAIVER OF BREACH.

(See CIVIL ACTION, II.; CUSTOM; PLEADINGS, B., VII., c., ditto, 16; EQUITY, III., IV., ditto, 26; EVIDENCE, 96, *et seq.*; INTEREST, 3; DAMAGES, V.)

I. GENERALLY.

**1. Essentials.** To constitute a contract or agreement there must be a "clear accession on both sides to one and the same set of terms." *Lanz v. McLaughlin, et al.*, 14 Minn. 72.

II. ABANDONMENT OF CONTRACT.

**2.** When work has been done under a special contract, which has not been abandoned or rescinded by either party, but remains in full force, the action must be brought upon it, and the plaintiff cannot recover on a *quantum meruit*; but when plaintiff labored for defendant under special contract, and charges in his complaint that he was discharged from his employment by the defendant without cause. *Held*, he was at liberty to regard the contract as abandoned by the defendant, and to proceed to recover the value of his ser-

vices as though no special contract had existed. He need not first demand work, the discharge throwing on the employer the burden of justifying it. *MacKubin v. Clarkson*, 5 Minn. 247.

III. RECISSION OF CONTRACT.

**3. After performance.** After a party has gone on and performed a special contract and accepted partial performance from the other, he cannot then rescind the contract and sue on a *quantum meruit*, but must bring an action on the breach of contract for damages. *Bond v. Corbett*, 2 Minn. 252.

**4. Fraudulent contract.** When a party enters into a contract which is a fraud upon him, he may on discovery of the fraud rescind the contract and recover what he has paid, or the value of what he has performed under it—whether the contract be by parol or in writing—and this though the subject matter of the contract may be an interest in lands. *Brown v. Manning*, 3 Minn. 35.

**5.**—When a fraudulent sale and warranty of personal property has been made, the vendee may rescind the contract, return the property, and recover back the price paid therefor; or he may affirm the contract and recover damages for the fraud. *Marsh v. Webber*, 16 Minn. 418.

IV. ENTIRETY OF CONTRACT.

**6. N. Y. rule approved.** The rule of the New York courts, that, where a party undertakes to perform a given contract and before its completion, wilfully or without cause abandons its performance, he shall recover nothing—approved. *Mason & Craig v. J. T. Heyward*, 3 Minn. 182. (See *Williams v. Anderson*, 9 Minn. 50.)

**7. Example.** A contract by which plaintiffs "agreed to cut from their own materials and furnish to M. all the cut stone required for a building, \* \* and that M. in consideration thereof promised to pay the plaintiffs what the same should reasonably be worth, "payment to be made

from time to time as the work *under said contract* progressed," is an entire contract. *Milner et al. v. Norris et al.*, 13 Minn. 455.

## V. CONDITIONS PRECEDENT.

**8.** The parties to a contract having agreed upon an inspector by whom the grade of any wheat was to be fixed, which the purchaser considered inferior to No. 1, unless he decided to receive it as No. 1, at his option, the latter cannot claim any deduction from the value of wheat by reason of its inferior quality, when he has omitted to call the inspector to pass upon it. *Brackett v. Edgerton*, 14 Minn. 174.

**9.** Under a contract by which defendant was to transport wheat for the plaintiff—the latter to deliver the same upon reasonable notice of the defendant's readiness to receive it—it is not necessary for the plaintiff to offer to deliver to defendant the wheat in the first instance to make defendant liable for a breach. *Cowley v. Davidson*, 13 Minn. 92.

## VI. CONSTRUCTION OF CONTRACT.

### a. Rules of construction.

**10. Court construes.** The existence of a contract is for the jury to determine; its construction for the court. *Dodge v. Rogers* 9 Minn. 223.

**11.—when on inspection only.** Where the contract contains no terms of art, or other unusual language employed out of its ordinary signification, requiring explanation by extrinsic evidence, the court must construe the same on inspection only. *Van Eman v. Stanchfield et al.*, 8 Minn. 518.

**12.** In construing a contract, such a construction will be given as is not inconsistent with, and may be distinctly derived from a fair and rational interpretation of the words actually used. *Sanborn v. Neal et al.*, 4 Minn. 126.

**13. Whole contract to be considered.** Every contract is to be construed with reference to its object and the whole of its terms; accordingly the whole context

must be considered in endeavoring to collect the intention of the parties, even though the immediate object of inquiry be the meaning of an isolated clause. *Rose v. Roberts*, 9 Minn. 119.

**14.** In construing a contract the court in this case referred to its language, the circumstances attending its execution, and the conduct of the parties. *Hall v. Smith*, 16 Minn. 58.

**15. Real intention prevails over literal sense.** Where the literal interpretation of an instrument involves any absurdity, contradiction, injustice, or extreme hardship, the courts may deviate a little from the received sense and literal meaning of the words, and interpret the instrument in accordance with what may appear to have been the intention and meaning of its framers, and the real intention, when accurately ascertained, must in all cases prevail over the literal sense of the terms. *Taylor v. Taylor et al.*, 10 Minn. 107.

**16. Evidence of circumstances under which contract was made, allowable when.** The construction of a written instrument is matter of pure law when the meaning and intention of its framers is to be collected from the instrument itself; but not so when, by extrinsic facts it is made doubtful or uncertain what was intended, or what the meaning of the instrument is. Such doubt may be removed by extrinsic evidence of the circumstances under which the instrument was framed. *Donnelly et al. v. Simonton et al.*, 13 Minn. 301.

**17. Contract prohibited is a penalty.** To determine whether or not a contract prohibited by a penalty is void, the whole statute must be examined to find out whether or not the makers of it meant that a contract in contravention of it should be void or not. *Soloman v. Dreshler*, 4 Minn. 278.

**18. Wheat contract and order on warehousemen.** A contract for the sale of wheat in the hands of warehousemen accompanied by order on the latter drawn by the vendor in favor of the vendee, are to be read together as a part of the contract

between the parties. *Brackett v. Edgerton*, 14 Minn. 174.

*b. Particular contracts.*

**19. Land, contract to leave right to arbitrator.** "I. and B. agree that (certain land) may be bid off for them by M. in trust for them, each furnishing half the funds, the same to be conveyed agreeably to the determination of five disinterested citizens, the award of whom, or a majority of whom, shall be binding on each claimant." *Held*, the citizens were not to divide the land between I. and B. according to share of purchase money furnished by each—the parties claiming the whole of the land, and agreed thus to settle the dispute. *Irvine v. Marshall & Barton*, 7 Minn. 286.

**20. Logs.** A contract in these words, "I etc. for etc., do hereby sell, assign, transfer and set over, and convey to said John Young all the logs belonging to and owned by me in the Mississippi River and along the shores thereof and also in booms above the Falls of St. Anthony," etc., without any punctuation marks, conveys logs above the Falls of St. Anthony only. *Van Eman v. Stanchfield et al.*, 8 Minn. 518.

**21. D. and R. contracted as follows,** "R. contracts for all material to put up a house, paying part in lots and pianos when possible, using his own judgment as if for himself—for which D. allows R. to make a selection of the best piano in a lot enumerated below, and keep for himself, R." *Held*, the contract conferred on R. the right simply to select an instrument in the first instance, but did not pass the title, a performance of the contract on his part a *condition precedent*. *Dodge v. Rogers*, 9 Minn. 223.

**22. A stipulation provided that** "unless she Rebecca F. Black shall within the time above mentioned, and on or before March 6th, 1865, apply, etc." *Held*, application could be made on March 6th. *Barker v. Keith*, 11 Minn. 65.

**23. The word "until," in the absence of anything qualifying its meaning, might perhaps be regarded as exclusive in its sig-**

nification, but its import may be ambiguous, in which case its meaning will be determined from the whole text or instrument in which it is used. *Id.*

**24. Mail contract.** W. had contracted with the United States to carry the mails over a given route two years from July 1, 1866, under the regulations of the P. O. Department. Defendant contracted with W. to take said mail contract off W.'s hands and save him harmless therefrom, W. agreeing to pay defendant at rate of seven hundred and ninety dollars per year, payable quarterly, "*as the same is paid by the Post Office Department*," subject to deductions made by the department for fines, etc., or any increase or reduction, in the service to affect the pay in proportion. Afterward plaintiff contracted to take defendant's contract off his hands for a given time, and hold him harmless under the same regulations, etc., for which defendant agreed to pay plaintiff "at the rate of seven hundred and eighty dollars a year, that is five hundred and twenty dollars for the whole time above stated, payable quarterly, as the same is paid by the P. O. Department to W., and by him paid to defendant, and defendant agrees in case the same is not paid within thirty days to draw an order on said W. for the same, or the amount which shall be unpaid." *Held*, W's contract with defendant bound him to pay defendant at the rate of seven hundred and ninety dollars a year, as the Department pays him, namely, quarterly, during the term, and does not limit his liability to a mere faithful accounting to defendant for moneys paid to him by the Department. So also as to defendant's contract with plaintiff the payment was due quarterly, the stipulation as to the draft on W. being wholly independent of the agreement, and plaintiff was to carry the mails not absolutely as set forth in contract, but under the instruction of the Department. *Conehan v. Crosby*, 15 Minn. 13.

**25. Where A. sold to B. and C. jointly**—C. being an infant—*personal* chattels, and the vendees execute their notes and mort-

gage on the property sold, with other personal property, to the vendor for part of the purchase money, it is one transaction. *Cogley v. Cushman*, 16 Minn. 397.

## VII. CONSIDERATION.

### a. What a sufficient consideration.

**26. Forbearance to use legal means** by one party to secure himself at request of another, and consequent loss is sufficient loss to support a contract. *Brewster v. Leith*, 1 Minn. 56.

**27. Releasing attachment lien.** B. receives property of C. and A. as assignee for the benefit of the creditors, and promises the creditors to pay their claims if they will release the property from their attachment lien. *Held*, such promises of B. was on good consideration and binding. *Id.*

**28. Payment before debt was due.** B. held claim of \$300 against A., which was due March, 1867. In January, 1867, B. received \$100 from A., in full of such claim, from compassion for A.'s misfortune in having been burned out. *Held*, such payment and receipt constituted a good defense to an action for the remaining \$200. *Sonnenburg v. Reidel*, 16 Minn. 83.

**29. Giving larger note for a smaller.** Where the maker of a note for \$1,007.88, including interest, took up the same by giving his note for \$1,120. *Held*, the excess of the second note over the former was a sufficient consideration to make the transaction a payment of the first note—even in the absence of express agreement. *Hough v. McNitt*, 6 Minn. 513.

### b. What an insufficient consideration.

**30. An agreement between the maker and payee of a promissory note made "when the note became due and payable,"** that it should be paid at a particular place, is without consideration and void. *Colter v. Greenhagen*, 3 Minn. 126.

**31. T., (mortgagee,)** holding certificate of sale of certain land, agreed with plaintiff, (mortgagor,) to sell, release and quit claim to plaintiff for a certain sum. Plain-

tiff contracted with defendant C., to pay T. the necessary amount, and took from T. the deed as security, also a deed from plaintiff, all of which was done with T.'s knowledge. Plaintiff never promised to pay T. the agreed price, nor did any consideration from him move to T. C. instead of furnishing the money, gave T. his notes with a mortgage back to T. to secure it. *Held*, T.'s promise to plaintiff was *nudum pactum*, and he might with full knowledge of the agreement between plaintiff and C., convey directly to C. and take a mortgage back, and on default might foreclose and sell the mortgaged premises, and C.'s mortgage being given for the purchase money, takes precedence to C.'s agreement with plaintiff. *Bolles v. Carri et al.*, 12 Minn. 113.

**32. B., occupant of land in the half-breed reservation,** sold a piece to defendants before getting a patent. When the land was authorized to be entered with half-breed scrip, B. desired to have it endorsed on scrip belonging to M. Defendant objecting (since M. would thereby take the title,) it was agreed that M. should take the title and then convey to defendant—M. executing a bond to convey in accordance therewith, which was void for uncertainty. *Held*, the withdrawal of defendant's objections constituted no consideration, nor did the deed from B. to defendant, and the contract of M. to convey, could not be enforced. *Sharpe v. Rogers*, 12 Minn. 174.

**33. Defendants signed the following contract:** "The capital stock of the New York and Minnesota Gold Mining Company is one million dollars, divided etc. \* \* \* And we, the undersigned, do for value received, hereby mutually agree to purchase and take of the original proprietors the number of shares set against our names, at the rate of fifty thousand dollars for three thousand shares, and that we will pay to the Treasurer of said Company the sum so affixed in such installments, and at such times as shall be ordered by the Trustees of the Company. And the

condition of this subscription is that two thousand shares of the capital stock shall be paid to the Trustees, to be held by them for the benefit of and subject to the direction of the company." *Held*, void for want of consideration, the defendants receiving no benefit nor the plaintiff sustaining any injury, the payment of shares to trustees was placing them in the hands of its own servants, no benefit to defendant or injury to plaintiffs, and the fact that other persons signed the agreement is no consideration when it does not appear whether they signed before or after defendants or on the inducement or consideration that defendant would sign. If the payment of shares was to constitute defendant stockholder in corporation, it does not appear. *New York and Minnesota Gold Mining Co. v. Martin et al.*, 13 Minn. 417.

*c. Rights of a stranger to the consideration.*

**34. Privity of contract.** When a privity of contract exists, a person for whose benefit a promise is made, with the assent of the party from whom the consideration moves, may maintain an action for the breach of the contract. *Van Eman v. Stanckfeld, et al.*, 10 Minn. 255.

**35.**—O. made his promissory note to the order of C., who, for value transferred it to F. While in hands of latter defendants contracted with O. for purchase of certain property, and agreed to assume and take up O.'s note held by F., with interest, when due, and on same day gave F. a writing which recited that "whereas, etc." they had contracted with O. to purchase said property, "and have agreed to assume and pay a certain note given to C. by O., now held by F., etc., and we have agreed to pay the said note to F. on, etc." F. signed the former agreement (between O. and defendants) as witness, both agreements being executed same day, and in F.'s presence. *Held*, the two agreements were one transaction, and the language of the latter showed a promise to F. to pay him the note and that the sale by O. was the considera-

tion of both the agreements, and that F. being a party to the contract—though a stranger to the consideration, can maintain an action thereon, and his assignee also. *Ib.*

**36. Want of privity of contract.** B., on a valuable consideration, moving from A., promised the latter to pay his debt to plaintiff. *Held*, plaintiff could maintain an action against B. on that promise. *WILSON, Ch. J., dissenting. Sanders et al., v. Clason et al.*, 13 Minn. 379.

VIII. PERFORMANCE.

*a. Place and time of performance.*

**37. No place designated.** When defendant agreed to pay for a horse by breaking twenty-five acres of land for plaintiff within a given time, *no place* designated, *Held*, if plaintiff did not designate the place, defendant should have requested him to do so; if plaintiff selected a reasonable place defendant should have performed at that place; if plaintiff refused to appoint a reasonable place, or selected one manifestly without the meaning of the contract, defendant could have pleaded either of such facts in discharge of his obligation, but failing to make any effort to perform within the time, the contract became a money demand for which he was liable to plaintiff, with interest from time of default, by way of damages. *Morey v. Enke*, 5 Minn. 392.

**38. No time or place appointed.** Where the promisor is to pay in work and labor or specific articles, and *no time or place* for performance is designated, the promisee must first make a demand, and the promisor must refuse before he is in default; when the *time of performance* is designated but *no place*, the promisor must perform within the time, without demand, at some reasonable place within the probable intention of the parties. So, he must perform without demand where both *time and place* are stipulated. *Ib.*

**39. Time of performance.** A contract to drive logs from one point to another, where no time of performance is specified, must be performed in a reasonable time under all the circumstances of the case. *Whalon et al. v. Aldrich*, 8 Minn. 346.

*b. Excuse for non-performance.*

**40. Subsequent statute making it illegal.** A contract not to pursue a mortgage security until the note had been first prosecuted, is not binding after an act which require the mortgage to be first exhausted before proceeding to obtain a personal judgment. *Cutlin v. Fletcher*, 9 Minn. 85.

**41. Performance prevented by act of the other party.** When the performance of a condition is prevented, or rendered impossible by the party for whose benefit it was to be performed, the condition is deemed in law performed or its performance waived or non-performance excused. *Dodge v. Rogers*, 9 Minn. 223.

**42. Absolute contract must be performed.** If a party enters into an absolute contract, without qualification or exception, he must abide by the contract, and either do the act or pay the damages; the performance is not excused by an inevitable accident or other contingency, although not foreseen by, or within the control of the party. *Cowley v. Davidson*, 13 Minn. 92.

**43.**—When the contract was to transport wheat to, and deliver it at Milwaukee at a specified time, or deliver other No. 1 wheat in its stead at that time and place, although a river constituting a portion of the route of transportation was unnavigable, it did not render the contract impossible of performance so as to constitute an excuse for non-performance. *Ib.*

## IX. PAYMENT.

(See SHERIFF, 7.)

*a. By commercial paper.*

**44. Taking third person's note, etc.** When a creditor takes the note or security of a person other than the debtor it is not

*prima facie* evidence that it is taken in payment of an *antecedent debt*. There must be an express agreement to take such note in payment, and the burden of proof is on the debtor. *Devlin et al. v. Chamblin et al.*, 6 Minn. 468.

**45. Question of fact for jury.** On a contemporaneous sale of goods, when the vendor receives commercial paper upon which the vendee is liable (as vendee's draft) the law raises no *presumption* that it was received in payment, but the question is solely one of fact for the jury. *Ib.*

*b. Appropriation of payments.*

**46. Lawful and unlawful demand.** If a person have two claims against a debtor, one of which is lawful and the other unlawful, and the debtor makes a payment without appropriating it, the law will apply it to the lawful demand. *Solomon v. Dreshler*, 4 Minn. 278.

**47. Secured and unsecured debts.** When a debtor makes a general payment, and his indebtedness is in part secured, the law, in the absence of any specific appropriation by the parties, will apply the payment first to the liquidation of the unsecured indebtedness. *Lash v. Edgerton et al.*, 13 Minn. 210.

## X. DEMAND, TENDER, ETC.

*a. Demand.*

(See CIVIL ACTION, XXII, 1.)

**48. When unnecessary.** After a party has incapacitated himself from performing his contract, a demand or tender is an idle ceremony, which the law does not require. *Smith v. Jordan et al.*, 13 Minn. 264.

**49. On Sunday.** A demand of performance of contract on Sunday is illegal and a nullity, and the party by his subsequent conduct cannot waive his right to urge the objection. *Brackitt v. Edgerton*, 14 Minn. 174.

*b. Tender.*

(See CIVIL ACTION, XXII, 2.)



**50. When unnecessary.** A party having repudiated his contract, is not entitled to a tender by the other party to make him liable. *Gill v. Newell et al.*, 13 Minn. 462.

**51. When insufficient.** A tender of a creditor's over due promissory note is not good. *Barker v. Walbridge*, 14 Minn. 469.

## XI. VOID CONTRACTS.

### a. For Illegality.

(See U. S. LAND, 11, 20.)

**52.** No person, natural or artificial, can enforce a contract that is void, illegal, or contrary to the policy of the law. *Rochester Insurance Co. v. Martin*, 13 Minn. 59.

**53.** A wager upon the result of a horse race is illegal and invalid, as against good morals, and sound public policy. *Wilkinson v. Tousley*, 16 Minn. 299.

**54. Election Contract.** A note payable when H. H. Sibley is elected Representative to Congress from Minnesota Territory, is void as being against public policy and no action lies. *Cooper v. Brewster*, 1 Minn. 95.

**55. A meeting of occupants of public land** to promote measures for securing their right to the land so occupied at a coming land sale, is opposed to the public policy and laws of U. S., and their acts are illegal and void. *Brisbois v. Sibley et al.*, 1 Minn. 230.

**56. Sale of liquors without license.** A violation of the liquor license statute of 1855 is an act *contra bonos mores*, and a court of justice should not lend its aid to help a party to enforce a contract thus tainted, *i. e.* sale of liquors under that statute without a license is void. *Solomon v. Dreshler*, 4 Minn. 278.

**57. Act prohibited by penalty.** When a statute inflicts a penalty for doing an act, though the act is not prohibited in terms (*e. g.* sale of liquor without license,) yet it is thereby rendered unlawful, because the infliction of a penalty implies a prohibition. *Ib.*

**58. Contract by pre-emptor—consid-**

**eration paid on void contract not recoverable.** Defendant being a settler on unsurveyed government land under the Town-site act, having contracted in writing with plaintiff that the title when perfected should pass to plaintiff, afterwards induced plaintiff to surrender and cancel this written contract, and in lieu thereof undertook and promised with plaintiff that after he had pre-empted the land (which he could not do had any contract for the sale of his interest existed,) he would re-execute the original agreement. *Held*, this latter agreement was void as against public policy; it being in conflict with the requirements of Sec. 13, act of Congress Sept. 14th, 1841; nor can any consideration paid on such a contract be recovered. *The Saint Peter Co. v. Bunker*, 5 Minn. 192.

**59. Pre-emptor's agreement.** An agreement with a pre-emptor under act of Congress, 1841, by which the parties were to occupy the land when pre-empted as a town site, etc., is utterly void and so tainted with immorality as to render it incapable of becoming the foundation of any rights—let alone equities. *Evans v. Folsom* 5 Minn. 422.

**60.—agreement for mortgage.** A contract by which A. lends money to S. to pre-empt land of the United States, and by which S. is to give back after such pre-emption, a mortgage on the same to secure the re-payment of his money so advanced, is void as contrary to the act of Congress, Sept. 24, 1841—and such mortgage cannot be enforced. *McCue v. Smith* 9 Minn. 252.

(See MORTGAGES, 44.)

**61.—No agreement between parties** prior to pre-emption whereby any part of the land to be pre-empted by either, was to be shared with the other, could be enforced. *Warren v. VanBrunt et al.*, 12 Minn. 70.

**62. Sunday contracts.** A note made on Sunday in this State is absolutely void, and if the date is pleaded, the courts will take judicial notice of its being Sunday—without its being specially alleged—follow-

ing *Brimhall v. VanCampen*, 8 Minn. 13.  
*Finney v. Callendar*, 8 Minn. 41.

**63.**—The sale of a horse consummated on the Sabbath is void, and an action on the warranty in such sale will not lie. *Finley v. Quirk*, 9 Minn. 194.

**64. Contract to do an unlawful act.** The threshing of grain with a threshing machine, the tumbling rod of which was not boxed, as required by ch. 60, p. 99. Laws, 1868, was an unlawful act, and is not such a consideration as will support a promise to pay for such threshing, and no recovery can be had therefor. *GILFILLAN ch. J., dissents. Ingersoll v. Randall*, 14 Minn. 400.

*b. For uncertainty.*

**65. Property and person.** An instrument by which the parties signing "bind themselves, etc., to execute and deliver to each and every lot owner, who may have title thereto from Joseph Briasson and wife, or from either of them in any portions of lot known as four (4), section 29, town 111, north of range 10 west, State of Minnesota, a good and sufficient deed, etc." Held, void for uncertainty as to the property intended and the person to whom it was to be conveyed. *Sharpe v. Rogers*, 10 Minn. 207.

## XII. WAIVER OF BREACH.

**66. Requisites of.** To constitute a waiver of a claim for a breach of warranty or contract, the acts or circumstances relied on to constitute the waiver must have been performed or have transpired after the party against whom the waiver, is urged, knew or should have known the facts constituting the breach of warranty or contract. *Dodge v. The Minnesota Plastic Slate Roofing Co.*, 14 Minn. 49.

## COPYRIGHT.

**1.** "A certain set of abstract books, and books of indexes, containing complete abstracts of title to all the lands situated in

Ramsey county, with the incumbrances and liens upon said lands, prepared at great cost and expense and labor and skill of the plaintiff and others," are works in which the owner has an exclusive property in them as against all the world so long as they remain in manuscript and are not published—and this at common law. *Semble*—that all right to such protection ceases after publication, unless secured by act of Congress. *Banker v. Caldwell*, 3 Minn. 94.

## CORPUS DELICTI.

(See CRIMINAL LAW, 98.)

## CORPORATIONS.

I. GENERALLY.

II. POWER.

III. ACCEPTANCE OF CHARTER.

IV. STOCKHOLDERS.

(See CONSTITUTIONAL LAW, V., 15;  
 PLEADING, 32, 97, 98.)

ST. ANTHONY FALLS WATER POWER Co.

SCHOOL DISTRICTS.

ST. ANTHONY, CITY OF.

BOARD OF EDUCATION OF THE CITY OF ST. ANTHONY.

COUNTIES.

MEEKER COUNTY.

FIRST DIV. ST. PAUL & PACIFIC R. R. TRANSIT R. R. Co.

MINNESOTA & NORTHWESTERN R.R. Co.

MINNEAPOLIS & CEDAR VALLEY R.R. Co.

ST. PAUL, CITY OF.

RAILROADS.

MUNICIPAL CORPORATIONS.

REGENTS OF THE UNIVERSITY OF MINNESOTA.

BANKS.

TOWNS.

I. GENERALLY.

**1. Grant to run a ferry does not create a corporation.** An act of the legislature

granting to M. the right to maintain and run a ferry does not thereby constitute him a corporation within Sec. 1 and 2, Art. 10, State Constitution—it's a simple grant of a franchise. *McRoberts v. Washburn et al.*, 10 Minn. 23.

**2. Powers regulated by charter.** A corporation, being the creature of law, and having such powers only as are conferred on it by the statute creating it, or under which it is organized, cannot legally exercise *any power* not thus conferred. *Rochester Insurance Co. v. Martin*, 13 Minn. 59.

**3. Presumption in favor of the validity of an exercise of power.** Although a corporation is not permitted to transact business not authorized by its charter, yet it should clearly appear that the act or contract was not within its power, before a court would declare such to be its character. *Dana et al. v. The Bank of St. Paul*, 4 Minn. 385.

## II. POWER.

**4. Cannot expend in excess of a fund to which it is confined.** A corporation which is confined in its expenditures to a particular fund, may not create a debt or borrow money beyond such fund without express authority. *Regents of the University of Minn. v. Hart et al.*, 7 Minn. 61.

**5. It can negotiate its bonds directly to creditors.** The object for which a corporation was authorized by the legislature to issue bonds, was the payment of its then existing indebtedness. *Held*, the corporation was not compelled to negotiate the bonds and thus raise money to meet the indebtedness—it might turn the bonds over to the creditor directly. *Wiley v. Board of Education of Town of Minneapolis*, 11 Minn. 371.

## III. ACCEPTANCE OF CHARTER.

**6. What amounts to an acceptance.** Certain members of the "Sons of Temperance," without the authority of their "division," obtained from the Legislature a

charter for their division by which the division was created a corporation under the name of "St. Paul Division No. 1, Sons of Temperance," with power to take, receive and hold property, of suing and being sued, etc. The division never formally accepted the charter, but afterwards on resolution they effected a loan of one B. and conveyed certain real estate to him as security, which conveyance was executed by B. T. & B. "as trustees of St. P. Division No. 1, S. of T. of the county, etc.," and took from B. a bond for a deed in the same name. *Held*, these acts were corporate acts and amounted to an acceptance of their charter. *Sons of Temperance v. Brown et al.*, 11 Minn. 356.

BERRY, J., *dissenting*.

## IV. STOCKHOLDERS.

(See DEBTOR AND CREDITOR, 5.)

**7. Stockholder, liability of.** A complaint against a corporation and certain stockholders therein, alleged the recovery of a judgment against the corporation in behalf of plaintiff on breach of contract for \$283.15, the issuance of execution thereon, its return unsatisfied, and that the same was unpaid; further, that said stockholders were such from the making of said contract to the commencement of this action, holding each not less than ten shares of fifty dollars a share, and prayed judgment. *Held*, sufficient statement of a cause of action against the stockholders, and it is not obnoxious to the objection that the contract between the corporation and plaintiff was a joint contract of the corporation and stockholders under Sec. 3, Art. 10, Constitution of the State or Sec. 10, Chap. 34, G. S., by virtue of which the plaintiff's cause of action is merged in the judgment, for those provisions do not contemplate *one action only* in which the liability both of the corporation and the stockholders shall be determined. *Dodge v. Minn. Plastic Slate Roofing Co.*, 16 Minn. 368.

## COUNTY ATTORNEY.

**1.** It is the duty of the County Attorney under Sec. 181, Chap. 8, G. S., to appear in all suits in which his county is a party, whether pending within or without the same, without further compensation than his salary. *The County Com'rs Hennepin Co. v. Robinson*, 16 Minn. 381.

## COUNTIES.

## I. POWER GENERALLY.

## II. POWER OF COUNTY COMMISSIONERS AND SUPERVISORS.

## III. LIABILITY FOR ILLEGAL TAXES COLLECTED AND OPENING ROADS.

## IV. LIABILITY TO TRUE OWNER OF ORDERS.

## V. REGISTER OF DEEDS.

## VI. TREASURER AND HIS DEPUTY.

## VII. PROCEEDINGS ON APPEAL FROM THE COMMISSIONERS TO DISTRICT COURT.

(See COUNTY ATTORNEY.)

## I. POWER GENERALLY.

**1. Cannot purchase land on execution sale.** A county under Sec. 251, Comp. St., p. 109, cannot purchase land at a sale on an execution issued on a judgment in its own favor—there being no express nor implied power granted for that purpose. *Williams v. Lash*, 8 Minn. 496.

**2. Negotiable paper of county void as such, but good as evidence of indebtedness.** Counties in this State have no authority under the general law (1865) to make bonds or negotiable paper of any kind, the consideration of which cannot be inquired into in the hands of any person. Such bonds or negotiable paper, although inoperative as such, may be evidence of an indebtedness. Sec. 13, p. 59, R. S., and Sec. 95, p. 111, R. S. *Goodnow v. Commissioners of Ramsey Co.*, 11 Minn. 31.

**3. Power generally.** Counties, like

towns and school districts, are mere *quasi* corporations invested with corporate powers *sub modo*, and for a few specified purposes only, but deficient in many of the powers incident to the general character of corporations. *Id.*

## II. POWER OF COUNTY COMMISSIONERS AND SUPERVISORS.

**4. No power to purchase real estate at execution sale.** County Commissioners of Ramsey county could not purchase real estate at an execution sale on a judgment in their favor. Following *Williams v. Lash*, 8 Minn. 496. *Shelley et al., v. Lash*, 14 Minn. 498.

**5. Stranger bound to take notice of their powers.** A person dealing with county commissioners is bound to take notice of the statute under which they act, and is presumed to know the extent of their power. *Goodnow v. Commissioners of Ramsey Co.*, 11 Minn. 31.

**6. Power to set off portions of organized townships.** County Commissioners have no power to set off a portion of an organized township containing more than thirty-six sections, on the petition of a large number of town residents and voters, the same not having been submitted to a vote of the electors of the town Sec. 104, Ch. 8, G. S. Nor was such a petition the one contemplated by Sec. 2, Ch. 10, G. S., which includes a petition by the township as a corporate act, and not by individuals. *The Town of Mantorville v. Mantor, Assessor etc.* 14 Minn. 437.

**7. Power to reduce township in area.** County Commissioners under the laws in force in 1866, had no power to reduce a township in area on petition without submitting the question to a vote of the electors of the town as required by the proviso in Sec. 23, Chap. 14, laws of 1860. Such proviso is not repealed by Chap. 67, laws 1862, p. 137, said chapter being an amendment of Sec. 1, Chap. 14, laws 1860. *The Supervisors of the town of Maple Grove v. the Board of Com. of Wright Co.*, 12 Minn. 403.

**8. Power to issue bonds to build court house and jail.** Under Sec. 13, p. 153 Comp. St., county commissioners have power to create a debt by the issuing of bonds for the purpose of erecting a court house and jail. *Chaska Co. v. Board of Supervisors of Carver County*, 6 Minn. 204.

**9. Can't issue bonds, with interest coupons attached, as "orders."** County Commissioners under an act authorizing them to issue orders to the persons named, for the amounts severally named, for the amounts severally due them, subject to the same rules as other county orders issued by said County Commissioners, act of legislature approved May 23, 1857, Ex. Sess. 301, have no authority to issue bonds payable at a future day with interest coupons attached. *Goodnow v. Commissioners of Ramsey Co.*, 11 Minn. 31.

### III. LIABILITY FOR ILLEGAL TAXES COLLECTED, AND OPENING ROADS.

**10.** A county having directed the levy and collection of illegal taxes and received the proceeds thereof, is liable in an action to recover it. *Foster v. Board of County Commissioners, Blue Earth Co.*, 7 Minn. 140.

**11.** When illegal taxes have been collected, and the county commissioners have settled with the collector and charged him with the amount, the commissioners thereby receive it to the use of the owner. *Board of County Commissioners, Dakotah County, v. Parker*, 7 Minn. 267.

**12. Not liable to pay orders issued to pay for expense in opening a road before the acts authorizing their issue had been performed.** The act of March 20, 1858, authorizing commissioners to lay out and construct the Cannon Falls and St. Paul Road, providing that the counties through which it ran should pay for its location and construction, the proportion that the length of said road in each county bore to the whole length of the road; that the commissioners should file with the county com-

missioners of each county a written statement of the cost of construction of said road in said county, designating its apportionment, and allowing them to draw orders on the several county treasurers for the amount of their apportionment of the expenses. On 24th June, 1858, the road commissioners had filed with the defendants the statement of expenses and amount to be paid by Washington County, and previous to that time had drawn orders against that full sum. The commissioners afterwards collected a tax to meet this demand. After the drawing of the orders, and before the filing the statement, the original act was amended by repealing the clause authorizing the drawing of orders, and providing that each county should pay for the road within its limits. Held, that at date of drawing the orders the liability of the county had not attached—the filing of the statement being a condition precedent, and the authority to draw orders being taken away by the amendment before the statement was filed, the county was not liable to pay the orders—but was liable only for such expenses as were incurred within its boundaries—which expenses are not pretended to be covered by these orders. Nor does this amendment take away any vested rights, for the persons doing the labor knew not at the time of its performance on which county the commissioners would draw the orders, did not do it on the credit of any particular county, nor does the fact that the tax was collected make any difference in their liability. *Thorne v. Board of County Commissioners, Washington County*, 7 Minn. 150.

**13. Not liable until road is located, opened, and statement of expenses filed by commissioners.** Under Special Laws, 1858, p. 135, for "locating and opening" a road between given termini, the counties through which it passed were not liable for the cost thereof until the commissioners had filed a statement of expenses showing the amount to be paid by each county, and that statement could not be made until the work for the performance of which the

commissioners were appointed had been completed. *Ib.*

#### IV. LIABILITY ON ORDERS PAID TO OTHER THAN THE TRUE OWNER.

**14. Innocent payment.** Payment by a county treasurer of county orders to the bearer, where the same are payable to a person named or bearer, made in good faith, in ignorance of defects in bearer's title, exonerates the county from liability thereon to another person, the true owner, and this where payment is made after the orders are dishonored. The owner in such case should bring notice home to the treasurer of the loss of the orders—publication of the loss in a newspaper, or notice to the county auditor, is insufficient. *Sweet v. The County Commissioners, Carver County*, 16 Minn. 106.

#### V. REGISTER OF DEEDS.

(See MANDAMUS, 7.)

**15. Custodian of books, etc., of the Supervisors.** The Register of Deeds is the proper permanent custodian of all "the books, records and accounts of the Board of Supervisors," but he may be compelled, by mandamus, to deliver them over to the Board of Supervisors when they need them in the performance of their duties. *Board of Supervisors, Ramsey Co., v. Heenan*, 2 Minn. 341.

**16. Entitled to extra compensation for keeping "reception book."** Under Sec. 4, Art. 2, Chap. 8, R. S. 1851, as amended by Sec. 2, Chap. 2, G. L. 1857, p. 8, which provides that every Register of Deeds shall "procure, open, and keep the Reception Books provided for in the above section, at the expense of his proper county," the county is liable to pay for such additional labor, and the same is not provided for in the fee bill allowed such officers. *Hough v. The Board of Commissioners of Ramsey County*, 9 Minn. 23.

**17.—but not if the column "where situated" is left blank.** A Register of

Deeds, under Sec. 22, p. 156-7, and Sec. 35, p. 159, Comp. St., is not entitled to compensation for keeping "reception books" where he has made no entries in the column "where situated." *Mapes v. Board of Commissioners of Olmstead Co.*, 11 Minn. 367.

#### VI. TREASURER AND DEPUTY TREASURER.

**18. Fees for making sale of land for delinquent taxes.** A County Treasurer making sale of land for delinquent taxes in 1859, was entitled, under Sec. 5, Art. 16, p. 198, Comp. St., to twenty-five cents for each certificate of sale executed by him for the use and benefit of the county, and three per centum on the amount for which the lands were exposed for sale. *Bingham v. The Board of Supervisors of Winona Co.*, 8 Minn. 441.

**19. What is a waiver of Deputy's bond.** Where a Treasurer who appoints a deputy, recognizes him as such, and delivers to him the list of delinquent personal taxes for collection, it amounts to a waiver of the official bond, where none has been taken. *McCormick et al. v. Fitch*, 14 Minn. 252.

**20. Deputy's bond may be waived.** The requiring of a bond from a deputy treasurer is solely for the security of the Treasurer, and may be dispensed with by him. *Ib.*

#### VII. PROCEEDINGS ON APPEAL FROM COMMISSIONERS TO DISTRICT COURT.

**21. No new claim can be set up in District court.** The county commissioners allowed a claim of the sheriff for *per diem* services of \$24.00. The county attorney appealed, under Sec. 81, 82, Chap. 8, G. S., to the District Court. Under Sec. 82, requiring pleadings to be made up in said court, the sheriff prepared a complaint, in which he claimed \$48.00, as mileage for traveling 480 miles, at 10 cents per mile. *Held*, the proceedings were prop-

erty dismissed by the court, on the ground that the cause of action set up in the complaint was not the subject matter adjudicated upon by the commissioners—the jurisdiction in such case being purely appellate, to permit a review of the acting of the commissioners—and the respondent was entitled to costs under said action when he prevails. *Thomas v. Commissioners of Scott County*, 15 Minn. 324.

## COURTS.

### I. GENERALLY.

#### II. THE SUPREME COURT.

#### III. THE DISTRICT COURTS.

#### IV. CONCURRENT JURISDICTION WITH U. S. COURTS.

(See U. S. LAND, 2.)

(See BOATS AND VESSELS.)

### I. GENERALLY.

**1.** A court cannot sit as a court of law and chancery at the same time. *Hurtshorn v. Green's Administrators*, 1 Minn. 92.

**2. Substitute parties.** The Supreme and District Courts have power, on motion, to substitute as party to an action any one to whom the subject matter of the action has been transferred since its commencement. *Keough v. McNitt*, 7 Minn. 29.

**3. Control over suitors.** Courts have no power to compel a party to enter judgment or do any other affirmative act in the progress of the cause, which relates merely to the conduct of the same. Where the duty is clear, and the other party is interested in its performance, the court may always command it to be done under penalty (if it is the plaintiff) of being turned out of court; and (if it is the defendant) of allowing the plaintiff to proceed to judgment—as where the prevailing party refuses to enter up judgment, so the other party can review it within time allowed by

law: considering *Duel v. Hawke*, 2 Minn. 50, and *Furlong v. Griffin and Fullerton*, 3 Minn. 207. *Sherrerd v. Frazer et al.*, 6 Minn. 572.

### II. THE SUPREME COURT.

**4.** Art. 1, Chap. 69, R. S., gives the Supreme Court appellate jurisdiction *only*, except in cases specified. *Ames v. Boland*, 1 Minn. 366.

**5.** Sec. 222, R. S. (1851), p. 564, providing that the Supreme Court shall “consider and decide the questions of law, and shall render judgment, and award such sentence, or make such order thereon as the law and justice shall require,” is not peremptory. *State v. Bilanskey*, 3 Minn. 246.

**6. Habeas corpus.** The statute (Comp. St., Chap. 73, Sec. 26,) conferring jurisdiction on any judge of the Supreme Court to allow writs of *habeas corpus*, is not in conflict with the Constitution, and the taking of recognizances in the course of proceedings on such writs is within their jurisdiction. *State v. Grant*, 10 Minn. 39.

**7.** The Constitution (Art. 6, Sec. 2,) designed this court as one of review for the correction of errors committed by inferior tribunals; and is not to exercise original jurisdiction except where it is conferred by law; it will not, therefore, entertain questions which have not received the actual decision of the tribunal from which they come, unless it is quite evident that substantial error has been committed, and adequate relief cannot be had below. *Babcock et al. v. Sanborn et al.*, 3 Minn. 141.

### III. THE DISTRICT COURTS.

(See NEW TRIAL, 1.)

**8.** The District Courts of the State take the place and receive the causes of the late District Courts of the Territory. *Irvine v. Marshall & Barton*, 3 Minn. 73.

**9. Control over suitors, etc.** FLANDRAU, J., says the District Court has full

power over its attorneys, suitors and records, and may compel the performance of any act or duty which the party or attorney should perform in the progress of a suit or proceeding; but it does not follow that it can enforce the entry of a judgment other or different from the one he is entitled to. *Deuel v. Hawke*, 2 Minn. 50.

**10. Power on certiorari to Justice Court.** Sec. 11, Art. 14, of the organic act of the Territory, regulating proceedings on certiorari from justice's court, does not confer on the District Court authority to disregard all formal requirements in the proceedings before a justice, and settle finally the rights of the parties as the very right of the matter may appear. *St. Martin v. Desnoyer*, 1 Minn. 41.

**11. Jurisdiction—general.** The District Courts of the State have original jurisdiction in every case where the Constitution itself does not clearly confer it on some other court. This jurisdiction extends to all causes which the Legislature may, in its discretion, authorize other courts to take cognizance of, for the discretion may never be exercised, or not to the full extent, and some court must in the meantime possess it. The authority possessed by the Legislature to confer on other courts a portion of the jurisdiction vested by the Constitution in the District Courts, does not imply the right to deprive the latter of such jurisdiction, but simply to authorize other courts to exercise it, concurrently with the District Courts. *Agin v. Heyward*, 6 Minn. 110.

**12. Amount involved.** The District Courts, under the Constitution, are courts of general jurisdiction, and possess all the judicial power not conferred on other courts. They have original jurisdiction in case involving less than \$100, concurrently with courts of Justices of the Peace. *Ib.*

**13.**—The District Court has jurisdiction in actions where the amount in controversy is less than one hundred dollars—following *Agin v. Heyward*, 6 Minn. 110. *Cressy v. Gierman*, 7 Minn. 398; *Thayer v. Cole*, 10 Minn. 215.

**14.** The District Courts of this State are courts of general jurisdiction, and may entertain all cases, jurisdiction over which is not conferred upon some other court by the Constitution or some other statute of the State—approving *Agin v. Heyward*, 6 Minn. 110; *Southern Minn. R. R. Co. v. Stoddard*, 6 Minn. 150.

**15. Claims against counties.** Under Sec. 7 and 8 of the G. L. 1860, p. 132, the District Court has jurisdiction in all actions relating to claims against the county. *Bingham v. Board of Supervisors, Winona County*, 6 Minn. 136.

**16. Setting off judgments.** The District Court possesses full power—in the absence of statutory provisions—to adjust adverse claims between suitors, by setting off judgments recovered between the same parties. *Temple and Beaupre v. Scott*, 3 Minn. 419.

**17.** The District Courts have power to set aside the report of a referee, and grant a new trial. *Thayer v. Barney*, 12 Minn. 502.

**18.** In an action to compel the just administration of assets, the District Court has jurisdiction where the complaint shows that the plaintiff's claim and those for whom he sues as similarly situated, amount in the aggregate to exceed \$100, although the plaintiff's claim is less than \$100. *Goncelier v. Foret et al.*, 4 Minn. 13.

**19. Striking out excess in judgment.** Under Sec. 133, p. 516, Comp. Stat., the District Court has ample power to strike out any excess in a judgment brought from the Justice's Court, and reduce the same to what it should have been. *Walker v. McDonald*, 5 Minn. 455.

#### IV. CONCURRENT JURISDICTION WITH UNITED STATES COURTS.

**20. Generally.** A grant of jurisdiction generally to the United States Courts is not sufficient to vest an exclusive jurisdiction, as in Sec. 2, Art. 3, Constitution of U. S., which provides that the judicial power of the United States shall extend to



all cases of admiralty or maritime jurisdiction. Though Congress under this section might make the jurisdiction exclusive of the State courts until such action is taken, the latter retain a concurrent cognizance in this and all cases where previous to the Constitution, they had jurisdiction over the subject matter. *Reynolds v. Steamboat Favorite*, 10 Minn. 242; *Morin v. Steamboat F. Sigel*, 10 Minn. 250.

**21. Jurisdiction in steamboat cases.** The District Courts of this State have jurisdiction in cases coming under Chap. 76 of the Comp. St., concurrently with the United States District Courts—the judiciary act of 1789, which confers on the latter courts “exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, etc., saving to suitors in all cases the right of a common law remedy when the common law is competent to give it,” leaving the concurrent power, in this class of cases, where it stood at common law, and the remedy provided by Chap. 76 is in all essentials a “common law remedy” within the meaning of the statute. *Ib.*

## COSTS.

(See JUSTICE OF THE PEACE, IV. E.)  
(See NEW TRIAL, IV.)  
(See PRACTICE, II. 14.)

## COUNTY COMMISSIONERS.

(See MANDAMUS, 9.)  
(See COUNTIES, II.)

## COUNTY SUPERVISORS.

(See COUNTIES, II.)

## COUNTY TREASURER.

(See COUNTIES, V.)

## COUNTERCLAIM.

(See PLEADING, B. VIII. e.)

## COURT COMMISSIONER.

**1.** A Court Commissioner has the power of a Judge at chambers and has no jurisdiction to entertain a motion or set aside a summons. *Pulver v. Grooves*, 3 Minn. 359.

**2.** A Court Commissioner has the power of a Judge at Chambers not of the court *in vacation*. Chamber duties are confined to such preliminary and intermediate matters, as the granting of orders to show cause, extending time to plead; letting to bail; granting injunctions, and many other matters of a similar nature, which are usually *ex parte*, go of course on a *prima facie* hearing, and may be allowed by the Judge of a Court, when out of term, and when acting as *Judge merely*, and not as the Court. He cannot try an issue of law. *Gere v. Weed and Avery*, 3 Minn. 352.

## COVENANTS.

(See CIVIL ACTION, IX. 1.)

**1. Independent.** Where one party “in consideration of the benefits and profits arising from the erection of a steam saw mill on the premises, hereby conveyed by this title bond,” agreed to convey to the other party certain lots “so soon as the building for said mill shall be commenced and a portion of the machinery on the ground,”—such covenants are independent. *Hone v. Woodruff*, 1 Minn. 421.

**2.** A covenant to “stand seized,” can only be supported when based upon a consideration of blood and marriage. *Hope v. Stone et al.*, 10 Minn. 141.

**3.** A covenant of non-claim in a quit claim deed relates only to the estate, right or interest actually conveyed by the deed, and does not preclude the covenantor from setting up in his own favor and against the covenantee any after acquired estate or interest. *Ib.*

**4. Breach of covenant of warranty.**

To constitute a breach of a covenant of warranty and for quiet enjoyment, it seems there must have been an eviction under a paramount title existing at the time of the conveyance. *Burke et al. v. Beveridge* 15 Minn. 205.

**5. Breach of covenants of seizin and right to convey** is *prima facie* established by proof that subsequent to the conveyance in question a stranger took possession of the premises claiming to be the owner thereof in fee simple, and was the owner thereof, and has since retained possession adversely to plaintiff, and not under any title derived from plaintiff. *Ib.*

**6. Nominal damages only recoverable when.** When A. having no title, covenants that he is seized and has good right to convey, and also warrants the title, and he afterwards acquires good title, the grantee can recover only nominal damages for the breach of covenant of seizure, for by the warranty A's after acquired title recurs to him, and he thereby obtains all the broken covenant was designed to accomplish. *Ib.*

**7. It seems that,** when a deed of conveyance is executed, the purchaser is remitted for his relief, as to defects in the property purchased, to the covenants in his deed, unless there has been fraud on part of vendor. *Faribault v. Sater et al.*, 13 Minn. 223.

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## CRIMINAL LAW.

[SCOPE NOTE.—This title is designed to embrace all the decisions on criminal law and practice not relating to the criminal jurisdiction and practice of Justices of the Peace, for which see that title.]

**I. GENERALLY.****II. INDICTMENTS.**

1. *Formal parts.*
2. *Person injured.*
3. *Misnomer.*
4. *Place.*
5. *Time.*
6. *Certainty.*

7. *Technical words.*
8. *Joinder of offenses.*
9. *Demurrer.*
10. *Amendment.*
11. *Setting aside indictments.*
12. *Waiver of defects.*
13. *Indictments in particular cases.*
  - a. *Attempting to extort property, etc.*
  - b. *Assault with intent to do great bodily harm, being armed with a dangerous weapon.*
  - c. *Rape.*
  - d. *Murder.*
  - e. *Larceny.*
  - f. *Uttering counterfeit bills.*
  - g. *Polygamy.*
  - h. *Taking illegal fees.*
  - i. *Official neglect.*

**III. DEFENSES.**

- a. *Benefit of Clergy.*
- b. *Justification.*
- c. *Self-defense.*
- d. *Intoxication.*
- e. *Provocation.*
- f. *Insanity.*

**IV. THE TRIAL.**

- a. *Place of trial.*
- b. *Change of venue.*
- c. *The Grand Jury.*
- d. *The Petit Jury.*
1. *Drawing the Jury.*
2. *Summoning Jurors.*
3. *Summoning special venire.*
4. *Calling the Jury.*
5. *Challenging Jurors.*
6. *Swearing the Jury.*
7. *Triers.*
  - e. *Argument of counsel.*
  - f. *Charging Jury.*
  - g. *Province of Jury.*
  - h. *Retirement of Jury.*
  - i. *Verdict.*
  - j. *Nolle Prosequi.*

**V. EVIDENCE.**

1. *Presumptions.*
2. *Depositions.*

3. *Confessions.*
4. *Corpus Delicti.*
5. *Evidence of character.*
6. *Weight of evidence.*
7. *Evidence in particular cases.*
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## VI. PRACTICE ON REVIEW.

1. *Methods of Review.*
2. *Questions that can be raised.*
3. *Amending the record.*
4. *Principles of determination.*
5. *Judgment Roll.*
6. *Immaterial errors.*
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## VII. THE EXECUTION.

## VIII. PARTICULAR OFFENSES.

1. *Petit treason.*
2. *Extortion.*
3. *Conspiracy.*
4. *Forgery.*
5. *Offenses against chastity, morality, and decency.*
  - a. *Adultery under promise of marriage.*
  - b. *Polygamy.*
  - c. *Fornication.*
6. *Offenses against life and person.*
  - a. *Murder.*
  - b. *Manslaughter in second degree.*
  - c. *Murder in second degree.*
  - d. *Assault with intent to murder or maim.*
  - e. *Assault with intent to commit rape.*
  - f. *Assault with intent to do great bodily harm, being armed with a dangerous weapon.*
  - g. *Libel.*
7. *Offenses against property.*
  - a. *Larceny.*
  - b. *Willful and malicious killing etc. of horses, etc.*

## I. GENERALLY.

**1. Common law superseded by the statutes.** There are no offenses punishable by our laws that are not made offenses by statute. When the statute defines an offense we cannot go beyond, except to determine the meaning of common law terms,—if the statute provides simply for the punishment of a crime without defining it, we must adopt the common law definition—but nothing can be added to a taking away from the statutory definition. *Benson v. State*, 5 Minn. 19.

**2. Common law simply modified by the statute.** Our statutes, as to crimes, were intended merely as a *modification*, and not as an entire repeal, or abrogation of the common law. BERRY, J., *dissents. State v. Palle et al.*, 12 Minn. 164.

## II. INDICTMENTS.

### 1. Formal Parts.

**3. Statutory forms sufficient.** Where a form is given by statute for indictments, and declared to be sufficient for any purpose, nothing short of its leading to absurd results, or conflicting with some constitutional provision, would justify a court in disregarding it. *Bilansky v. State of Minnesota*, 3 Minn. 427. *State v. Ryan*, 13 Minn. 370.

**4. Division of statutory forms.** The forms provided by statute divide an indictment into two parts; first the accusation, second the specification of the crime charged. (Chap. 105, p. 755, Comp. Stat.) In the first part defendant is charged with committing a certain crime, naming it, as murder; and in the specification the crime is particularly described. *The State v. Eno*, 8 Minn. 220.

**5. Specification.** Where an indictment charges a crime which is described into several classes, it is sufficient if the specification show a crime within any one of those classes. *Id.*

**6. Conclusion.** Rape is a crime at common law, and the indictment therefor need

not concluded *contra formam statuti*. *O'Connell v. State*, 6 Minn. 279.

**7. Caption.** An indictment for an offense committed in the organized county of St. Louis, to which the unorganized counties of Lake, Carlton, and Itasca, are attached for judicial purposes, was entitled in the counties of St. Louis, Lake, Carlton and Itasca. *Held*, correctly entitled and found under Ch. 112, Laws of 1867, p. 156. *State v. Stokely*, 16 Minn. 282.

#### 2. Person injured.

**8. In case of a "private injury."** Sec. 73, Chap. 119, R. S. 1851, as follows: "Where the offense involves the commission of an attempt to commit a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured, or intended to be injured, is not material." *Held*, the term "private injury is limited and applicable only to injuries to "private property" in contradistinction with "injuries to the person." *State of Minnesota v. Boylson*, 3 Minn. 438.

#### 3. Misnomer.

**9. Variance of a letter in a foreign word.** When a name appears to be a foreign one, a variance of a letter which, according to the pronunciation of that language does not vary the sound, is not a misnomer. *State of Minnesota v. Timmes*, 4 Minn. 325.

#### 4. Place.

**10. Naming county is sufficient.** An indictment which charges a crime to have been committed in the county, is sufficient without specifying the particular place in the county. *O'Connell v. State*, 6 Minn. 279.

**11. "Then and there" without showing county.** An indictment charged that "then and there (defendant) did extorsively demand etc.," without showing the county, except the county in which the indictment was brought. *Held*, there in the connection here used is not equivalent to the expression "in the county aforesaid," and

does not certainly show the county in which the crime was committed. *State v. Brown*, 12 Minn. 490.

**12. When offense is committed on dividing line of county.** Indictment was found in county of C., venue in the margin was the county of C., but it charged the offense to have been committed "in the county of S., in the State of Minnesota, within one hundred rods of the dividing line between the said county of S. and county of C.," etc. *Held*, sufficient under Sec. 20, Ch. 108, G. S., for under this statute the indictment may charge that the offense was committed in the county in which the indictment was found, or in an adjoining county, within one hundred rods of the dividing line between them. *State v. Robinson*, 14 Minn. 447.

#### 5. Time.

**13. Sufficient averment of death.** The indictment charged that defendant "killed" the deceased on a given day. *Held*, it shows *ex vi termini* that he died on that day, and sufficient allegation of the time. *State v. Ryan*, 13 Minn. 370.

#### 6. Certainty.

**14. General rule.** The general rule as to certainty required in an indictment is that when the definition of an offense, whether by a rule of the common law or by statute, includes generic terms (in this case "bank bills" and "gold coin,") it is not sufficient that the indictment should charge the offense in the same generic terms as in the definition, but it must state the species—it must descend to particulars (in this case state the number, amount, denomination, bank, etc.) To this rule there is one exception, viz: when it is impossible for the grand jury to state the particulars with legal certainty, and they make that impossibility appear in the indictment. *State v. Hinckley*, 4 Minn. 345.

#### 7. Technical words.

**15. Statement of necessary facts sufficient.** An indictment which states the

*facts* constituting an offense, without charging the crime in terms: as, having committed the crime of "larceny," etc., is sufficient under Sec. 66, Comp. Stat. p. 755, the law from the facts determines the nature of the crime. So, an omission to term it a "crime" or to "accuse" the party in express words, cannot change the legal effect of the facts pleaded. *Ib.*

**16. "Presents" instead of "accuses."** Comp. Stat. p. 760, Sec. 76, sub div. 6 and Sec. 77, are complied with by an indictment which "presents" instead of "accuses," the defendant with "feloniously stealing, taking and carrying away" without in terms charging the "crime of larceny." *Ib.*

*8. Joinder of offense.*

**17. "Making etc., a counterfeit" and "uttering and publishing" the same, constitutes two distinct offenses, and cannot be joined.** An indictment which charges the defendant, in the first count with "making, forging, and counterfeiting" a promissory note under Sec. 1, p. 610 G. S., and in the second count with "uttering and publishing" the same, under Sec. 2, *ib.* charges two offenses and is demurrable under Sec. 3, p. 651, G. S., it not being one of those cases where it is allowed by statute to charge more than one offense.—Sec. 6, p. 646, G. S. *State v. Wood*, 13 Minn. 121.

**18.** An indictment charged that defendant having in his possession as Justice of the Peace, sixty dollars and twenty cents, received by him in satisfaction of a judgment recovered before him by one K., he did "wilfully, corruptly and fraudulently withhold it" from said K.; that K. having called on him, and made inquiry of him about the said judgment, he "wilfully and corruptly, and with intent to injure and defraud the said K.," withheld from him the knowledge that the judgment had been satisfied, and neglected to pay over to him the amount received in satisfaction of the judgment, and then and there "wilfully and corruptly advised said K. to sell said judgment, and afterwards paid, of the

money so received, to one J. A. K. fifty-one dollars, and did then and there wilfully and corruptly reserve to himself the remainder of said judgment money, amounting to nine dollars and twenty cents, "with intent to injure and defraud said K." Held, the indictment sets forth two transactions, neither of which constitute an offense. To charge an offense for neglecting to do an official act, the indictment must clearly set forth enough to show that the duty of doing it is imposed on the officer. *State v. Coon*, 14 Minn. 456.

*9. Demurrer.*

**19.** If a demurrer goes to the whole indictment, and if, omitting the objectionable parts, there remains an offense properly charged, the indictment must be sustained. *State v. Hinckley*, 4 Minn. 345.

*10. Amendment.*

**20. Amendments of form allowed, on demurrer.** Under Sec. 7, Comp. St., p. 765, the power of the court to amend an indictment upon demurrer, "when the defendant will not be unjustly prejudiced thereby," is confined to matters of form, and does not authorize an amendment of an indictment which fails to show that the "crime was committed within the jurisdiction of the court," for that would be perfecting the charge, and, in effect, holding defendant to answer for a crime in a manner other than "on the indictment of a grand jury," within Comp. Statutes, p. 701. *State v. Armstrong*, 4 Minn. 335.

*11. Setting aside indictment.*

**21. Pendency of another indictment for same offense, no ground for setting it aside.** An indictment will not be set aside on the ground that there is another indictment pending in that court against the same parties, for the same offense, at the time when this indictment was found—Chap. 110, G. S., not recognizing this as a sufficient ground. *State v. Gut*, 13 Minn. 341.

**22. Court may hold the motion until**

a new arraignment. When on motion to set aside the indictment it appears that the defendant has been served with defective and untrue copies of the same, the court may order the arraignment to be set aside and a new arraignment had before the motion should be entertained. *Id.*

**23. Want of opportunity to challenge grand jury by reason of defendant's imprisonment, no ground for setting aside the indictment, in the absence of prejudice.** Sec. 13, Chap. 115, Statutes of 1851, as amended, and Sec. 14 and 15, specifying the causes for which a person held to answer a charge for a public offense may challenge the grand jury or an individual juror, *before* they retire, after they are sworn and charged by the court, is *permissive* only; and when it does not appear that any of the causes of challenge existed, or that the prisoner asked, demanded, or was denied the right of challenge, either as to the panel or individual juror, and it only appears that he had no opportunity to challenge the panel, as he was imprisoned at the time the grand jury was impaneled and sworn—the indictment will not be set aside. *Maher v. State of Minnesota*, 3 Minn. 444.

**24.**—An indictment will not be set aside, on the ground that the defendant “was not permitted to challenge the panel of the grand jury, or any individual grand juror, before they retired, by reason of his being in confinement, and that he had reason to believe and did believe, that good and sufficient causes, etc., existed, etc.,” it not appearing that he made any request of the court, or officers having him in charge, to appear for that purpose, either personally or by counsel, or that any cause of challenge actually existed, or that he was ever informed that cause existed—following *Maher v. State*, 3 Minn. 444. *State v. Hinckley*, 4 Minn. 345.

**25.**—An indictment will not be set aside, on the ground that the defendant was confined in jail at the time the grand jury were impaneled, sworn, and engaged in finding the same, and had no opportu-

ity to challenge the panel of the grand jury, or any individual grand juror, where it appears that no attempt was made to interpose a challenge, and does not appear that any cause of challenge existed—following *Maher v. State*, 3 Minn. 445, and *State v. Hinckley*, 4 Minn. 363. *State v. Hoyt*, 13 Minn. 132.

**26. Failure to charge additional grand juror.** An indictment will not be set aside, on the ground that the court did not charge an additional grand juror, who was duly summoned, returned, sworn, and admitted as a member of the grand jury after they had been regularly impaneled, sworn, and charged by the court, and such juror is present and participates in the subsequent examination of a criminal charge, and votes upon the finding of the indictment. *State v. Froiseth*, 16 Minn. 313.

**27. Defendant examined before grand jury.** When a defendant is required by the grand jury to testify touching a criminal charge made against him, pending before them, and in pursuance of such requisition does testify before them touching such charge, the indictment for such offense returned by the grand jury will be set aside. *State v. Froiseth*, 16 Minn. 296.

#### 12. Waiver of defects.

**28. Want of signature by foreman, how waived.** An objection that an indictment was not signed by the foreman of the grand jury, not having been taken by motion to set the indictment aside or demurrer, is waived. Sec. 2, p. 764, and Sec. 11, p. 766, Comp. St. *State v. Shippey*, 10 Minn. 223.

#### 13. Indictments in particular cases.

##### a. Attempting to extort property, etc.

**29. Indictment must show the interest of the pretended owner.** Under Sec. 37, p. 706, Comp. Stat., an indictment charged that defendant made threats in a given manner “to compel” one Solomon, against his will, to sign “a conveyance of a certain lot in Saint Paul,” without stating that Solomon had any interest to convey,

the kind of conveyance, to whom it was to be made, nor the *intent* on the part of the defendant in making the threats. *Held*, the statute must be construed as applying only to acts by which money, property, or some pecuniary advantage may be acquired or lost, and the indictment insufficient in not showing that Solomon had some interest to part with, and that the act, if done, would have tended to deprive him of that interest, and an *intent* on part of defendant to do the act complained of. *State v. Ullman*, 5 Minn. 13.

*b. Assault with intent to do great bodily harm, being armed with a dangerous weapon.*

**30.** The fact that an indictment charges an assault with intent to do great bodily harm, which is a statutory offense, also states a beating and wounding, cannot vitiate it, for the latter is mere surplusage. *State v. Dineen*, 10 Minn. 407.

**31.** An indictment under Chap. 41, Laws of 1864, named the offense as "an assault with intent to do great bodily harm to one T. C.," without adding the words "being armed with a dangerous weapon," by the charging part it was plainly and specifically alleged that defendant was thus armed. *Held*, sufficient. *State v. Garvey*, 11 Minn. 154.

**32.** Where an indictment shows that defendant, without authority of law, made the assault with intent to do great bodily harm, the wilful and criminal character of the act sufficiently appears without adding the adverbs "feloniously" or "criminally." So the use of the terms "deliberately," "premeditatedly," and "malice aforethought," is unnecessary. *Id.*

*c. Rape.*

**33.** An indictment for rape charged that defendant "did feloniously ravish and forcibly and against her will carnally know one Barbara Oehrlien." Verdict: "Not guilty of the rape, but guilty of an assault with intent to commit a rape."

*Held*, sufficient to sustain the verdict without charging an assault, (Comp. Stat. 783, Sec. 20,) or that he ravished "forcibly and against her will," as the latter is imported by the word "*ravished*," and the form recommended by the statute does not require it. *O'Connell v. State of Minnesota*, 6 Minn. 279.

*d. Murder.*

**34.** An indictment charging murder simply, without specifying the degree and following the statute, is always sufficient unless it leads to some absurd results, or conflicts with some established right—following *State v. Ann Bilansky*, 3 Minn. 427. *State v. Dumphrey*, 4 Minn. 438.

*e. Larceny.*

**35.** Larceny of bank bills, etc., indictment must show their number, etc., denomination, bank which issued them, and genuineness, etc. An indictment which charges that the defendant "feloniously did steal," etc., etc., "*divers bank notes, amounting in the whole to the sum of five hundred dollars, and of the value of five hundred dollars*," etc., "and divers other pieces of gold coin current within this State by the laws and usages thereof, and of the aggregate value of four hundred and eighty-three dollars," is fatally defective (that portion) in description, for it does not show the number of the bills, etc., their denomination, the bank which issued them, nor whether they were genuine and current. A conviction under such uncertain allegations would not protect defendant against another indictment for the same offense. *State v. Hinckley*, 4 Minn. 345.

**36.** An indictment for larceny which describes the property stolen as "divers and sundry genuine and current treasury notes, of different denominations, issued by the treasury department of the United States, and divers and sundry genuine and current bank notes, of different denominations, issued by different and sundry national banks, organized under the laws

of the United States, all of which treasury notes and bank notes amounted to the sum of, and were of the value of two hundred and fifty dollars, and were the property of one J. S.; a more particular description of which treasury notes and bank notes, or of any or either of them, is to the said jurors unknown," is clearly sufficient; and it seems that it would be good without the averment of inability on the part of the grand jury to give a more particular description, such an averment not being traversable. *State v. Tannit*, 16 Minn. 109.

**37.**—An allegation in an indictment "that a more particular description of the articles (stolen) is unknown to the grand jury," is not traversable. *Ib.*

**38.** Larceny from the person. The indictment charged "larceny" by feloniously stealing, taking, etc., a pair of horses worth three hundred dollars "from the person and possession of the said O. P., being from a stable occupied by him at," etc. It being objected on demurrer that the taking from "the person," as charged, was inconsistent with taking from the stable, shown in the same part. *Held*, not inconsistent; the specification shows larceny from the person. *State v. Eno*, 8 Minn. 220.

**39.** "Did feloniously steal" property of value of thirty dollars. An indictment charging that the defendant "did feloniously steal," etc., property of the value of thirty dollars, is sufficient, inasmuch as the statute defines "feloniously" to mean "criminally," thereby extending it to misdemeanors as well as felonies. *State v. Hogard*, 12 Minn. 293.

*f. Uttering counterfeit bills.*

**40.** Must show that the bills were issued by bank duly authorized. Under Sec. 6, Comp. Statutes, p. 717, an indictment charged the uttering or passing, etc., of two counterfeit bills, etc., knowing them, etc., with the intent, etc. *Held*, insufficient in not charging that the bills, etc., was issued or purported to be issued by a bank duly authorized by law to issue such

bills or notes, and was passed, or uttered, as true or genuine—these elements entering into the statutory definition of the crime. *Benson v. State*, 5 Minn. 19.

*g. Polygamy.*

**41.** Indictment must negative the exceptions in Sec. 3, C. S., p. 728. The exceptions contained in Sec. 3, Comp. St., p. 728, to which the statutory crime of polygamy does not extend, are to be considered as made in the same clause as the one which creates the offense, (Sec. 2, *ib.*) and consequently are to be negated in an indictment. But where the indictment did not allege that the first wife of the defendant "has not been continually remaining beyond sea" (which is one of the exceptions), the omission was cured by alleging "that the said (defendant) knew at the time of the second marriage, and ever since, that his first and lawful wife, Eleanor Cherry, was still living," since the words "the party marrying again, not knowing the other to be living within that time," apply to both, where the wife "remained beyond sea," and where she has "voluntarily withdrawn from the other." *State v. Johnson*, 12 Minn. 476.

**42.** Need not allege the second marriage in another State was unlawful. In an indictment for polygamy under Sec. 2, Comp. St., p. 728, it is not necessary to allege that the second marriage "was unlawful in the State of Wisconsin, where it took place." If the second marriage took place in Wisconsin, the parties cannot be punished for it in this State. But under our statute the "continuing to co-habit with such second husband or wife," while the first one is living, by the party marrying again, with knowledge that the first wife is living, is polygamy. *Ib.*

*h. Taking illegal fees.*

**43.** Allegation that Judge of Probate took illegal fees by "color of office" insufficient, without showing amount of fees due, collected, and by color of what office. In drawing indictments, while our



statute dispenses with mere formality or technicality, it requires certainty in every material allegation or charge. An indictment against a Judge of Probate for claiming and receiving fees in excess of those allowed by law, charged that he took the fees by "color of office,"—by color of what office is not stated; although it is alleged that he was Judge of Probate of Nicollet County, it is not alleged that he took the fees as such officer, or in a case or proceeding pending before him, or for any duties performed by him as such officer—this is a fatal defect. It does not show what fees were due, if any, or what amount he collected, which the authorities seem to require. *State v. Brown*, 12 Minn. 490.

*i. Official neglect.*

**44.** To charge an offense for neglecting to do an official act, the indictment must show that the duty of doing it is imposed on the officer. *State v. Coon*, 14 Minn. 456.

### III. DEFENSES.

*a. Benefit of clergy.*

**45.** The plea of benefit of clergy never had any practical operation in the United States, and had it, in the absence of statutory provisions, been claimed as a common law right in any State, it would have been denied. *State v. Anne Bilinsky*, 3 Minn. 246.

*b. Justification.*

**46.** That the act was committed during an affray, no excuse. The fact that the defendant may have been engaged in the commission of an affray cannot in itself be a justification or excuse for any offense he may have committed. *State v. Dineen*, 10 Minn. 407.

**47.** So, as to act committed during a riot. The fact that at time defendant committed the assault with intent to do great bodily harm, he was engaged in a riot, is no defense to either crime—both

are felonies, and cannot be merged one in the other. *Ib.*

**48.** The proclamation or order of a State officer cannot make legal the killing of an Indian. *State v. Gut*, 13 Minn. 341.

*c. Self defense.*

**49.** Must be an apparent necessity for the act. It is not enough that a party believed himself in danger, unless the facts and circumstances were such that the jury can say he had reasonable grounds for his belief—there must be an apparent necessity to ward off by force some bodily harm. *State v. Shippey*, 10 Minn. 223.

**50.** Not enough that defendant believed it necessary. The mere fact that defendant believed it necessary for him to act in self defense, would not entitle him to acquittal—he must have had reasonable grounds for such belief. *Ib.*

*d. Intoxication.*

**51.** Insanity from intoxication or otherwise, which leaves the person so that "he does not know what he is doing," good defense. On an indictment for an "assault with intent to do great bodily harm," being armed with a dangerous weapon, it is error for the court to charge that "if defendant did not know what he was doing from being in a state of insensibility, the jury cannot convict, but otherwise if from excitement or madness the immediate consequence of indulgence in strong drink." If the defendant was so drunk as "not to know what he was doing," he had no intent which must in fact exist. The intention being element of the crime, insanity of any kind, or from any cause, which renders the party incapable of forming any intention, and which is not voluntarily induced with a view to the commission of a crime while in that state, may be given in evidence to show that he is not guilty of the specific crime charged. Intoxication might exist with an intent to commit the offense—it was for the jury to say. *State v. Garvey*, 11 Minn. 154.

**52.** If an intent exists, intoxication is

**no defense.** Where it appears that the defendant *intentionally* killed or participated in the killing of deceased as a matter of revenge, the grade of the crime is not lessened by his intoxication at the time. *State v. Gut*, 13 Minn. 341.

*e. Provocation.*

**53. Civil trespass and throwing a stick but not hitting with it, no provocation to excuse a murder.** The provocation given by the deceased trespassing on defendant's land and throwing at him a stick—not hitting him—is not such as the law will recognize as sufficient to reduce the killing below murder. *State v. Shippey*, 10 Minn. 223.

**54. Evidence to be considered in determining sufficiency of provocation.** To determine on the sufficiency of the provocation to mitigate the killing from murder to manslaughter, the instrument or weapon with which the homicide was effected must be taken into consideration. For if it was effected with a deadly weapon, the provocation must be great indeed to lower the grade of crime from murder; if with a weapon or other means not likely to produce death, a lesser degree of provocation will be sufficient. *Id.*

**55.**—When a homicide is committed in a heat of passion, upon sudden provocation, to determine the sufficiency of the provocation it is proper to take into consideration the character of the weapon used, and if it was a deadly weapon, the provocation must have been great indeed to lower the grade of crime from murder to manslaughter, within Sec. 12, Chap. 94, G. S. Following *State v. Shippey*, 10 Minn. 229. *State v. Hoyt*, 13 Minn. 132.

**56. Killing of defendant's friend no provocation.** The fact that deceased had killed a friend of the defendant is not by the law such a provocation as will reduce the crime of murder to manslaughter. Whether a different rule would obtain had the defendant been present when his friend was killed, and under the excitement of the

moment taken the life of the slayer—*query?* *State v. Gut*, 13 Minn. 341.

**57. What is a sufficient provocation.**

It is the province of the court to define what will constitute *provocation* within Sec. 12, Chap. 94, G. S., by, in substance, informing the jury that it must be something, the natural tendency of which would be to disturb and obscure the reason to an extent which *might render* the average of men of fair average mind and disposition *liable* to act rashly or without due deliberation or reflection, and from passion rather than judgment, and something which the jury are satisfied did so disturb and obscure the reason of the defendant in the case before them, so that the homicide was the result of the provocation. It is for the jury under instructions of this general nature, to determine whether the provocation proved in the particular case on trial is sufficient. *State v. Hoyt*, 13 Minn. 132.

*f. Insanity.*

**58. Burden of proof on party setting it up.**

It is not error for court to charge that “the plea of insanity is one for the defendant to establish; that the sanity of mankind being the rule, the burden of proof is on the defendant to show that an exception exists in his case, and that if the defendant is acquitted on that ground, it must (under our statutes) be so stated in the verdict. R. S., Sec. 259, p. 570. *Bonfanti v. State*, 2 Minn. 132.

**59.**—Insanity is a defense and must be made out from the evidence, to the satisfaction of the court as in any other case. *State v. Brown*, 13 Minn. 335; *State v. Gut*, 13 Minn. 341.

**60. Negative definition of insanity. A**

party indicted is not entitled to an acquittal on ground of insanity, if at the time of the alleged offense he had capacity sufficient to enable him to distinguish between right and wrong, and understood the nature and consequence of his act and had mental power sufficient to apply that knowledge

to his own case. *State v. Shippey*, 10 Minn. 223.

**61.**—A defendant is not entitled to an acquittal on the ground of insanity, if at the time of the alleged offense he had capacity sufficient to enable him to distinguish between right and wrong as to the particular acts charged, and understood the nature and consequences of his acts, and had mental power sufficient to apply that knowledge to his own case (following *State v. Shippey*, 10 Minn. 223), and whether the defendant at time of inflicting the blows upon the body of deceased, knew that the natural or necessary consequences of his acts were to produce the death of the deceased, may be taken into consideration by the jury in determining whether he knew and understood the nature and consequences of his acts. *State v. Gut*, 13 Minn. 341.

**62. Insane delusion on other matters no excuse.** If the defendant has an insane delusion upon any one subject, but commits crime in some other matter not connected with that particular delusion, he is equally as guilty as if he had no insane delusion and was perfectly sane. *Ib.*

#### IV. THE TRIAL.

##### a. Place of Trial.

**63. Offense committed in one county may be tried in another attached for judicial purposes.** When counties are attached together for judicial purposes, they together constitute a trial district, and a person charged with the commission of a crime in any one of them, may be legally tried in any other, and the law of 1867, Chap. 112, changing the place of trial from one to the other, is not as to crimes committed before its passage, in conflict with Sec. 6, Art. 1, Const. of State, which secures a defendant a trial by a jury of the "county or district where the crime is committed." *Ib.*

**64. The act allowing an offense committed within one hundred rods of a county line and prosecuted in either**

**county, is valid.** The following provision of statute to wit: "Offenses committed on the boundary lines of two counties, or within one hundred rods of the dividing line between them, may be alleged in the indictment to have been committed in either of them, and may be prosecuted and punished in either county, Sec. 20, Chap. 108, G. S., is not in conflict with Sec. 6, Art. 1, of the Constitution. *State v. Robinson*, 14 Minn. 447.

##### b. Change of Venue.

**65.** The crime was committed in Brown county and was being tried in Redwood county, both of which were in the same trial district. On motion of defendant the venue was changed to Nicollet county, which is out of the trial district, but joins Brown, but does not join Redwood county. *Held*, Brown and Redwood being a single trial district, the change to Nicollet, which adjoins Brown, though not Redwood, was allowed by the spirit and meaning of the law which authorizes the court, when it appears that a fair and impartial trial can not be had in the county where the offense was committed, to direct the person accused to be tried in some adjoining county. *State v. Gut*, 13 Minn. 341.

**66. Venue may be changed on application of State to another judicial district.** Under G. S. Chap. 113, the place of trial of an indictment found in any county of a given judicial district, may be changed on the application of the State to an adjoining county in another judicial district, whenever it appears to the satisfaction of the court that the State could not have a fair and impartial trial in said county, and Art. 1, Sec. 6, is not thereby infringed, which provides for the trial of an accused by an impartial jury of the county or district where the crime is committed. *State v. Miller et al.*, 15 Minn. 344.

**67. Counter affidavits admissible.** On an application for a change of venue in a criminal case, the court is not confined to the affidavits of the defendant applying, but may receive counter affidavits. The

application is addressed to the sound discretion of the court, and at common law counter affidavits are receivable, and Sec. 1, Chap. 113, G. S., is not restrictive but in affirmance thereof. *State v. Stokely*, 16 Minn. 282.

*c. The Grand Jury.*

**68. Excuse from service from over age.** The excuse from service of a grand juror for over age does not depend on the consent of the defendant. *State v. Brown*, 12 Minn. 538.

**69. Challenge for statutory causes only.** A challenge to the panel of a grand jury can be allowed only for one or more of the causes mentioned in Sec. 14, p. 637, G. S., whether the regular panel or a special venire. *State v. Gut*, 13 Minn. 341.

**70. Admission of grand juror after jury are sworn.** It seems that, where a sufficient number of grand jurors upon the regular panel appear, and are sworn and charged, the admission of others of the regular panel appearing afterwards, is a matter addressed to the discretion of the court, and in such cases when they are admitted, or where additional jurors are summoned after the organization of the grand jury, to supply any deficiency which may occur, the charge should be repeated in view of the oath prescribed by statute. *State v. Froiseth*, 16 Minn. 313.

*d. Petit Jury.*

*1. Drawing the Jury.*

**71. What a sufficient showing that they were drawn at an annual meeting of commissioners, and sufficient certificate thereof.** When on a challenge to the panel of the petit jury, it is objected that the panel was not drawn at an "annual meeting of the commissioners in January, 1867, and the list was not attested by the "clerk of the board," a "list of persons selected for petit jurors by the county commissioners in January, 1867," with the certificate and signature of the chairman, attested by the county auditor, as follows: "I certify

that the above named persons were duly selected for petit jurors for the year 1867, by the board, of county commissioners of Nicollet county, at a regular meeting of said board held in January, 1867." *Held*, sufficient showing that the selection was at an annual meeting in January—presumption being in favor of their regularity. Courts will take judicial notice that the auditor of the county is *ex-officio* clerk of the board of county commissioners. *State v. Gut*, 13 Minn. 341.

**72. What sufficient filing of the list drawn.** When the statute required the list of petit jurors to be drawn at the annual meeting of the county commissioners in January, and "forthwith" filed with the clerk of the court, a list so drawn filed in September following, is a sufficient compliance, and no ground of challenge, it not being a material departure from the forms prescribed in drawing jurors, to be ground of challenge within the statute. *Ib.*

**73. Certificate of drawing may be contradicted by the clerk.** Where the panel of a petit jury is challenged on the ground that according to the certificate on the list, the drawing was by the clerk, sheriff and justice of the peace, instead of by the clerk, in the presence of these officers. *Held*, competent for the clerk to testify that the drawing was regular, and certificate erroneous—and thus contradict the record. *Ib.*

*2. Summoning Jurors.*

**74. What a sufficient return on the venire.** The return of a sheriff on a venire showed that he served the summons upon the within named "parties," instead of the jurors within named. *Held*, an immaterial verbal error, and the jurors being in attendance perhaps immaterial how they were summoned. *Ib.*

**75. What a sufficient returning to the clerk.** The return by the sheriff of a venire to the clerk of the court the day before the session of the court, and not "at the opening thereof," is an immaterial error. *Ib.*

### 3. Summoning Special Venire.

#### 76. Attendance of every regular juror not necessary before calling talesman.

The court is not required to secure the attendance of every juror on the regular panel, before summoning talesmen, or calling those summoned on a special venire. *State v. Brown*, 12 Minn. 538.

77. A special venire issued under Sec. 17, Chap. 64, G. S., need not specify the names of the persons to be summoned. *State v. Stokely*, 16 Minn. 282.

### 4. Calling the Jury.

78. Clerk may recall names of those who did not answer the first call. The clerk having called the names of all jurors summoned by the special venire, without completing a jury, was ordered by the court to replace in the box, and re-call the names of those who failed to answer. *Held*, though not in accordance with the ordinary practice, still it not being contrary to the statute, or in any view prejudicial to the defendant, cannot be considered a ground for reversing the judgment. *State v. Brown*, 12 Minn. 538.

79. Failure to call name of juror not in attendance, no error. The omission to place in the box, or call the name of a juror not in attendance at the court, could not possibly prejudice the defendant, and is therefore not an error fatal to the judgment. *Ib.*

### 5. Challenging Jurors.

80. Challenge too late after verdict. In the absence of fraud or collusion in the selection of a jury, an objection to the array or to a single juror is too late after verdict—unless it is shown that the party objecting is prejudiced by the irregularity. *State v. Maloney*, 1 Minn. 350.

81. Withdrawal of challenge no bar to another challenge. The State challenged a juror, and then withdrew the challenge afterwards, and before jury were sworn, challenged again the same person for actual bias, and on triers examination

he was excluded. *Held*, no error; the right of challenge was not waived by the withdrawal of the first challenge, especially as it was afterwards found to be well founded. *State v. Dumphey*, 4 Minn. 438.

82. What insufficient ground for challenge. That one of the jurors in a criminal case was a clergyman, who had preached the funeral sermon of the deceased, was insufficient to disqualify him as a juror; he having on his *voire dire* declared himself impartial, and the fact had no tendency to show bias. *State v. Stokely*, 16 Minn. 282.

### 6. Swearing the Jury.

83. The Statute oath must be followed. Where the statute has prescribed the form of the oath for the jury, in a capital case, it is error to disregard it and substitute another. *Maher v. State of Minnesota*, 3 Minn. 444.

84. Swearing jurors separately. The practice in swearing each juror separately is correct, being sanctioned by statute Comp. St. 773, Sec. 14-16. *State v. Brown*, 12 Minn. 538.

### 7. Triers.

85. Triers need not be re-sworn on the submission to them of each challenge in a case—Comp. St. 775, Sec. 80. *Ib.*

### e. Argument of Counsel.

86. Commenting on defendants. In a criminal prosecution defendant testified in his own behalf as to one part of the case—the circumstances under which a confession was obtained from him—but declined to answer any questions on the merits. *Held*, counsel for the State, under Sec. 7, Chap. 73, G. S., as amended Chap. 70, laws 1868, was not restrained from resorting to any argument or evidence to impeach the witness, since his testimony was in opposition to the evidence given by other witnesses. Had he remained silent, as the party he could not be prejudiced thereby, but his veracity as a witness may be attacked, whether as to what he did say or refused or

neglected to say. *BERRY and McMILLAN, J. J.*, concur on the ground that by *testifying* the defendant lost the benefit of the statute. *State v. Staley*, 14 Minn. 105.

*f. Charging Jury.*

**87. Instructing jury after they have retired.** It is proper for the court in presence of parties and in open court to give a jury further instructions concerning the law of the case, after they have retired, if they request it. *State v. Brown*, 12 Minn. 538.

**88. Opinion of Court on question of fact.** The Court charged the jury that they "were at liberty to find a verdict against the defendant of murder in the second degree, and that there was evidence in the case that they might consider in that respect." *Held*, not an expression of opinion, that the evidence warranted such a verdict, but there was evidence proper for their consideration upon which they might find such a verdict, if satisfied thereby of the defendant's guilt. *State v. Stokley*, 16 Minn. 282.

*g. Province of Jury as to questions of fact.*

**89. As to what degree of a crime is established.** Where part of the evidence tended to convict of *murder* and another part of *manslaughter*, it was the province of the jury to determine which degree was proved, and error in the Court to charge that, "there was no testimony in the case which would warrant the finding of the defendant guilty of manslaughter." *State v. Laliyer*, 4 Minn. 368.

**90. Credibility of witness.** The jury should consider and decide whether the relationship of any witness to the complaining witness or defendant, acted upon said witness to make false statements in his evidence, or whether such relationship influenced said witness and swerved him from the truth. *State v. Hogard*, 12 Minn. 293.

*h. Retirement of the Jury.*

**91. In cases of felony one juror must**

**not separate from his fellows, without attendance of an officer.** It is error for a juror to separate from his fellows in a case of felony, after they have retired, without the attendance of an officer, though but for a very short time, and it be not shown that he was tampered with or held any conversation about the trial. *Maheer v. State of Minnesota*, 3 Minn. 444.

**92. In capital cases, jury may separate.** In lengthy trials in capital cases the jury should be allowed to separate, and, in the absence of improper influences, the simple fact of separation—if consent of both parties is given—it will be no ground of error. *Anne Bilansky v. State of Minnesota*, 3 Minn. 427; *State v. Ryan*, 13 Minn. 370.

**93. After charge, cannot separate.** On the trial of an indictment for murder, after the charge, the Court gave the jury a recess of five minutes, and they were allowed to leave the court-room and go at large without objections or remarks by either party, for and during said space of time, without being in charge of an officer. *Held*, under Gen. Stat. Chap. 72, Sec. 5, this was error. *State v. Parrant*, 16 Minn. 178.

*i. Verdict.*

**94. Conviction of the "crime as charged in the indictment," good.** An indictment charged murder in the first degree. The verdict convicts defendant "of the crime as charged in the indictment." *Held*, the degree of crime is sufficiently determined without any special finding as to the degree—there being *one and only one* degree charged in the indictment. *Anne Bilansky v. State of Minnesota*, 3 Minn. 427.

**95.—unless a less degree is found, verdict of guilty sufficient.** Where the jury design to convict of the offense charged, a verdict of guilty is sufficient, but where they convict of a less degree, or of part and acquit as to another, or find guilty of an "attempt," then a special verdict is necessary. *State v. Eno*, 8 Minn. 220.

**96. In case of reasonable doubt, can convict of lowest degree only.** When.

there is a reasonable doubt of which crime, or in which degree a defendant is guilty, the jury can convict of the lowest only under Sec. 2, Comp. Stat., p. 782. *State v. Laliyer*, 4 Minn. 368.

**97. What sufficient in murder in the first degree.** The following verdict clearly shows the intention of the jury, and is sufficient: "We, the jury in the case of the State of Minnesota against John Ryan, do find a verdict of murder in the first degree." *State v. Ryan*, 13 Minn. 370.

**98. What sufficient in murder in second degree.** A verdict of murder in the second degree on the trial of an indictment for murder in the first degree, without expressly acquitting defendant of the last offense, is good. It amounts to an express acquittal of the higher offense, and could be successfully pleaded in bar of another prosecution for the same offense. *State v. Lessing*, 16 Minn. 75.

**99. Conviction may be had for a lesser degree of offense charged.** Under the statutes, upon an indictment for an offense, consisting of different degrees, if the indictment charges the crime in terms which embrace the highest degree of such crime, a conviction may be had for that, or any lesser degree of the same offense, although the indictment omits to state the particular intent and circumstances characterizing such lesser degree of the offense, if the act for which the accused is indicted is the same for which he is convicted. *Ib.*

#### j. *Nolle Prosequi.*

**100.** The court has power to enter a *nolle prosequi* as to portion of the offense charged, and refuse to enter the same as to the remainder. *The State v. Eno*, 8 Minn. 220.

### V. EVIDENCE.

#### 1. *Presumption.*

**101. Deliberate Shooting.** Where a person deliberately and intentionally shoots the deceased, the law presumes it was an act of murder. *State v. Shippey*, 10 Minn. 223.

**102. Presumption of malice and intent from killing.** Every homicide is presumed unlawful, and when the mere act of killing is proven, and nothing more, the presumption is that it was intentional and malicious. *State v. Brown*, 12 Minn. 538.

#### 2. *Depositions.*

**103. Depositions taken before Justice secondary evidence.** Secs. 15 and 25, Comp. Stat. ch. 103, which provides for the taking of depositions of witnesses in examinations in criminal proceedings before a Justice, and their return to the clerk of court or district attorney, simply relieves them from their extra judicial character, they are still secondary evidence, and not competent in another proceeding where the witness can be produced. *Chapman v. Dodd*, 10 Minn. 350.

#### 3. *Confessions.*

**104. Corpus delicti must be first proved before admitting confessions.** If there is no evidence of the *corpus delicti*, then the *confession* of the defendant should not be admitted; but when there is evidence from which a jury might reasonably infer the commission of the offense charged, then a sufficient foundation has been laid for admitting the prisoner's confession, the prosecution, however, being still held to the production of the proofs requisite to warrant a conviction. *State v. Laliyer*, 4 Minn. 368.

**105. Full proof of corpus delicti must be made before a conviction.** Under Sec. 6, chap. 118, Comp. Stat. p. 782, which provides that confessions "in the course of judicial proceedings or to a private person" are not "sufficient to warrant a conviction, without proof that the offense charged has been committed." *Held*, full proof, (beyond a reasonable doubt,) that the particular offense charged has been committed by some one, independent of the confession, is required. *Ib.*

**106. Preliminary proof that confession was properly obtained, when object-**

ed to for improprieties. If proof of a confession is objected to, on the allegation that it was improperly obtained, the Judge is to determine as a preliminary question, whether the allegation is true in point of fact, and his decision is reviewable, but only as a finding on any other question of fact, that is, not reversible unless manifestly against the weight of evidence. The admission seems to be somewhat in the discretion of the Judge. *State v. Staley*, 14 Minn. 105.

**107. Promise of favor or inducements tending to make confession untrue.** Unless there is a positive promise of favor, made or sanctioned by a person in authority, or the inducement held out is calculated to make the confession an untrue one, the confession will be admissible. *Ib.*

**108. What inducements to confess are allowable.** The fact that a confession was made, in answer to a question assuming the guilt of the person, or was obtained by artifice, falsehood or deception, or preceded by a caution to the accused to tell the truth if he said anything, does not render the confession inadmissible. *Ib.*

**109. What inducements, etc., are not allowable.** If any advantage is held out, or harm threatened, of a temporal or worldly nature, by a person in authority, a confession induced thereby must be excluded, and an officer making the arrest is a "person in authority." *Ib.*

**110. Jury can not wholly reject a confession.—When they ought to be rejected.** The jury may consider the circumstances under which a confession is made, with a view of determining what weight should be given to it, but they cannot reject it. If a party making a confession is not entirely free from fear or wholly uninfluenced by present fear or hope of favors, the court should reject his confession. If voluntary, they are receivable, whatever may be the motives of the party in making them. *Ib.*

#### 4 *Corpus Delicti.*

**111. Facts ascertained by a prisoner's confession** may be taken into consideration

in establishing the *corpus delicti*. *State v. Lohiier*, 4 Minn. 368.

**112. No conviction without proof of corpus delicti.** Satisfactory evidence of the *corpus delicti* must always be established, to warrant a conviction in a criminal proceeding. *State v. Hogard*, 12 Minn. 293.

#### 5. *Evidence of character.*

**113. The rule respecting the admission of proof of the quarrelsome or violent character of the deceased** is this: Where the killing is under such circumstances as to create a doubt as to the character of the offense committed, (*i. e.* whether premeditated, hence not justifiable; or under provocation,) the general character of deceased may be shown, because it becomes a material and perhaps necessary fact, to enable the jury to ascertain the truth, and as such is involved in the *res gestæ*; but without the character is in some way an essential part of the *res gestæ*, it cannot be examined into, because "it would be a barbarous thing to allow A. to give, as a reason for killing B., that B.'s disposition was savage and riotous. *State v. Dumphrey*, 4 Minn. 438.

**114. Proof of good character always admissible.** Proof of the good character of the accused may always be let in, but proof of bad character of deceased, only when connected with the *res gestæ*. *Ib.*

#### 6. *Weight of evidence.*

**115. Circumstantial evidence.** To justify a verdict, in a criminal prosecution, against the defendant, on circumstantial evidence, the facts proved need not be absolutely incompatible with the innocence of the defendant. *State v. Staley*, 14 Minn. 105.

**116. No conviction in case of doubt.** Courts will give a person accused of a crime the benefit of every doubt, either as to law or fact. *State v. Gut*, 13 Minn. 341.

**117. Proof of identity of property stolen.** It need not be established "clearly and without any doubt, that the property stolen is the identical property found in



the possession of the defendant"—moral certainty, not absolute certainty, is required. *State v. Hogard*, 12 Minn. 293.

**118. What is proof beyond a reasonable doubt.** In charging a jury as to the weight of evidence necessary to convict of a criminal offense, the court said "in order to convict they must be satisfied beyond a reasonable doubt. That this does not require unreasonable or impracticable things at the hands of the prosecution, nor absolute certainty; but the jury should be satisfied as reasonable men, so that they would be willing to act upon it as in matters of great importance to themselves." *Held*, the last clause was error, the true rule being that the evidence must be sufficient to satisfy the mind of a common man; and to convince him that he would venture to act upon this conviction in matters of the highest concern and importance to his own interests. *State v. Dineen*, 10 Minn. 407.

7. *Evidence in particular cases.*

**119. Competent evidence of county in which offense was committed.** An allegation in an indictment that the offense was committed in a certain county is sustained by proof of its having been committed on a vessel which passed through that county on a voyage, during which the act took place under Sec. 89, Comp. Stat., p. 761. *State of Minnesota v. Timmens*, 4 Minn. 325.

**120. Murder—threats of deceased to kill co-defendant.** The offer of the defendant's counsel to prove that the deceased threatened to kill one Tripp, (who was impleaded with defendant for murder.) was properly ruled out, unless he had further offered to show that Tripp knew of such threat; and even then doubted whether such fact could avail the defendant. *State v. Dumphrey*, 4 Minn. 438.

**121. Wounds not mentioned in indictment.** On the trial of an indictment for murder, it is competent to prove wounds not mentioned in the indictment, wounds which might have been mortal—it being

sufficient if the proof agree with the allegation in its substance and generic character. *State v. Hoyt*, 13 Minn. 132.

**122.—attempts to wound witness after killing deceased.** On the trial of an indictment against H. for the murder of S., the wife of S. had testified in behalf of the State, that defendant came to her house on the morning of and after the homicide, and said to her that he had killed Mr. S., and was going to kill her. *Held*, improper for her to further testify that "he then raised his axe to strike me, and kept striking at me, and threw me down on the floor, etc.,"—it having no tendency to prove the charge contained in the indictment, and its natural effect was to prejudice the jury. *Ib.*

**123. Identity in case of murder.** To identify the defendant as the person who struck the fatal blow, it was competent to ask "how was the size and general appearance of defendant compared with him you saw going towards the blacksmith's shop." *State v. Stokely*, 16 Minn. 282.

**124. Identity—hearsay.** That the deceased, on the evening of his death, identified the defendant as the person who struck the fatal blow, was incompetent on the ground of hearsay. *Ib.*

**125. Assuming facts not in proof in examining witness.** Where an expert called by the State, who attended the deceased after he had been stabbed, and who testified as to his condition, character of the wound, and the cause of death, he was asked on cross-examination, "suppose a person received a wound and went about in the rain and cold, would not such imprudence increase the hemorrhage and inflammation?" *Held*, it assumed a fact not in proof, and if otherwise, an affirmative answer would have no tendency to show that the stabbing was not in itself an act eminently dangerous to life, but that the fatal consequences were hastened and perhaps aggravated by the exposure—hence properly excluded. *Ib.*

**126. Polygamy—evidence of marriage in fact.** In prosecutions for polyga-

my, where a marriage *in fact*, whether it be the first or second, is essential to prove the crime; indirect or circumstantial evidence, as of co-habitation, repute, conduct of the parties, birth of children, or admissions is not admissible, in the absence of statute. McMILLAN, J. thinks it is admissible in corroboration of the direct and positive evidence. *State v. Johnson*, 12 Minn. 476.

**127. Larceny—defendant's admissions as to ownership of property.** In a prosecution for petit larceny, it is competent to show defendant's admissions, made some months after the property came into his possession, that from the proof of identity then given him, he thought the property was the property of the alleged owner. *State v. Hogard*, 12 Minn. 293.

**128. Secondary evidence of stolen bills,** where the State is unable to produce them on the trial, is admissible, though such inability is the result of negligence—it being the best that can then be produced. *State v. Taint*, 16 Minn. 109.

#### 8. Witnesses.

**129. Competency of co-defendants.** The common law rule that co-defendants in a criminal prosecution cannot be permitted to testify *for*, nor compelled to testify against each other, is not abolished, but *affirmed* by the amendments to the Revised Statutes, Sec. 93, p. 20. Not error to exclude such witnesses. *Baker v. The United States*, 1 Minn. 209.

**130.**—Co-defendants in criminal prosecution cannot be allowed to testify in behalf of each other—following *United States v. Baker*, 1 Minn. 207. *State v. Dumphrey*, 4 Minn. 438.

**131. Husband and wife cannot testify against each other in adultery.** Sec. 53, Comp. Statute, p. 681, allowing husband or wife to testify against each other in a "criminal action or proceeding for a crime committed by one against the other," does not authorize a wife to testify against her husband in a prosecution for adultery; nor does Sec. 1, Comp. Stat. p. 728, which provides that "no prosecution for adultery

shall be commenced except on complaint of the husband or wife," for the Legislature intended by this that if the parties immediately interested did not feel sufficiently injured by it to institute proceedings against the offender, the public would not notice it. *State v. Armstrong*, 4 Minn. 335.

**132. Witness's opinion as to defendant's intent.** When it did not appear that the prosecuting witness had any better opportunity for judging of defendant's intention to commit the "assault with intent to do great bodily harm, etc.," than the jury, it was not competent for him to testify whether "he believed at the time the shot was fired, G. intended to shoot him." *State v. Garvey*, 11 Minn. 154.

**133. Contradicting witness.** A witness's attention having been first called to certain statements, which it is claimed he made, it is competent to call other witnesses to contradict him as to such statement, but not to show any further conversation. *State v. Staley*, 14 Minn. 105.

## VI. PRACTICE ON REVIEW.

### 1. Methods of Review.

**134. Report of Judge.** It is competent for the Supreme Court to review a criminal case brought up on a report of the judge as well as on writ of error. *Query?* Can an appeal be taken from a judgment in a criminal case. *Bonfanti v. State*, 2 Minn. 124.

**135. Application to Supreme Court in first instance.** Under Sec. 6. p. 777 and 778 Comp. Stat., the defendant in a criminal action, if convicted, may apply to the Supreme Court in the first instance, any time within a year, for a new trial, and authorizes the court to grant the request, if on the whole, it appears justice has not been done. *State v. Heenan*, 8 Minn. 44.

**136. Appeal or writ of error.** At common law it seems to have been a matter of doubt whether *either party* was entitled to an appeal or writ of error in a criminal case. *State v. McGrorty*, 2 Minn. 225.

**137. No review in behalf of the peo-**

ple. Neither an appeal nor a writ of error can be brought to this court in a criminal case in behalf of the people. *Ib.*

2. *Questions that can be raised.*

**138.** No objection being taken to the indictment by demurrer or motion, none can be entertained in the Supreme Court, except as to jurisdiction and that the facts stated do not constitute a public offense. *State v. Garvey*, 11 Minn. 154.

**139.** Error must be shown affirmatively. Upon a writ of error in a criminal action, it is not necessary that the record should show affirmatively the defendant's request to be sworn and examined in order to sustain the proceedings against an allegation of error, on the ground that he was sworn as a witness without his request—defendant must show affirmatively that he was sworn without his request. *State v. Lessing*, 16 Minn. 75.

3. *Amending the record.*

**140.** A record failed to show that the jury were each sworn as prescribed by law—that when they retired they were in charge of a sworn officer—that they were permitted to separate before verdict with consent of defendant, or that they being polled at request of the defendant, each assented to their verdict—that it was then entered, read to the jury, and by them again assented to. *Held*, that the court could amend the record in this repeal *after term*, where there exists no doubt about what the truth is. *Anne Bilanskey v. State of Minnesota*, 3 Minn. 427.

4. *Principles of determination.*

**141.** Efficiency of evidence to sustain verdict. Defendant being found guilty, and there being evidence which tended to identify him as the person who struck the fatal blow. *Held*, it would be usurping the province of the jury to say that the evidence was manifestly insufficient to satisfy them, beyond a reasonable doubt, that the defendant was the man. *State v. Stokely*, 16 Minn. 282.

**142.** Conviction when set aside. Where all the evidence is contained in the return, and there is a total absence of evidence of the commission of the act charged against the defendant as an offense, the conviction must be set aside. *City of St. Paul v. Marvin*, 16 Minn. 102.

5. *Judgment Roll.*

**143.** Minutes of the trial. By ch. 118, Sec. 1, Sub. 4, G. S., the minutes of the trial constitute a part of the judgment roll in a criminal case, and if error appears therein, the defendant is perhaps entitled to the benefit of it. *State v. Lessing*, 16 Minn. 75.

6. *Immaterial errors and omissions.*

**144.** Improper remark of counsel. A remark of counsel improperly made, which does not appear to have been sanctioned by the court, is not a ground of exception. *State v. Brown*, 12 Minn. 538.

**145.** Errors that work no prejudice. *It seems* that an informality or error in practice merely, which cannot prejudice either party, is not the subject of an exception, or ground for reversing a judgment or writ of error. *Ib.*

**146.** No error, not a violation of some positive rule of law, or which may not possibly prejudice the defendant, can be a ground for reversal on appeal. *State v. Ryan*, 13 Minn. 370.

**147.** The charge of a court on an abstract proposition, that cannot possibly have prejudiced the defendant, is no ground for reversing the judgment. *State v. Gut*, 13 Minn. 341.

**148.** Failure of record to show certain acts. The fact that the record does not show that the officer attending the jury on their retirement was sworn, or that the defendant was present in court after his arraignment until he was called for sentence, when the same shows that he was arraigned and pleaded to the indictment, is no ground of error—presumption being in favor of the regularity of the proceedings in a court

of general jurisdiction. *State v. Ryan*, 13 Minn. 370.

#### 7. *Material error.*

**149. The admission of evidence to sustain insufficient and uncertain allegations** in an indictment is erroneous, and will be fatal to a verdict. *State v. Hinckley*, 4 Minn. 345.

#### 8. *New trial.*

**150. At common law, not allowed.** At common law a defendant convicted for felony, could not for any cause have a new trial, the sole remedy being to apply for a pardon, if for any cause the conviction was improper. In misdemeanors it was not so. This rule does not prevail in this country. *State v. Miller*, 10 Minn. 313.

**151. Verdict unsustained by the evidence.** When the evidence is manifestly insufficient to warrant the finding of the defendant guilty, he is in all cases entitled to a new trial. *Id.*

### VII. THE EXECUTION.

**152. The time of the execution of a person convicted of murder, is not an essential part of the judgment.** It is for the judge before whom the conviction is had, to designate the time—not less than one, nor more than six months—during which the convict shall be kept in solitary confinement, and at the expiration of that time it is the duty of the Governor to issue his warrant of execution. If for any reason his warrant is not issued immediately on the expiration of the time fixed by the court for solitary confinement of the defendant, he may afterwards issue it, and cause the legal execution of the convict. *State v. Gut*, 13 Minn. 341.

### VIII. PARTICULAR OFFENSES.

#### 1. *Petit treason.*

**153. At common law.** Petit treason, at common law, by the statute of 25 Ed.

III., Chap. 2, was reduced to three heads: 1st. When a servant killed his master. 2d. When a wife killed her husband. 3d. When an ecclesiastical person, secular or regular, killed his superior, to whom he owed faith and obedience. *State of Minnesota v. Anne Bilansky*, 3 Minn. 246.

#### 2. *Extortion.*

**154.** Extortion is made a misdemeanor by our statute, and is therefore punishable. *State v. Brown*, 12 Minn. 490.

#### 3. *Conspiracy.*

**155. Common law offense exists.** The common law crime of conspiracy is not abolished by our statutes. *BERRY J., dissents. State v. Pulle et al.*, 12 Minn. 164.

**156. The gist of the crime of conspiracy** at common law, is the unlawful confederation, and it is not necessary to prove an overt act in pursuance of it. *Id.*

#### 4. *Forgery.*

**157.** The maker of a promissory note does not commit the crime of *forgery* by obtaining possession of the note and endorsing on it "Received the sum of forty-six dollars, Louisville, 21st January, 1860." *State v. Monnier*, 8 Minn. 212.

**158. Stamp.** To support an indictment for uttering and publishing a forged promissory note, it is not necessary that there should be a revenue stamp upon such note. *State v. Mott*, 16 Minn. 472.

#### 5. *Offenses against chastity, morality and decency.*

##### a. *Adultery under promise of marriage.*

**159. Essentials of the offense.** Under Sec. 6, Comp. Stat., p. 729, creating the offense of adultery under promise of marriage, a conviction cannot be had without corroborating the testimony of the woman seduced, on every material point, viz.: 1st. The promise to marry. 2d. The seduction under such promise. 3d. Previous chaste character of the person seduced. This

corroborating proof need not be sufficient of itself to establish the facts, but of such circumstances as usually form the concomitants of the main fact sought to be proved. (As to evidence which was held proper as corroborating the testimony of the seduced woman, see this case.) *State of Minnesota v. Timmes*, 4 Minn. 325.

**160.**—Under an indictment for “adultery under promise of marriage,” (under Sec. 6, Comp. St., p. 729,) the jury may convict if they find the defendant “had carnal intercourse with the woman complaining at the time and place charged in the indictment, under a promise to marry, although she may have had carnal connection with the defendant previously, or any other man, provided she had reformed and was chaste at the time of the commission of the offense. *Ib.*

*b. Polygamy.*

**161. No conviction on admission of defendant only.** In criminal prosecutions for bigamy or adultery, when the offense depends upon the defendant being a married man or woman, the marriage must be proven in fact, and a conviction cannot be had upon the admission of the defendant. *State v. Armstrong*, 4 Minn. 335.

**162. First marriage in fact must be proved.** In prosecution for polygamy, a first marriage *in fact*, must be proved, and this may be done by an eye witness to a marriage. A marriage *in fact* being necessary, the question of marriage or no marriage is to be determined by the *lex loci contractus*, and it seems necessary that the first marriage was valid by the law of its place of celebration—following *State v. Armstrong*, 4 Minn. 344. *State v. Johnson*, 12 Minn. 476.

*c. Fornication.*

**163. What is.** Under the Comp. Statutes, carnal and illicit connection of a married man with an unmarried woman, is not adultery, but fornication. *State v. Armstrong*, 4 Minn. 335.

*6. Offenses against life and person.*

*a. Murder.*

**164. Wilful killing of husband by wife, is murder.** Sec. 14, R. S. (1851), p. 523, which abolished the distinction between “murder” and “petit treason,” making the last offense punishable as murder in the second degree, attempts to abolish a distinction which did not exist, and then makes a distinction by changing the punishment of the latter offense—supposing it to exist. Hence, a wife who wilfully kills her husband, (petit treason at common law,) is liable to the punishment imposed by our statute for murder—viz., capital punishment. *State of Minnesota v. Anne Bilansky*, 3 Minn. 246.

**165. All wilful killing, murder.** Sec. 14, R. S., p. 523, (1851,) destroying the distinction between murder and petit treason, was of no effect. Sec. 12, organic act of Territory of Minnesota, kept in force the laws of the Territory of Wisconsin, that were in force at date of admission of State of Wisconsin, May 29, 1848. Under those laws no distinction existed—all wilful killing was murder, and punished by hanging. *Ib.*

**166.**—The designed killing of another, without provocation, and not in sudden combat, is none the less murder because the perpetrator of the crime is in a state of passion. *State v. Shippey*, 10 Minn. 223.

**167. Killing an enemy after he has laid down his arms.** It is legal to kill an alien enemy in the heat and exercise of war, but to kill such an enemy after he has laid down his arms, and when confined in prison, is murder. *State v. Gut*, 13 Minn. 341.

**168. When killing is murder.** If an intention to kill is formed and executed “in the heat of passion, upon sudden provocation, or in sudden combat,” the case falls within Sec. 12, Chap. 94, G. S., where it speaks of a killing “intentionally, but without premeditation.” If the intention

to kill is formed before the "heat of passion, upon sudden provocation, or in sudden combat," or, though formed in the heat of passion, is executed after sufficient cooling time, or after the heat of passion has subsided, the case then comes within the meaning of a killing with a premeditated design to effect the death of the person killed. *State v. Hoyt*, 13 Minn. 132.

*b. Manslaughter in second degree.*

**169. When character of weapon competent evidence.** When a homicide is committed in heat of passion, in sudden combat, the character of the weapon used is not to be taken into consideration in reference to a provocation, nor in case of such sudden combat is it necessary that there should have been any legal provocation to render the homicide manslaughter, (under Sec. 12, Chap. 94, G. S.) The question of provocation can hardly be said to arise in case of homicide in sudden combat. But the character of the weapon may properly be considered in case of homicide in sudden combat, for the purpose of determining whether the party killing entered upon the combat with a premeditated design to kill, and such intention might be inferred from his *preparing* himself with a deadly weapon previous to the combat, and for the purpose of the combat, when his adversary was in possession of no deadly weapon, or other means of inflicting great bodily harm upon him. *Id.*

**170. What not manslaughter in second degree.** Sec. 13, p. 598, Gen. St., which declares that "whoever unnecessarily kills another, except by accident or misfortune, and except in cases mentioned in Sub. 2, Sec. 5, this chapter, either while resisting an attempt by such other person to commit any felony, or to do any other unlawful act, or after such attempt has failed, shall be guilty of manslaughter in the second degree," has no application to a case where the killing was inflicted with an axe—a deadly weapon—by inflicting blows on the head and neck, in resisting a civil trespass upon the land or cattle, or

both, of defendant, and no pretense that the weapon was used without a design to effect the fatal result which followed its use—viz., death. *Id.*

*c. Murder in second degree.*

**171. An intentional doing of the act sufficient to constitute the offense.** When defendant was charged with murder in the first degree, and convicted of murder in the second degree, it is no ground for reversing the judgment that the court refused to charge the jury that "the mere act of killing is no evidence of premeditated design," the same (if abstractly correct) doing no injury, since an "intentional" doing of the acts being sufficient to support the crime of murder in the second degree. *State v. Brown*, 12 Minn. 538.

**172. What is.** Deceased was stabbed in the belly, by an underhand blow with a knife. *Held*, this would justify, in this case, a verdict of murder in the second degree, unless done in self-defense, or heat of passion, on sudden provocation, or in sudden combat; and the prosecution was not bound to prove affirmatively that no such circumstances of justification or extenuation existed. *State v. Stokely*, 16 Minn. 282.

**173. What sufficient.** To warrant a conviction for murder in the second degree, it is sufficient to prove that the killing was unlawful, perpetrated by an act eminently dangerous to one or more persons, evincing a depraved mind, regardless of the life of such person or persons—it is not necessary to prove the absence of any design to effect death. *Id.*

*d. Assault with intent to murder or maim.*

**174. Common law definition of murder not applicable.** In a prosecution under Sec. 32, R. S., p. 495, concerning *assaults with intent to murder, maim, etc.*, that part of the charge to the jury which gave them the "general common law definition of murder," and instructed them "that to return a verdict of guilty, they must find that if the assault had resulted in death,

the killing would have been murder within the general definition." *Held*, to be erroneous, in that such "general definition" comprehended under our statutes all the degrees of murder and some of manslaughter, and thus found a verdict of guilty without the intent required by the statute, by classing it under some common law offense which required no intent. *Bonfanti v. State*, 2 Minn. 129.

**175.** Under Sec. 73, Chap. 119, R. S. (1851), it is not sufficient, on an indictment against B. for assaulting M., to find that the assault was committed on either M. or T. *State of Minnesota v. Boylson*, 3 Minn. 438.

**176. Punishment.** On an indictment for an assault with intent to murder. *Held*, that the jury might convict of the assault only, and the court might fine the accused \$200.00, under Sec. 44, Comp. Stat., p. 776, and Sec. 21, Comp. Stat., p. 784, nor do these provisions conflict with Sec. 206, Comp. St., p. 526, for though to give the District Court jurisdiction in the first instance, the offense charged must be punished with over three months' imprisonment, or fine exceeding \$100, still, as by express provision of statute, the jury may convict of a lesser offense, included within the one charged, the court may punish such lesser offense though within the jurisdiction of a justice of the peace. *Boyd v. State of Minnesota*, 4 Minn. 321.

*e. Assault with intent to commit rape.*

**177. Punishment.** A sentence of ten years in the penitentiary for an assault with intent to commit rape is authorized by Sec. 40, p. 706, Comp. St. *O'Connell v. State*, 6 Minn. 279.

*f. Assault with intent to do great bodily harm, being armed with a dangerous weapon.*

**178. What is a dangerous weapon.** "A large heavy stone," in the hands of a man intending to do great bodily harm, is one likely to produce death or great bodily harm, hence is a "dangerous weapon"

within the meaning of the statute, Chap. 41, G. L. 1864. *State v. Dineen*, 10 Minn. 407.

**179.**—It seems that *offensive* and *dangerous* weapons are synonymous terms. *Ib.*

**180. What is being armed with a dangerous weapon.** A person having and using a stone or rock, may or may not be said to be "armed with a dangerous weapon" under the statute, according to the size and description thereof, and the manner in which it is seized, held and used, and the peculiar circumstances of each case. *Ib.*

**181. Materiality of place and time of arming.** Under the statute which provides that "if any person, being armed with a dangerous weapon, shall assault another with intent to do great bodily harm, etc.," the *place* of arming (*i. e.*, whether at place of the assault or elsewhere,) is immaterial, and as to the *time* of being armed, it is only necessary that it precede the assault. Whether to constitute an "arming" the weapon should have been *taken* with the intention of using it for offensive purposes, no opinion expressed. *Ib.*

**182. Criminal intent is sufficient—not felonious.** The intent which is necessary to constitute the offense of assaulting one with intent to do great bodily harm, need not be a *felonious* intent—it is sufficient if it be a *criminal* intent. *Ib.*

**183. Defense.** On an indictment for assaulting with intent to do great bodily harm, under the statute, if the jury found that at the time and place, and in the presence and midst of the disturbance spoken of by witnesses, the defendant on a sudden, and in the heat of a momentary excitement, picked from the ground a stone or rock with which he was not previously armed, and struck the blow sworn to, such facts of themselves did not amount to a defense—it was for the jury, in view of those circumstances, to determine whether the criminal intent necessary to constitute the offense was present—of which they are the sole judges. *Ib.*

**184. Premeditation not essential.** "Premeditation," except as implied in the *intent* to do great bodily harm, is not necessarily an element of the offense of assaulting with intent to do great bodily harm, being armed with a dangerous weapon. *State v. Garvey*, 11 Minn. 154.

*g. Libel.*

**185. It seems that libel is punishable as a crime at common law in this State.** BERRY, J., *dissents*. *State v. Pulle, et al.*, 12 Minn. 164.

*7. Offenses against property.*

*a. Larceny.*

**186. May convict of lesser degree not charged.** On an indictment for larceny "from the person," the defendant may be convicted of larceny in a lower degree. *State v. Eno*, 8 Minn. 220.

**187. Evidence of ownership of property.** On an indictment for larceny, to prove ownership of the property, it is incompetent to show the finding of a jury on that point in a civil action—the parties were not the same. *State v. Hogard*, 12 Minn. 293.

**188. Recent possession of property as evidence of guilt.** Recent possession of stolen property is evidence to go to the jury of the defendant's guilt, and the court cannot properly say, in any given case, that evidence of good character, or open and undisguised possession of stolen property, is a satisfactory explanation of such recent possession—it is for the jury to determine what weight shall be given to all the circumstances. *Ib.*

*b. Wilful and malicious killing, etc., of horses, etc.*

**189. Killing of a dog not an offense.** Sec. 39, Chap. 101, R. S., which provides that "every person who shall wilfully and maliciously kill, etc., any horses, cattle, or other beasts of another, etc., shall be punished, etc." does not include dogs, the kill-

ing of which is not indictable under it. *United States v. Gideon*, 1 Minn. 297.

**190. Animal must have been of value, and so charged.** Under Sec. 39, Chap. 101, R. S., the animal claimed to have been maliciously killed must be charged in the indictment to be of value, and proved as charged. *Ib.*

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## CUSTOM.

**1.** A custom among vendors of land warrants sold on a guaranty of genuineness, etc., to substitute on breach of the guaranty, other land warrants in lieu of paying their value in money, is not a valid custom. *Johnson et al., v. Gilfillan*, 8 Minn. 395.

**2.** Where defendants, merchants in New York, hired plaintiff to travel and take orders for and sell their goods, to be paid by a share of the profits on sales, in an action brought to recover such share, defendants cannot show a general custom of merchants in New York and elsewhere to employ traveling solicitors of trade, and reserve to themselves the option of filling or rejecting orders taken by such travelers—any usage to affect plaintiff, must have distinct reference to persons hiring for a share of the profits of the sale. *Dike v. Pool et al.*, 15 Minn. 315.

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## DAMAGES.

- I. GENERALLY.
- II. NOMINAL DAMAGES.
- III. EXEMPLARY DAMAGES.
- IV. LIQUIDATED DAMAGES.
- V. DAMAGES ON BREACH OF CONTRACT.
- VI. DAMAGES IN TORT.

*a. Injuries to property.*

*b. Injuries to the Person.*

(See EVIDENCE, 110.)

(See INTEREST, 6, 7, 8, 9.)

(See PLEADINGS, 34.)



## I. GENERALLY.

**1. Damages not recoverable in excess of amount claimed.** The plaintiff in a suit at law is limited in his recovery to the amount claimed by him in his declaration. *Elfelt v. Smith*, 1 Minn. 125.

**2. Where no rule of law governs the assessment of damage,** and the amount depends on computation, the judgment of the jury and not the opinion of the court is to govern, except in cases of partiality, prejudice or mistaken view of the merits of the case. *The City of St. Paul v. Kuby*, 8 Minn. 151.

## II. NOMINAL DAMAGES.

**3. On demurrer.** When a complaint sets up a contract between the parties and alleges a breach thereof—on demurrer plaintiff is entitled to nominal damages—at least. *Cowley v. Davidson*, 10 Minn. 392.

## III. EXEMPLARY DAMAGES.

**4. In cases of wilful wrongs,** exemplary damages may be given. *Fox v. Stevens*, 13 Minn. 272.

**5. Exemplary damages are not recoverable in an action for the conversion of personal property,** where there has been no wrongful taking. *Jones v. Rahilly*, 16 Minn. 320.

## IV. LIQUIDATED DAMAGES, PENALTIES, ETC.

**6. When the stipulation is to pay a greater sum, on default of paying a lesser sum, no form of words will change it from a penalty to liquidated damages.** *Mason et al. v. Callendar et al.*, 2 Minn. 369.

**7. The only cases in which courts will carry into effect an agreement to pay a fixed and stipulated amount of damages,** are those where the nature of the damages provided against are not regulated with certainty by any rule of law, and cannot be readily ascertained by a jury, and the whole contract must be of this character,

for if on the breach of any one covenant contained in it, the damages are ascertainable by a jury with any degree of certainty, the stipulation will be held a penalty to cover damages on such breach, and cannot be changed to meet the others when the damages are uncertain. *Ib.*

**8. For certain rules laid down obiter,** for the determination of liquidated damages and penalties, see *Mason, Craig, et al. v. Callendar et al.*, 2 Minn. 366.

## V. BREACH OF CONTRACT.

**9. An entire contract.** If A. engages to work for B. for a year, and he voluntarily quits without B.'s consent, before the year expires, he can recover nothing. If he is discharged by B. before the year expires, without cause, he can recover as damages, the difference between the agreed price and such sum as he has, or which it is shown he might have received for work elsewhere. *Williams v. Anderson*, 9 Minn. 50.

**10. Continuing, executing contract.** On a breach of a continuing executory contract the injured party may: First, Bring an action at once; or, Second, hold himself in readiness to perform, and bring action from time to time or at expiration of contract, for damages sustained at time of bringing suit. In the first instance the rule of damages would be the profits he would have realized during the continuance of the contract, had it been faithfully performed—excluding the expenses of a full performance. In the second instance the rule of damages would be the like profits, together with the cost incurred by the party in holding himself in readiness to perform. *Murrisson et al. v. Lovejoy*, 6 Minn. 319.

**11. Goods, contract to pay for.** A breach of a contract to pay for goods sold and delivered, carries with it the right to recover damages measured by the legal rate of interest, and from the moment of default, and these damages need not be pleaded. *Cooper et al. v. Reaney*, 4 Minn. 528.

**12.—contract to furnish for special purpose.** When a contract was made by one to furnish another a specified article of a particular description, to be used for a particular purpose, at *another place* and the *destination, purpose and use, is known to him* who agrees to furnish the article, and the article furnished is defective, and not according to the contract, the damage occasioned by reason of such defects, as applied to such purpose at the place of its use, are *direct and recoverable*, and the damage in such a case is the difference between the value of the article furnished and that agreed to be furnished *at the place of its use*—and not the difference between its actual value as furnished at that place and the price at which the vendee *was to have sold* it to some third party. *Converse v. Burrows et al.*, 2 Minn. 235.

**13. Logs, contract to deliver at certain time.** Where logs have been delivered after the time when they should have been delivered, the measure of damages is the difference between the market value of the logs when they were in fact delivered, and when they should have been delivered under the contract. *Whalon et al. v. Aldrich*, 8 Minn. 346.

**14.—contract to supply a mill.** Plaintiff sued defendant on an alleged breach of contract by which defendant was to furnish plaintiff logs for a certain time, and purchase the lumber at an agreed price, while plaintiff was to saw the lumber, and to do so was to rent certain mills of other parties. Breach, that the defendant failed to supply the logs, and plaintiff as a portion of the damages, claimed to estimate the rent actually agreed to be paid by him for the mills to the lessors—under the rule in *Morrison et al. v. Lovejoy et al.*, 6 Minn. 319. *Held*, the rent which plaintiff might estimate in arriving at his damages was not what he had contracted to pay to the third parties, for defendant was no way in privity with that contract, but what the rent of the mills was actually worth—and that the rule in 6 Minn. 319 is to be so understood.

*Lovejoy et al. v. Morrison et al.*, 10 Minn. 136.

**15. Title, covenant for, and quiet enjoyment.** On breach of covenants of seizing and right to convey, the damages are the consideration money with interest from date of deed, or if the consideration was land, its value at time with interest since, not exceeding the amount named in the deed. *Burke et al. v. Beveridge*, 15 Minn. 205.

**16. Wheat, contract to sell and deliver.** When A. contracts to sell and deliver wheat to B. at Ottawa, and the latter sends a barge to said place to receive the same, which returns empty by reason of A.'s failure to deliver the wheat, B. cannot recover for the expense of sending the barge to O. as *general damages*, for it cannot be presumed to have resulted from the breach of the contract, it is certainly not the *necessary* result, and if recoverable as *special damages* must be alleged. *Bruckett v. Edgerton*, 14 Minn. 174.

**17.—contract to receive and transport.** On a breach of a contract to receive wheat at Ottawa and transport the same to Milwaukee by the 20th day of May, 1864, the rule of damages is the difference between the value of that quality of wheat at Milwaukee on that day, and the price of wheat of same quality, at same time, in Ottawa, with costs of transportation from said Ottawa to said Milwaukee, at the rate mentioned in the contract added, together with interest from said 20th of May, 1864. *Conley v. Davidson*, 13 Minn. 92.

**18.—contract to cut.** In an action against defendant for breach of contract to cut plaintiff's wheat at a given time, the court charged that if the jury "found that the defendant made the contract alleged in the complaint, and failed to fulfill it, as alleged, and that plaintiffs used reasonable diligence to secure the crop of wheat, and to prevent loss, after defendant's failure, and which defendant had agreed to harvest, defendant would be liable for all damages sustained by plaintiff in consequence of the

defendant's neglect to fulfil, etc., whether such damage was caused by wheat becoming ripe and shelling in handling, or whether the same was destroyed by a storm which occurred after defendants had agreed to harvest it, and had reasonable and sufficient time to harvest and secure it, as he had agreed to. *Held*, not to ignore all distinctions between ordinary and extraordinary storms; the instruction relates to loss from ordinary storms, not extraordinary ones, and to which the parties must have referred in entering into the contract. *Baldwin et al. v. Blanchard*, 15 Minn. 489.

**19. Warranty, breach of as to horse.** Where the complaint alleges a breach of warranty as well as deceit, and the defendants did not demur to such joinder of causes of action, the jury, if they believe the horse was falsely represented and warranted to be sound, but was in fact so diseased as to make him worthless, may find for the plaintiff for the value of the horse. *Johnson v. Wallower et al.*, 15 Minn. 472.

**20. Promissory note with privilege of extension by paying interest annually.** Promissory note, payable in one year interest at 4 per cent. per month, "with privilege of two years by paying interest annually at 4 per cent. per month." Payee allowed it to run two years, no interest having been paid—the question being what could the payee recover for use of the money after the first year? *Held*, it depended solely on the election of defendant by paying the annual interest, whether the contract extended beyond the first year, he having failed to make that election, the contract was broken at end of first year, and plaintiff could not keep it alive by any waiver on his part, for defendant had declined to adopt the privilege of extension, by paying interest, and plaintiff could recover damages only at rate of statutory interest, (7 per cent.) after breach. Following *Talcott v. Martin*, 3 Minn. 339. *Chapin v. Murphy*, 5 Minn. 474.

## VI. DAMAGES IN TORT.

### a. Injuries to property.

**21. Trespass recoverable.** It seems, that, in trespass damages may be recovered up to day of trial. *McMILLAN J. Dorman v. Ames & George*, 12 Minn. 451.

**22. Claim and delivery.** In an action for claim and delivery of personal property, a person cannot recover more damages than he claims, nor assume the value of the property to be ascertained by the assessment of damages where no value is found. *Eaton v. Caldwell*, 3 Minn. 134.

**23.**—In "claim and delivery," in the absence of fraud, malice, negligence or oppression on the part of the plaintiff, and there is no circumstance showing the plaintiff does not honestly believe himself the owner of the property, the measure of the defendant's damage is the value of the property at or about the time it was replevied by the plaintiff. *Berthold v. Fox et al.*, 13 Minn. 501.

**24. Goods wrongfully taken from an officer by the general owner.** When plaintiff had replevied the property from an officer (defendant) who took the same on execution against S., and on the trial defendant recovers judgment on ground that plaintiff's title was based on a sale from S., which was fraudulent as against the execution creditor; the rule of his damages in case the property is not returned is not the full value of the property, for plaintiff is the general owner, subject to defendant's special property by virtue of the levy, but the amount of the execution, debts, interest and costs. *Dodge v. Chandler*, 13 Minn. 114.

**25.**—**officer can recover the value of his special interest only.** When an officer has taken on an execution property of the judgment debtor, and the same has been retaken by the debtor in separate proceedings, and the officer is found to be entitled to judgment, he can only recover the value of his *special interest*, which is the execution, with interest and costs, and not the re-

turn of the property, or the value thereof. if a return can not be had. *Lacrosse & Minnesota Steam Packet Co., v. Robertson*, 13 Minn. 291.

**26.**—One having a special property in goods, can only recover as against the *general owner* the value of his *special interest*. *Ib.*

**27. Goods, unlawful taking and conversion.** A party recovering for the value of goods unlawfully taken and converted, is entitled to interest on the value of the goods from the time of the taking, and under the statute it is to be assessed by the jury. *Derby & Day v. Gallup*, 5 Minn. 119.

**28. Logs, conversion of.** Had defendants become possessed of plaintiff's logs, without authority from him, and converted them to their own use, or being lawfully possessed, had they afterwards made any disposition of them contrary to authority, they would have been liable in damages for the conversion, and the measure of such damage would have been the value of the logs. *Chase et al., v. Blaisdell*, 4 Minn. 90.

**29. Conversion of money.** Where a defendant has misapplied the proceeds of plaintiff's property which he had lawfully sold—he could not be held to greater damages than the amount received with interest, unless it was specially alleged and proved that the property was wilfully or negligently sold for less than its value. *Ib.*

**30. Conversion of note.** In an action for damages for converting a promissory note, a judgment for the amount received on the note by defendant, where less than the face of the note and interest due, cannot be to his prejudice. *Nininger v. Ban-ning*, 7 Minn. 274.

**31. Negligent discharge of an indorser.** In an action against defendant—bankers—for negligently discharging an indorser on a promissory note left with them for collection by failure to give due notice of non-payment—the measure of damages is *prima facie* the face of the paper. Defendants may mitigate the damages by showing solvency of maker, insolvency of indorser during whole interval from maturity of

note to commencement of the action, or that paper was partially or wholly secured, or any fact which will lessen the actual damage. *Borup et al. v. Ninninger*, 5 Minn. 523.

**32. Negligent loss of note.** Where by the negligent act of defendant plaintiff had lost a promissory note, drawing *four* per cent. per month interest. *Held*, he can recover the value of the note with accrued interest at the *time* of the destruction by defendant, and only *seven* per cent. (legal rate,) from that time till judgment. *Sanborn et al. v. Webster*, 2 Minn. 328..

**33. Nuisance.** In an action for damages sustained by reason of a nuisance erected by defendant, (mill dam,) plaintiff can recover only for injuries sustained up to commencement of action—since every continuance of a nuisance is a fresh nuisance and ground for a distinct action—*contra* it seems, in trespass. *Dorman & Ames v. George*, 12 Minn. 451.

**34. Exempt property, levy on.** “Exemplary damages” are allowed in an action to recover damages for levying upon exempt property, knowing the same to be exempt. *Lyon v. Pickett et al.*, 7 Minn. 184.

**35.**—The fact that defendant knew the property was exempt at the time of the levy, is sufficient of itself to authorize a jury in finding that it was done for the purpose of harrassing and oppressing the plaintiff, and thereupon to base a verdict for peremptory or exemplary damages. *Ib.*

**36.** \$150.00 was not thought excessive “exemplary damages” for levying on a pair of horses, knowing they were exempt. *Ib.*

**37. Fraud in sale, proper injury.** In arriving at the damages sustained from a fraudulent warranty, in sale of certain sheep, it is competent to ask a witness “what was the difference (on the day of sale) between the value of the sheep in the condition they were seen and described by the witnesses, to be at subsequent periods designated, and their value if sound.” *Marsh v. Webber*, 16 Minn. 418.

**38. Fraud in sale of personal property.** Where a vendee, who has been defrauded in the purchase of personal property, elects to retain the property and brings an action for the recovery of damages for the fraud, he may recover all the damages of which the act complained of was the efficient cause; as in this case, where there was a fraudulent warranty against an infectious disease in a flock of sheep, the vendee can recover the whole loss occasioned by the presence of the disease among the flock purchased, as well as among those which took the infection *after the sale*, without vendee's fault, as those which had it when the sale was made; also such consequential damages as resulted to another flock owned by him at the time of the purchase by reason of the communication of such disease to it from a mingling of the two flocks—the purchaser being ignorant of the presence of such disease in the flock purchased and exercising ordinary care. *Marsh v. Webber*, 16 Minn. 418.

*b. Injuries to person.*

**39. Assault and battery.** In assault and battery the plaintiff is not confined to the recovery of merely *nominal* damages, but may recover such general damages as he may prove to have resulted from the injury. *Andrews v. Stone*, 10 Minn. 72.

**40. Expelling passenger from R. R. car.** In an action against a R. R. Co., for damages for unlawfully expelling plaintiff from its car, in the absence of malice, in estimating damages sustained by plaintiff, the jury may take into account not only the loss of time but pain of body, pain of mind, and injury to feeling of plaintiff, and award damages in their discretion as a compensation for the ill-treatment to which plaintiff was subjected in being ejected from the car—such damages being compensatory and such as are alleged in the complaint or implied by law. *DuLaurens v. 1st Div. St. P. & P. R. R.*, 15 Minn. 49.

**41. Malpractice.** In determining the question of damages, one is entitled to re-

cover for injuries arising from malpractice of a physician in treating a broken limb, the jury may consider the pain, suffering and disability to use the limb, both present and prospective, and these injuries are to be arrived at by a comparison of his condition as affected by the accident, with proper treatment of the limb, with it as affected by the accident with its improper treatment—the difference—if any injury resulted—being the effect of the improper treatment. *Chamberlin v. Porter*, 9 Minn. 260.

**42.**—A jury in estimating damages arising from malpractice of a physician are not confined to the actual amount expended in being cured, because no sum for other damages was proved, for as to some of the elements of damage in such cases the jury are to determine without testimony, there being no rule established by law and the opinion of witnesses not being admissible. *Id.*

**43. Malicious prosecution.** The jury are the proper judges as to the amount of damages in case of malicious prosecution, and their verdict will not be disturbed in the absence of passion, prejudice or improper motive. *Chapman v. Dodd*, 10 Minn. 350.

**44. Slander.** In slander the assessment of damages by a jury is conclusive, unless so exceedingly large as to warrant the conclusion that they were swayed by *preference, partiality, prejudice, passion or corruption*. *St. Martin v. Denoyer*, 1 Minn. 156.

**45. Seduction.** In an action for damages for seduction of plaintiff's daughter, besides the loss of service and the disbursement for medical treatment and other necessary expenses, the jury can give such additional damages for wounded feelings, mental suffering, and for the dishonor of the plaintiff and his family as they deem from the evidence a reasonable and just compensation therefor, not exceeding the amount claimed in the complaint. There being no negligence, collusion, passive sufferance or connivance on part of plaintiff. *Fox v. Stevens*, 13 Minn. 272.

**46. False imprisonment—excessive**

**damages.** In an action for damages for illegal arrest and detention of plaintiff, by the defendant, where there was evidence from which the jury—if they believed it—could fairly infer that defendant's sense of public duty (as an alderman at a fire) was quickened by personal feelings, as well as a reckless indifference to plaintiff's feelings and personal rights on the part of defendant, which might savor in their opinion of oppression and abuse of power, and the detention being more than nominal—2½ hours in the city jail. *Held*, a verdict for \$800.00 damages was not so excessive or outrageous with reference to all the circumstances of the case, as to demonstrate that the jury were influenced by passion or prejudice. *Judson v. Reardon*, 16 Minn. 431.

## DAMS AND MILLS.

(See LIMITATION OF ACTION, 14, 15, 16, 17.)

**1.** Chap. 31, G. S., entitled "Dams and Mills," is constitutional. *Miller v. Troost et al.*, 14 Minn. 365.

**2. Petition, when sufficient.** A petition seeking to condemn land for mill dam purposes, under Chap. 129, Comp. St., described the several parcels of land which might be injured by the erection of the proposed dam, and stated the respective owners thereof, who are other persons than the petitioners. *Held*, a sufficient showing that the petitioners are not the "owners" of the land which will be injured within Sec. 1 of the statute, and that the law presumes *prima facie* want of "consent" within the meaning of that section. *Faribault et al. v. Hulett et al.*, 10 Minn. 30.

**3.—sufficient description.** In a petition under Chap. 129, Comp. St., p. 847, to take land for mill dam purposes, it is sufficient to state facts which bring the case within the provision of the act creating or conferring the jurisdiction (Sec. 1 and 2),

and need not show affirmatively that the relief applied for will not conflict with any proviso in the act as in Secs. 16 and 25. If those facts exist, they may be pleaded in bar. *Ib.*

**4. Right to maintain dam, commences where.** The fact that a lower proprietor had erected a dam before taking steps to have commissioners appointed to appraise damages to upper proprietor, does not affect his right to take such proceedings—his right to maintain the dam dates from the service of notice of such proceedings, and the condition of the upper proprietor's power (Sec. 16, Chap. 31 G. S.) at that time. *Miller v. Troost et al.*, 14 Minn. 365.

**5. Water power previously improved.** Whenever an owner on a stream has to any extent made any improvements in his power, with the *bona fide* intention to turn it to use, he comes within Sec. 16, Chap. 31, G. S., as a "water power previously improved." *Ib.*

**6. Appeal from assessment of commissioners.** An appeal from an assessment of commissioners, appointed under the *mill dam* act, brings up for consideration only questions as to the propriety of amount of damages awarded, and the court cannot on such hearing entertain a motion to set aside the order appointing the commissioners. *Turner et al. v. Holleran et al.*, 11 Minn. 253.

**7. Abatement of dam, what necessary.** Where defendant has a right to maintain a dam at some height, and the special verdict of the jury finds that the dam actually built is higher than the defendant is entitled to maintain it, but does not state how much higher, no judgment for an abatement or injunction can be entered thereon, for it can only be abated or enjoined to the extent that it exceeds the authorized height, which fact is not found. *Finch v. Green*, 16 Minn. 355.

**8. Height of dam—measurement.** In an action to recover damages occasioned by defendant's dam overflowing plaintiff's land with water, defendant asked the court to charge the jury that "the attempt to measure the actual height of fall of stream by

a process of instrumental levellings, is less satisfactory than, and must yield to actual, visible facts, because the instrumental measurements are liable to accidents and mistakes." *Held*, the Court rightly refused so to charge. *Ib.*

## DEBTOR AND CREDITOR.

(See HUSBAND AND WIFE.)

(PRINCIPAL AND SURETY, 4.)

**1. Debtor cannot assail creditor's assignment.** A debtor cannot attack his creditor's assignment on the ground of fraud in a suit against him by the creditor's assignee to recover the debt he owes the assignor (creditor). *Rohrer v. Turrill*, 4 Minn. 407.

**2. Debtor when protected as garnishee.** A judgment debtor being summoned as a *garnishee*, and judgment in such proceedings being had against him, paid the last judgment in good faith without notice that his creditor has before assigned his judgment against him to third parties. *Held*, that the debtor was not liable to repay the amount to the creditor's assignee—he having had no notice. *Dodd v. Brott*, 1 Minn. 272.

**3. Debtor, when discharged by creditor's loss of security.** Defendant endorsed the *negotiable promissory note of a third person* to plaintiff as collateral security, for the payment of his own debt. When said note became due, the maker was solvent and for a long time thereafter, during which time it might have been collected. While the maker was solvent defendant informed plaintiff that the note could be collected, and requested him to collect the same or permit him to collect it, and offered to substitute good and sufficient real estate security for his debt in the premises, but plaintiff refused to sue the note or permit defendant to do so, whereby the note and indebtedness became wholly lost. *Held*, good defense to plaintiff's cause of

action. *Lamberton et al. v. Windom et al.*, 12 Minn. 232.

**4. Creditor's right to remove fraudulent obstructions to his execution.** When a fraudulent obstruction (assignment) is interposed to prevent the sale of property, subject to an execution, a creditor may file his bill to remove the obstruction, as soon as he has obtained a specific lien upon the property by the issuing of his execution. *Banning et al. v. Armstrong*, 7 Minn. 40.

**5. Creditor's remedy against stockholders of defendant corporation.** In a direct proceeding in equity, by a creditor against a corporation and its stockholders, invoking a court of chancery to subject the unpaid stock of the corporation to the liquidation of its liabilities, the creditor might, perhaps, avail himself of the company's insolvency, refusal to perform the acts necessary to create a legal liability on part of the stockholders, as by calling for installments as required by its charter, making no provision for the payment of its debts, total abandonment of the work for which it was created and its dissolution, as a ground for equitable relief. *Robertson v. Sibley*, 10 Minn. 323.

**6. Rights of creditor by purchase of debtor to property fraudulently transferred.** A simple contract creditor of a debtor who had transferred property in fraud of creditors, does not, by a subsequent purchase from such debtor of such property, acquire any ownership or right of possession of such property. *Jones v. Rahilly*, 16 Minn. 320.

**7. Reclaiming property transferred in fraud of creditors.** Where a debtor transfers property in fraud of creditors, by an absolute bill of sale, he can neither reclaim it himself, nor confer upon any other person—creditor or not—a title to the same. *Ib.*

**8. Creditor's lien—bankrupt proceedings.** A non-proving judgment creditor of a bankrupt, whose judgment was recovered and docketed before proceedings in bankruptcy were instituted, and who has not waived or released his lien, is not affect-

ed by the setting apart of an undivided half of two lots as a homestead by the bankrupt adjudication. *Ward v. Huhn et al.*, 16 Minn. 159.

**9. Receiver—absconding debtor.** An absconding judgment debtor owned a mortgage which was lost, the same being unaccompanied by any note or personal liability. *Held*, no receiver would be appointed at suit of the judgment creditor against the mortgagor and his grantee, subsequent to and with notice of the mortgage, to collect such lost mortgage and apply the same to the satisfaction of the creditor's judgment. *Gale v. Battin et al.*, 16 Minn. 148.

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## DECLARATION OF FORMER OWNER.

(See EVIDENCE, III.)

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## DECEIT.

(See CIVIL ACTION, X.)

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## DEDICATION.

(See EASEMENTS, II., b.)

(See EVIDENCE, 103, *et seq.*)

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## DEEDS.

### I. GENERALLY.

### II. THE EXECUTION, ACKNOWLEDGMENT, ETC.

#### a. Generally.

#### b. Acknowledgment.

#### c. Delivery.

### III. WHO MAY TAKE BY DEED.

### IV. CONSTRUCTION.

### V. VALIDITY OF DEED.

### VI. RECORDING DEED.

### VII. NOTICE GIVEN BY DEED.

### VIII. CORRECTING DEFECTIVE DEED.

### IX. IMPEACHING.

### X. QUIT CLAIM DEED.

(See PLEADINGS, 49.)

(See EVIDENCE, 109.)

(See MORTGAGES, II.)

(See COVENANTS.)

(See TRUSTS AND TRUSTEES, 15.)

## I. GENERALLY.

**1. Void in part, void in whole.** Deed of land in one entire piece being void in part, for want of authority in the attorney to convey, is void as to the whole. *Rice v. Tavernier*, 7 Minn. 248.

## II. THE EXECUTION, ACKNOWLEDGMENT, ETC.

### a. Generally.

**2. Requisites of deed.** Every conveyance of lands must be in writing, under seal, signed by the grantor, and executed in the presence of two witnesses, who shall sign the same as such, and each of these acts is essential to the validity of the conveyance. *Meighen v. Strong*, 6 Minn. 177.

**3. Witnesses.** Where the statute requires the execution of an instrument to be in the presence of two witnesses, it is not sufficient that one person should witness the signature of one party, and another person witness the execution by the other party—each of the parties must have two witnesses. *Chandler v. Kent*, 8 Minn. 524.

### b. Acknowledgment.

**4. Seal to certificate of acknowledgment.** In the absence of statute it is not necessary that an official certificate of acknowledgment should be under seal. If the certificate styles the officer taking it one who is authorized by statute to take the same, it is *prima facie* evidence of his



official character. No seal was required by our act in 1852. *Baze v. Arper*, 6 Minn. 220.

**5.**—The want of an official seal to the certificate of acknowledgment does not invalidate the acknowledgment, the statute not requiring it—Comp. St. 398, Sec. 8—following *Baze v. Arper*, 6 Minn. 220. *Thompson et. al. v. Morgan*, 6 Minn. 292.

**6.** The curative statute of 1866, (Comp. St., p. 406,) refers to acknowledgments taken by the clerks of the Supreme, District and Probate Courts, and not to Judges of Probate. *Baze v. Arper*, 6 Minn. 220.

#### c. Delivery.

**7. What constitutes.** When a party executes and acknowledges a deed, and afterwards, either by acts or words, expresses his will that the same is for the use of the grantee, especially where the assent of the grantee appears to the transaction, it shall amount to a delivery, and convey the estate, although the deed remains in the hands of the grantor. The main thing the law looks at, is whether the grantor indicates his will that the instrument should pass into the possession of the grantee, and if that will is manifest, then the conveyance inures as a valid grant. *Stevens v. Hatch et al.*, 6 Minn. 64.

**8.**—B. executed and acknowledged a deed to N.; advised N. by letter that he had put it in the "safe to guard against accidents to" him (B.), would rather not record it until he saw N. at that place, when they could see that it was all right, but would if N. said so. N. replied: "It is all right as you wish to do." *Held*, a good delivery. *Ib.*

**9.**—To constitute a delivery of a deed sufficient to pass title to real estate, the same must be delivered by the grantor and accepted by the grantee. *Comer v. Baldwin*, 16 Minn. 172.

**10.** For a statement of facts which were held insufficient to constitute a delivery of deed, see *Ib.*

### III. WHO MAY TAKE BY DEED.

**11. Unincorporated association.** An unincorporated, voluntary association of individuals, called "The German Land Association," composed of "several hundred persons," has no legal capacity to take or hold real property, and a grant to such association *eo nomine* would pass no title. *German Land Association v. Scholler*, 10 Minn. 331.

### IV. CONSTRUCTION.

**12. "The half."** The conveyance of "the half" of any particular property conveys in law the *undivided half*. *Baldwin v. Winslow*, 2 Minn. 216.

**13. Such construction as will give conveyance effect.** If the form of a conveyance be an inadequate mode of giving effect to the intention, according to the letter of the instrument, it is to be construed under an assumption of another character, so as to give it effect—*e. g.*, a covenant to stand seized is sometimes held good as a grant. *Hope v. Stone et al.*, 10 Minn. 141.

**14. When the property fronts on a public landing.** It would seem that unless the parties most clearly express their meaning to the contrary, a deed of a lot fronting on a public landing, carries the fee not only to the center of the landing, but the middle of the stream, or at least to the water. *The Village of Mankato v. Willard et al.*, 13 Minn. 13.

**15. Description.** Where a description in a deed of land includes several particulars, *all* of which are necessary to ascertain it, no estate will pass, except such as agrees with every particular. But if the description is sufficient to ascertain the estate, although the estate cannot agree with all the particulars, yet it will pass. *Roberts v. Grace et al.*, 16 Minn. 126.

### V. VALIDITY OF DEED.

**16. When grantor has no interest.** A deed purporting to convey property which has not yet come into the ownership of

grantor, is void, and conveys no title. *Brisbois v. Sibley et al.*, 1 Minn. 230.

**17. Uncertainty of the "cestuis que trust."** A grant to T. S. and H. in trust for an unincorporated, voluntary association of individuals, called the "German Land Association," "composed of several hundred persons," is inoperative, by reason of the uncertainty as to who the persons were, associated under that name, and were the intended beneficiaries within Sub. 5, Sec. 31, Comp. St. 373. *German Land Association v. Scholler*, 10 Minn. 331.

## VI. RECORDING DEED.

**18. Title passes without record, when.** Sec. 1, Chap. 46, R. S., has the effect, in conveyances of real estate duly executed and delivered, to pass the title without record, as against all except *bona fide* purchasers for a valuable consideration, and an attaching or judgment creditor is not such a purchaser. *Greenleaf et al., v. Edes*, 2 Minn. 264.

**19. When record necessary.** An "occupant" on public lands under act of Congress of May 23, 1844, has such an interest in land as is contemplated in the recording laws of this State, Comp. Stat., p. 379, Sec. 30, and a conveyance of such an interest will not bind subsequent purchasers in good faith and for a valuable consideration, whose conveyances are first recorded. *Davis v. Barnes & Murphy*, 3 Minn. 121.

## VII. NOTICE GIVEN BY DEED.

(See NOTICE.)

**20.** A party accepting a deed containing the following clause—"subject to a mortgage executed by (the grantor) to W."—takes his title with actual notice of the existence of the mortgage, and of the liability of his grantor thereupon—even though said mortgage be defective in point of law, and only constitutes a lien in equity. *Ross v. Worthington*, 11 Minn. 438.

## VIII. CORRECTING DEFECTIVE DEED.

**21. By subsequent deed.** The record showed that the husband was the owner in fee of the premises in November, 1864, that on 5th July he conveyed to his wife (plaintiff) by a deed defective in its description of the land. Afterwards, March 25, 1867, he executed and delivered to plaintiff another deed, releasing all his right, title and interest in the land, and reciting that "this deed is made to correct description, and to confirm in Mary Greve title to land intended to have been described in and deeded by" the former conveyance. Held, even supposing the first deed was void by reason of uncertainty, and conveyed nothing, the imperfection was corrected by the last one, so that the two taken together would operate to pass the title, for the imperfection having occurred by mistake, could be corrected not only by court of equity but by act of the parties. *Greve v. Coffin*, 14 Minn. 345.

## IX. IMPEACHING.

**22.** A trustee of occupants of public land under the town site act, having conveyed to defendant's grantor (the occupant), and then having afterwards taken a mortgage on the land to secure his fees and charges, cannot, on ascertaining that the attorney in fact had no authority to mortgage under his power, then claim that the mortgage and conveyance were one transaction, and the deed was on condition that the mortgage debt be paid, for having taken with notice of the attorney's power, and no fraud, the delivery of the deed was voluntary and valid. *Morris et al. v. Watson et al.*, 15 Minn. 212.

**23. The receipt of a consideration,** admitted in a deed, cannot be contradicted for the purpose of raising a resulting trust for the grantor. *McKusick v. The Commissioners of Washington County*, 16 Minn. 151.

**24.**—It is not competent, for the purpose of destroying the effect and operation

of a deed, to show that no consideration was paid, where one is acknowledged therein, except to prove fraud or mistake. *Ib.*

## X. QUIT CLAIM DEED.

**25. Passes what title.** Under Sec. 3, Chap. 35, Comp. Stat., p. 397, providing what estate will pass under a deed of quit claim or release in common use. *Held*, that nothing will pass beyond grantor's actual interest at the time of the conveyance, whatever that may be. *Martin v. Brown et al.*, 4 Minn. 282.

**26. Grantee takes at his own risk.** When a person relies on a mere quit claim of a party's interest in property, he does so at his peril, and must see to it that there is an interest to convey. A release and quit claim presupposes in the grantee an interest in the property prior to the release and quit claim—in other words, that such a deed always conveys less than the whole estate. *Ib.*

**27. Passes only lawful estate of grantor.** A quit claim deed passes only the estate which the grantor could lawfully convey. Gen. St., Chap. 40, Sec. 4. *Hope v. Stone*, 10 Minn. 141; *Everest v. Ferris*, 16 Minn. 26.

## DEFINITIONS.

**1.** When the statutes furnish lucid definitions, they should be adhered to by the courts, and not set aside for the old, technical common law phrases. *Bonfanti v. State*, 2 Minn. 131.

**2.** The word *may*, in statutes, means *must* or *shall* only in cases where the public interests or rights of third persons require it to be so construed. *Lovell v. Wheaton et al.*, 11 Minn. 92.

**3.** As to the correct definition of an *ex post facto* law, see *State v. Ryan*. 13 Minn. 370.

## DEMAND.

(See CIVIL ACTION, XXII.)

(See EVIDENCE, 102.)

(See EQUITY, 7.)

(SEE ABSTRACTS.)

## DEMURRER.

(See PLEADINGS.)

(See CRIMINAL LAW, 18.)

## DELIVERY.

(See DEEDS, II. c.)

## DEPOSITIONS.

(See CRIMINAL LAW, 90.)

## DEPUTY SHERIFF.

(See SHERIFF, VIII.)

## DISCHARGE.

(See PRINCIPAL AND SURETY, IV.)

## DISMISSAL AND DISCONTINUANCE OF ACTIONS.

(See PRACTICE, II. 7.)

## DISTRICT ATTORNEY.

**1.** The Territorial Law of 1851, providing for the election of district attorneys

in each county, organized for judicial purposes, is not repugnant to the State Constitution, nor repealed thereby, except in so far as it makes it the duty of said officers to attend to criminal proceedings on behalf of the government; as to all civil matters in which the county for which they are elected has an interest, their duties remain as before the adoption of the Constitution. The prosecuting attorneys of the districts provided by the Constitution for each district, is the one to attend to the criminal matters on behalf of government. *Nourse v. The Board of Supervisors of Hennepin County*, 3 Minn. 62.

## DISTRICT COURT.

(See COURTS, III.)

## DIVORCE.

**1. Contract between husband and wife concerning.** A husband brought suit for divorce, and then entered into a contract with his wife stipulating that if the "said Roxa (defendant) would not appear in said action and interpose her claim for alimony," etc., he would assign certain property to a trustee for her benefit, etc. *Held*, the contract was against public policy, and void, and could not be enforced as against the husband, though the wife had performed. The contract was a fraud on the court, and would have prevented a divorce had it been known. *Belden v. Munger*, 5 Minn. 211.

**2. Admissions of parties insufficient.** A decree of divorce cannot be made upon the admissions of the facts charged in the complaint; the facts must be established by testimony of witnesses other than the parties—and this though the statute was silent. *True v. True*, 6 Minn. 458.

**3. Vacating decree for fraud.** A decree of divorce, though granted by a court

of competent jurisdiction, may be vacated for fraud. *Ib.*

## DURESS.

**1. The existence of a mortgage**, containing a power of sale by which defendant's land could be sold on refusal to pay a high rate of interest, does not constitute in law such *duress* as will authorize a recovery of money paid on such interest; for the money was contracted to be paid, was not extortionate. *Nutting v. McCutcheon*, 5 Minn. 382.

**2. Payment of taxes** to a collector, on demand, with the assessment roll and warrant attached in his hand, is not a voluntary payment. *Board of County Commissioners of Dakota County v. Parker*, 7 Minn. 267.

**3.** Where a wife is induced to execute a conveyance of her separate property by the importunity, abusive treatment, and threats of various kinds of her husband, such as an abandonment and to turn her out upon the world to shift for herself, and that it was only on account of such treatment, and to keep the peace, she executed the conveyance, such conveyance will be declared void for duress. *Tapley v. Tapley et al.*, 10 Minn. 448.

**4. Imprisonment by order of law** is not duress; to constitute duress, the arrest, or subsequent detention, must be tortious and unlawful. *Taylor v. Blake*, 11 Minn. 255.

**5. Query.** Will a person, who, being arrested for a just cause, and with lawful authority, *but for an improper purpose*, pays money for his enlargement, be considered as having paid the money by duress of imprisonment? *Ib.*

## EASEMENTS.

- I. GENERALLY.
- II. HOW CREATED.

a. *By Estoppel.*

b. *By Dedication.*

1. *Generally.*

2. *Dedication at Common Law.*

3. *Dedication under Statute.*

4. *Revocation of a Dedication.*

### III. ABANDONMENT.

#### I. GENERALLY.

**1. Perpetual easement in land can be created by writing only.** A perpetual easement in land is such an interest in land as comes within the statute, which makes a deed or conveyance in writing necessary to its creation, grant, etc., Sec. 10, p. 334, G. S. *The Village of Mankato v. Willard et al.*, 13 Minn. 13.

#### II. HOW CREATED.

a. *By Estoppel.*

**2. Where a grantor conveys land fronting it on a street.** The general rule is, that, where a grantor conveys land abutting or fronting it on a street, in the absence of qualifying circumstances he will be estopped as against his grantee to deny that it is a street—if he be the owner of the so-called street—and if the premises to which the right of way attached are divided, the right of way passes to each portion into whosoever hands it may come, but only so far as applicable to such portion. *Dawson v. St. P. Fire & Marine Ins. Co.*, 15 Minn. 136.

**3. Rights of assignee of a part of the dominant estate to an easement created by estoppel.** Where A. conveys to B. land bounding it on a strip of land called a street, of which A. is the owner, and B. subsequently conveys a portion of said tract which does not abut upon such strip, to C., and C. has no right of way over the portion retained by B., either by express grant or by necessity, no right of way over said so-called street is appurtenant to the parcel conveyed to C. And if at time of

A.'s conveyance to B. the former exhibited a map of the premises conveyed, upon which said street is designated as a street, and B. in purchasing relies upon representation implied from the map that the strip is a street. *Query*, whether the simple exhibition of the map without any reference to it in the deed would confer a right of way over said strip? If so, the representation to be implied from the exhibition of the map, and the right of way to be implied would be substantially the same as are implied from the call of a deed bounding premises conveyed upon a so-called street, and incident to the frontage on said street, and not attach as a right appendant to said parcel of C. *Id.*

**4. It seems that the implied covenant as to streets designated in the plan is not confined to the street on which the lot fronts.** It seems, that, a conveyance of lots according to a map or plan, implies a covenant to the purchasers that the streets or other public places indicated on such plan shall be forever open to the use of the public, free from all claims or interference of the proprietors inconsistent with such use, and that this principle is not limited in its application to the single streets on which such lots may be situated, and therefore that a release of the easement by the owners of lots fronting on any particular street does not discharge the land over which the street is laid from the servitude, but that the owners of other lots purchased from the same proprietor have also an interest or easement in the street, though the lots do not front upon it. *Wilder v. City of St. Paul*, 12 Minn. 192.

b. *Dedication.*

1. *Generally.*

**5. A dedication operates as an estoppel.** A dedication is not a grant or donation. Its effect is not to deprive a party of title to his land, but to estop him, while the dedication continues in force, from asserting a right of possession inconsistent with the uses and purposes for which it

was made. *Scharmeier v. The St. Paul & Pacific R. R. Co. et al.*, 10 Minn. 82.

**6. Existence of a grantee at the time not essential to a dedication to the public.**

In dedications to the public for public use, it is not necessary that there exist at the time a grantee capable of taking thereunder. The manner of dedication, whether *in pais* or statutory (in the absence of statute provision) is immaterial. *City of Winona v. Huff*, 11 Minn. 119.

**7. Dedication may be made before U. S. patent issues.** A party who has purchased government land may dedicate the same to public use, although no patent has been issued. *Wilder v. City of St. Paul*, 12 Minn. 192.

**8. Claimant under town site act may estop himself from questioning his authority to convey or dedicate.** A party cannot give or grant, or conclusively donate to public use, land claimed by him under the "Town Site Law," before his right to a deed from the trustee is established, but whether his rights are inchoate or consummate, legal or equitable, or whether he has any right of any kind in or to the land, he may by his deed or dedication estop himself from afterwards questioning the validity of his title, or his authority to convey the fee, or donate any interest or estate to public use at the time of such sale or dedication. *The Village of Mankato v. Willard et al.*, 13 Minn. 13.

**9. Burden of railway, not covered by dedication for purposes of public street.**

The dedication of land to the public use as a common street or highway, does not confer the right to use the same for a railroad. *Gray v. The First Division of the St. Paul & P. R. R. Co.*, 13 Minn. 315. *Molitor v. The First Division of the St. Paul & P. R. Co.*, 13 Minn. 285.

**10.—where the fee remains in the original owner.** Where land has been dedicated to the public for use as streets and landing, the fee remaining in the original owner or his grantees, such streets or landing cannot be subjected to any greater

burden or servitude than was intended by such dedication, and the laying of a railroad track is, manifestly, not such a use as was contemplated by a dedication under a statute "which provided that the land intended to be for the streets, etc., shall be held in the corporate name thereof, in trust to and for the uses and purposes set forth, and expressed or intended." *Scharmeier v. The St. Paul & Pacific R.R. Co.*, 10 Minn. 82.

**11.—so, it seems, when the fee passes it is on the condition subsequent that, it be used for the purposes originally contemplated.** *It seems*, that if a dedication of land for streets and landing is made under a law that conveys to the town (or city) the fee in such land, such dedication would be made on the consideration and express condition that the land should be used for *and as streets and landing only*, for the use and benefit of the public generally, and particularly for the use and benefit of the owners of adjacent lots, and the town (or city) would be bound to hold solely for such uses. The original owner gave, and subsequent owners purchased the property fronting on such streets or landings, on the condition and with the understanding, and implied agreement that the streets and landing should forever be kept open for their use, benefit and enjoyment, and it would seem that they had a vested right in such streets and landing so as to prohibit the same from being taken or injuriously affected without compensation—as for R. R. purposes. *BERRY, J.*, expresses no opinion. *Id.*

**2. Dedication at common law.**

**12. Requisites of common law dedication.** To constitute a valid common law dedication, there must be an intention to dedicate, and an act of dedication on the part of the owner, and an acceptance on the part of the public. Subject, perhaps, to this qualification, namely, that if the owner of the servient estate intentionally or by *gross negligence*, leads the public to

believe he has dedicated the premises to public use, he will be estopped from contradicting his representations to the prejudice of those whom he may have misled. Indeed a dedication at common law is an *estoppel in pais*. *Wilder v. City of St. Paul*, 12 Minn. 192.

**13. Time necessary to constitute it.** To establish a common law dedication, it is not necessary to show an adverse, exclusive, and uninterrupted possession of the premises for twenty years, with the actual or presumed knowledge of those adversely interested. The right of the public does not rest upon a grant by deed, nor upon twenty years possession, but upon the use of the land, with the assent of the owner, for such a length of time, that the public accommodation, and private rights, might be materially affected by an interruption of the enjoyment. The length of time of the enjoyment is a fact for the jury to consider, as tending to prove an actual dedication and acceptance by the public. *Case v. Favier*, 12 Minn. 89.

**14. The intent of the alleged dedication the important question.** Where a common law dedication is claimed the important question is the intention of the party claimed to have made the dedication. This is a question of fact for the jury to determine from all the circumstances. Any thing by which the intent may be established or disproved, is material. *Ib*.

**15. Acceptance by officers of city not necessary.** To constitute a dedication at common law of land for a street in a city it is not necessary that an acceptance by the officers of the city be shown, and though the acts of individuals are unsatisfactory, they are admissible, and their weight is for the jury to determine. *Wilder v. City of St. Paul*, 12 Minn. 192.

**16. At common law no particular time is fixed to make a dedication consummate** as to acceptance by user—the true test is “the assent of the owner of the land to the use, and the actual enjoyment of the use for such a length of time that the public accommodation and private rights might

be materially affected by an interruption of the enjoyment. *Baker et al. v. The City of St. Paul*, 8 Minn. 491.

**17. What time immaterial.** Where the act of dedication is something more definite than mere acquiescence in the user, as for instance, a distinct declaration of the fact by word or deed, then time is only material as regards the acceptance—that once made out the dedication is perfect. *Ib*.

**18. A dedication for a public landing** may be made at common law, as well as for any other purpose. *The Village of Mankato v. Willard et al.*, 13 Minn. 13.

**19. Dedication at common law operates as estoppel.** A common law dedication does not operate as a grant, but as an estoppel *in pais* of the owner of the servient estate from asserting a right of possession inconsistent with the uses and purposes for which the dedication was made—following *Wilder v. City of St. Paul*, 12 Minn. 201. *Ib*.

### 3. Dedication under the Statutes.

**20. Requisites of a statutory dedication.** To entitle a plat to record, or constitute a *statutory dedication* under Chap. 26, Comp. St. p. 369, it must be acknowledged as required therein—following *Baker et al. v. City of St. Paul*, 8 Minn. 492. *City of Winona v. Huff*, 11 Minn. 119.

**21. When insufficient.** A plat of a town which has a pretended acknowledgment signed by the surveyor, two justices and the owners, under a law (Chap. 26, Comp. St. p. 369. Sec. 4) which required the same to be entitled to record, to be acknowledged by the proprietors and certified to by the surveyor, is not entitled to record, and when filed does not operate as a dedication under said statutes of the streets and alleys therein laid out. *Baker et al. v. The City of St. Paul*, 8 Minn. 491.

**22. What sufficient.** The town plat which defendant filed for a statutory dedication of streets and alleys, showed on its face that block 104, (the disputed premises) was marked “Winona Square,” and de-

defendant's certificate thereto was as follows: "I hereby certify that the above plat of Winona was by me directed to be surveyed, marked out and platted, and dedicated, the streets, alleys, three squares, viz., No. 33 marked Public Square, No. 103 marked Winona Square, No. 99 marked Wabashaw Square, also two levees for public use and benefit forever." Block 103 in the plat was divided into lots, block 104 was not divided. *Held*, not certain but under the circumstances the plat would in any event prevail over the certificate, since the statute seemed to constitute it, the operative instrument (Sec. 5, Comp. St. p. 370), still, in view of the rule that if there be a repugnant call, which by the other calls in the instruments clearly appears to have been made through a mistake, that does not make the instrument void, and the entire instrument is to be taken and the identity of the premises determined by a reasonable construction, it is evident the intention was to dedicate block 104 as Winona Square. *City of Winona v. Huff*, 11 Minn. 119.

**23.**—Defendant being a claimant on United States land, platted the same for a town and filed said plat under the statute as a statutory dedication of certain streets, blocks, etc., among which was a public square, marked "Winona Square," consisting of block 104. Afterwards the proper judge entered said land under the town site act for benefit of occupants, and after the proper notice to occupants and others claiming rights, and this plaintiff or any person for him failing to make claim as required, the defendant's son, W. C. H., a minor, by defendant who acted for him, made claim to block 104, in due form of law. The judge on 2d Nov., 1855, deeded block 104 by name to W. C. H., which was duly recorded on 21st Nov., 1855. At this time W. C. H. was in possession of said block, with notice of said plat and the record thereof as aforesaid. In Feb., 1857, W. C. H. died, leaving defendant sole heir at law. In April, 1857, defendant entered upon, enclosed and since possessed said block

claiming title thereto. In March, 1857, plaintiff was incorporated, but never by any formal act accepted such dedication, but in 1858 commenced looking up its title, and never taxed the property, nor has defendant ever paid any taxes thereon, assessed by or through the plaintiff's action. *Held*, at time of survey and plat defendant had right of pre-emption, and the platting was legitimate and proper for that purpose—following *Weisburger v. Tenny*, 8 Minn. 459. The claim of the son was not adverse to but under defendant, based partly on defendant's settlement, and on the survey and plat referred to, and such survey and plat being expressly recognized both by the trustee and W. C. H. in the conveyance to the latter, said W. C. H. took the title subject to the dedication charged upon it by defendant. *Id.*

**24. Statutory dedication does not pass the fee.** R. laid out certain property into city lots, streets and landing, and recorded the same under an act (statutes of Wisconsin p. 159, Sec. 5,) which provided that "every donation or grant to the public, etc., marked or noted as such on said plat, shall be deemed in law and in equity a sufficient conveyance to vest the fee simple of all such parcels as therein expressed, and shall be considered to all intents and purposes, a general warranty against such donors, their heirs, etc., to the said donee or grantee, for his use, for the uses and purposes therein named, expressed and intended, and for no other use and purpose whatsoever; and the land intended to be for the streets, alleys, ways, commons or other public uses in any town or city, or addition thereto, shall be held in the corporate name thereof in trust to and for the uses and purposes set forth and expressed or intended." *Held*, the city (of St. Paul) did not acquire title in fee to land on which the streets and landing was laid out, it acquired only an easement to use the same for the uses and purposes expressed or intended. *Schurmeier v. The St. Paul & Pacific R. Co. et al.*, 10 Minn. 82. *City of Winona v. Huff*, 11 Minn. 119.



## II. REVOCATION OF A DEDICATION.

**25. Revocation of a statutory dedication.** Where a party makes a statutory dedication of streets and alleys, etc., it is exceedingly doubtful whether he can revoke it under any circumstances, except in the manner provided by statute, through the courts, and that whether there has been any action taken upon it by the public or not. *Baker et al. v. The City of St. Paul*, 8 Minn. 491.

**26. Revocation of a common law dedication.** At common law a dedication of land may be revoked at any time before the public have accepted it, after acceptance it becomes a contract irrevocable, except by consent of parties or operation of law. Acts of dedication or acceptance may take place in various ways. *Ib.*

**27.** Where the original owners platted the town and filed the plat, but so defectively as to constitute no dedication under the statute. *Held*, they could revoke their dedication at any time before the public had accepted it, under the common law rule, for nothing but a compliance with the statute in filing and acknowledging the plat will effect a dedication without an acceptance. *Ib.*

## III. ABANDONMENT.

**28.** It seems, that an abandonment of an easement will not be presumed from non-user for a lapse of time less than that which would raise the presumption of a grant. *Wilder v. City of St. Paul*, 12 Minn. 192.

## EJECTMENT.

(See CIVIL ACTION, XVI.)

(See PLEADINGS, B. VII. d. 13.)

## ELECTIONS.

## I. CANVASSING BOARD.

## II. IRREGULARITIES IN ELECTIONS.

## III. CONTESTING ELECTIONS.

(See PLEADINGS, 35.)

## I. CANVASSING BOARD.

**1.** A board of canvassers which have met, canvassed the votes, and adjourned *sine die*, is "*functus officio*," and cannot reconvene and reconsider its action, and supply omissions or correct errors in its proceedings. *Clark v. Buchanan et al.*, 2 Minn. 347.

**2.** The evident policy of our law is, to take from the board of canvassers all power over returns from established precincts, and as far as possible deprive it of the means of doing harm. Sec. 33, Chap. 5, R. S., p. 50. *Ib.*

**3.** The duties of clerk of board of supervisors in receiving and opening election returns, in canvassing and estimating votes, and in giving certificates of election, are purely ministerial, and no judicial or discretionary powers are conferred upon him, or the board of canvassers, except, perhaps, so far as to determine whether the returns are spurious or genuine, or polled at established precincts, and in ascertaining from the returns themselves for whom the votes were intended. Sec. 33, Chap. 5, p. 50, R. S. *O'Ferrall v. Colby*, 2 Minn. 186.

**4.** An act providing for an election prohibited the canvassing board of the county from refusing "to include any returns in their estimates of votes, for any informality in holding any election, or making returns thereof," (Sec. 43, Chap. 15, G. L. 1861.) *Held*, not competent for the board to pass upon the validity or regularity of the election—that being a judicial act—and this would be so independent of statute. See *O'Ferrall v. Colby*, 2 Minn. 180. *Taylor v. Taylor et al.*, 10 Minn. 107.

**5.** A county auditor may act by deputy

in the canvass of votes. *Crowell v. Lambert*, 10 Minn. 369.

**6.** When the certificate of election is issued and delivered by the auditor to the person declared to be elected to a county office, in accordance with the official canvass, regular upon its face, the certificate is conclusive evidence of the right of the person holding it to the office to which it shows him to have been elected, *except* in a proceeding where this right is directly in issue. *State ex rel. Biggs v. Churchill*, 15 Minn. 455.

**7.** Under the General Statutes, Chap. 1, Sec. 19, 21 and 29, the determination of the canvass by the canvassing board is a decision and determination of the election of the person whom they declare to be elected. *Ib.*

**8.** The abstract of the canvass of votes as prescribed in Sec. 21, Chap. 1, G. S., is the authentic and official evidence of the canvass by the board, by which the county auditor is to be governed in issuing the certificate of election. *Ib.*

## II. IRREGULARITIES AT ELECTIONS.

**9.** The fact that the judges and clerks of an election did not take the prescribed oath, nor any oath, or that there was no list of qualified electors of the election district transmitted with the election returns to the canvassing board of the county, or that no register poll lists were made and posted at the election, or that one of the persons who acted as judge of election was a candidate for office at that election, will not make void the election; though if on account of such errors the result was rendered uncertain in any given town, perhaps such returns should be rejected, or if on these ground the election was attacked for fraud, and it appears the errors were caused by a party interested, that, perhaps, would be *prima facie* evidence of fraud requiring satisfactory explanation. BERRY, J., *dissenting*, thinks the absence of poll lists at an election would make

void the same. *Taylor v. Taylor et al.*, 10 Minn. 107.

**10.** If the votes of citizens are freely and fairly deposited at the time and place designated by law, the intent and design of the election are accomplished. It is the will of the electors thus expressed that gives the right to the office or determines the question submitted, and the failure of the officers to perform a mere ministerial duty in relation to the election can not invalidate it if the electors had actual notice, and there was no mistake or surprise. *Ib.*

## III. CONTESTING ELECTIONS. 4

**11.** The statute which authorizes contested election cases to be heard at chambers, (Comp. St., p. 150-1,) if not heard at a regular term within thirty days after the election, is merely cumulative, and does not take from the jurisdiction of the court when sitting in term, to hear and decide the same case, should the judge refuse to hear it at chambers. *Whallon v. Baneroft*, 4 Minn. 109.

**12. Requisites of appeal.** Under the election law of March 12, 1861, Sec. 31, required on an appeal from the board of canvassers to District Court, to contest an election, that a notice should be filed with the clerk of court within twenty days from day of election. Sec. 49 and 52 provide that in case of contested election, the party contesting shall notify the adverse party, in writing, of his intention, "within twenty days after the votes have been canvassed," etc. *Held*, these sections are to be construed together, and no appeal can be taken without all the requirements being satisfied—that failure to notify the clerk as required within the time, prevented the District Court from acquiring jurisdiction. *Baberick v. Magner*, 9 Minn. 232.

**13.** When a party attacks the validity of an election on the ground of errors in the canvass of the votes, he must in every instance show that there was error, and that it affected the result, or rendered it uncer-

*tain. Taylor v. Taylor et al.*, 10 Minn. 107.

**14.** The trial in court of a contested election proceeding, is a special proceeding, and not a civil action, and oral testimony is admissible. *Ford v. Wright*, 13 Minn. 518.

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## EMPLOYMENT.

(See CIVIL ACTION, IX. 2.)

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## EMINENT DOMAIN.

(See CONSTITUTIONAL LAW, V. 13.)

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## ENTIRETY OF CONTRACTS.

(See CONTRACT, IV.)

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## EQUITY.

### I. GENERALLY.

### II. SPECIFIC PERFORMANCE.

#### a. Generally.

#### b. Contract to convey land.

#### c. Parol contract to convey land.

#### 1. What sufficient part performance to take contract out of the statute of frauds.

#### 2. What an insufficient part performance, etc.

#### d. Defenses.

### III. REVISION OF CONTRACT.

### IV. REFORMATION OF CONTRACTS.

### V. CORRECTING DEFECTIVELY EXECUTED INSTRUMENTS.

### VI. CANCELLATION OF INSTRUMENTS.

### VII. RELIEF AGAINST FRAUD AND STATUTE OF FRAUDS.

### VIII. RELIEF AGAINST PENALTIES.

(See INJUNCTION.)

(See CIVIL ACTION, XVIII.)

(See DEEDS, VIII.)

(See MERGER.)

(See MANDAMUS.)

(See PRACTICE, I.)

(See PLEADING, B. VII. d. 15.)

(See PARTNERSHIP, 26.)

(See HUSBAND AND WIFE, 5, 6.)

(See VENDOR AND PURCHASER.)

(See NOTICE.)

(See BONA FIDE PURCHASER.)

### I. GENERALLY.

**1. Fictitious issue.** Courts of equity will not exercise their powers for the enforcement of right or prevention, in the abstract, and where no actual benefit is to be derived by the party who seeks to exercise such right, nor injury suffered by the commission of the wrong complained of. *Goodrich v. Moore*, 2 Minn. 64.

**2. Adequate remedy at law.** Where a complaint shows that a mortgage foreclosure, which it seeks to avoid, was effected by parties having no interest in the mortgage or mortgage debt, equity will not interfere, for the defendants are thereby mere wrong doers, and adequate relief is afforded at law. *Bolles v. Carli et al.*, 12 Minn. 113.

### II. SPECIFIC PERFORMANCE.

#### a. Generally.

**3. Adequate remedy at law.** Courts are unwilling to interfere to enforce specific performance, when the injured party may be indemnified in damages. *McLain v. White*, 5 Minn. 178.

**4. Extension of time of performance.** Where time is not of the essence of the contract, a court of equity may allow the

party to make payment after the agreed time has elapsed, and require the deed to be executed. *Dahl et al. v. Pross*, 6 Minn. 89.

**5. Contract must be clear and distinct.**

To entitle a party to the specific performance of an alleged contract to convey real property, "the contract must be clearly proved, and its terms should be so specific and distinct as to leave no reasonable doubt of their meaning." *Lanz v. McLaughlin et al.*, 14 Minn. 72.

**6. Form of instrument immaterial.**

Courts of equity decree specific performance of contracts to convey land which are in their nature unobjectionable as a matter of course, without regard to the form of the instrument—compensation in damages for breach of such contracts not being regarded adequate relief—this in reference to a bond containing no covenants or agreements to convey. *St. Paul Division No. 1, Sons of Temperance, v. Brown et al.*, 9 Minn. 157.

*b. Contract to convey land.*

**7. Payment condition precedent—defendant wrongfully in possession must allow profits towards payment—waiver of payment of balance due—demand of deed.**

A. being the owner of certain land, contracted to sell the same to B., and surrendered to the latter the possession. B., with A.'s consent, assigned his contract to plaintiff. By the contract, plaintiff was bound to till in a good and husbandlike manner, keep fences in good repair, and pay taxes, and pay for the land by delivering certain share of the crop, or an equivalent in money, to A. each year. After part payment, and before default of plaintiff, defendant as assignee of A., with notice, took possession of the land while plaintiff was absent in the army, and has ever since retained possession. *Held*, to entitle plaintiff to specific performance, he must pay the balance of the purchase price due, either in kind or money, unless the circumstances excused him. That defendant,

having wrongfully dispossessed plaintiff, the former was chargeable in equity with the rents and profits during his wrongful occupation, and plaintiff was bound to pay only what was found due after deducting such rents and profits, and those being found insufficient, to make up the balance due, the plaintiff might show a waiver on part of defendant of performance of conditions precedent, by a refusal on part of defendant to "recognize the claims of said plaintiff to the land," and a declaration by defendant that plaintiff "might assert his rights at law," made to plaintiff when he notified defendant of his claim on the land, and this especially since the rents and profits being unknown to plaintiff, he was unable to tender or offer to pay any definite sum, and a failure to demand a deed would only go as to costs. *Smith v. Gibson*, 15 Minn. 89.

**8. Vendor's assignee in wrongful occupation must account for rents and profits.** Where A., having contracted with plaintiff to sell land, and surrendered possession thereunder, and defendant, as assignee of A., with notice of plaintiff's contract, enters upon and wrongfully withholds the possession thereof from plaintiff, the defendant holds the legal title for plaintiff, and will be held to account to the latter for the rents and profits, and in an action for specific performance by plaintiff, such rents and profits will be set off against the balance of unpaid purchase money, except the expense in keeping the fences in repair and taxes paid, though against knowledge of plaintiff; and the value of this use and occupation will be determined in view of the value thereof to plaintiff under the restrictions of his contract, and not its value to an absolute owner. *Id.*

**9. Parol agreement between husband and wife—not enforceable.** Complaint alleged the purchase of real estate, payment of purchase money by husband, conveyance to wife in her own name; that such conveyance was made for the sole use and purpose and only intention of providing a suitable home for the wife in case she

should survive the husband, all of which she had full knowledge, and assented at or immediately after the conveyance; that it was mutually understood by and between the husband and wife, that in case the husband should survive the wife, the title to the premises should rest in the husband, and should not descend to her heirs; that it was the intention of said husband and wife to have had prepared and duly executed the proper instrument, in writing, to effect the purpose aforesaid, but through their inadvertence and neglect, and the sudden and unexpected death of the wife, such instrument was not prepared, nor any will or other instrument executed by the wife, in any way affecting the estate. *Held*, such agreement would not be specifically performed in equity. *Johnson v. Johnson et al.*, 16 Minn. 512.

**10. Contract concerning personal property—enforceable.** T. agreed to assign and deliver to M. a certain note and mortgage against S., and M. agreed, *inter alia*, to cancel and deliver to T. certain notes running to M., made by T. T. performed his part of the contract. *Held*, T. was entitled to a specific performance by M. of his contract to cancel and deliver up the notes—though the notes were over due, and M. was the payee. T., independent of M.'s contract, is entitled to such relief, on the principle of *quia timet*. *Tuttle v. Moore*, 16 Minn. 123.

*c. Parol contract to convey land.*

*1. What sufficient part performance to take it out of the statute of frauds.*

**11. Improvements.** When one has entered and made improvements on land under a parol contract of sale, and wholly performed, specific performance will be decreed against the vendor. *Seager v. Burns et al.*, 4 Minn. 141.

**12. Part payment, entry and improvements.** It seems that part payment of purchase money, entry into possession by the vendee, and the erection of valuable

improvements upon the premises, is a sufficient part performance to take a parol agreement for the sale of land out of the statute of frauds. *Bennett v. Phelps et al.*, 12 Minn. 326.

**13. Entry into possession under contract.** It seems that delivery of, and entry into possession of land, in pursuance of, and in direct reference to a parol contract, has always been considered an act of part performance, which will take the case out of the statute of frauds. *Gill v. Newell et al.*, 13 Minn. 462.

**14. Entry, part payment, improvements.** An entry upon land under a parol contract of purchase, part payment of purchase money, and the making of improvements thereon by plowing the same, in pursuance of the contract, is such part performance as to take the contract out of the statute of frauds. *Id.*

**15. Entry, improvements—parol assignment of contract—waiver of tender—rights of parol assignee.** Plaintiff contracted in parol with N. as follows: N. was to enter into a written contract with L. for the purchase of land, to be paid in three installments—first one down; plaintiff was to furnish the money, and “all the rights secured under the contract of purchase to said N. should instantly inure to the benefit of the plaintiff,” and on the consummation of the purchase, and the execution of the deed from L. to N., the latter should immediately convey the premises to plaintiff. N. and L. entered into the written contract, the former paying the first installment in money supplied by plaintiff; whereupon the latter, with full knowledge and consent of N., entered into possession and commenced plowing the same, receiving from N. the written contract between N. and L. *Held*, plaintiff's entry and improvements was such part performance as entitled him to specific performance of the parol contract between him and N., which operated as an assignment of the written contract of purchase to plaintiff, and entitled him to a conveyance, on performance, either through N.

or otherwise—L. making no objection. And the fact that N., prior to the maturity of the second installment, repudiated the parol contract, offering to return the money advanced for the first payment by plaintiff, and pay a bonus, had no effect on the rights of the parties. As to tender of second installment by plaintiff since N.'s repudiation, he was entitled to no tender, nor can he object that a tender was not made to L.; and N. refusing to act, the court will decree L. to convey direct to plaintiff. *Ib.*

2. *What an insufficient parol performance to take parol contract out of the statute.*

**16. Continuance of former possession and improvements.** The continued possession and improvements of land which the vendee occupied and cultivated at time of contract of sale, is not such part performance as will take the agreement out of the statute of frauds. *Wentworth v. Wentworth*, 2 Minn. 284.

**17.**—Where continued possession under an agreement for the sale of land when the record does not show that it was continued *under the agreement*, is not such part performance as will take the case out of the statute of frauds. *Ib.*

**18. Payment of purchase price.** Not even *payment* of purchase price, without something more, will constitute such part performance as will take a case out of the statute of frauds; much less, deposit of purchase money. *Lanz v. McLaughlin et al.*, 14 Minn. 72.

*d. Defenses.*

**19. Married woman—mutuality.** Where a married woman has been put into possession of land under a parol contract to convey, has made valuable improvements thereon, and paid the consideration agreed upon, specific performance will not be refused on the ground of want of *mutuality* arising from her legal incapacity. *Seager v. Burns et al.*, 4 Minn. 141.

**20. B. loaned plaintiff money and took**

a conveyance of certain property as security, giving back to plaintiff his bond for a deed. In an action for specific performance against B., *Held*, it is no defense, and hence immaterial whether plaintiffs ever owned the premises or not, there being no claim that he did not get title, nor found mistake or surprise in the inception of the bond set up. *Sons of Temperance v. Brown et al.*, 11 Minn. 356.

### III. RESCISSION OF CONTRACT.

**21. Want of Consent.** While an innocent misrepresentation by mistake can never be made the ground of a personal action for fraud, it may operate upon the contract itself to such an extent that a court of equity will rescind the contract, but only where the error is of such a nature and character as to destroy the consent necessary to validity of the contract. *Brooks v. Hamilton*, 15 Minn. 26.

**22. Conveyances of land.** It seems that in all cases in which conveyances of land have been rescinded at the instance of the grantee, in the absence of fraud, the purchaser was unacquainted with the premises, and had no reasonable opportunity of informing himself in regard to their quality, locality or boundaries. *Ib.*

### IV. REFORMATION OF CONTRACT.

**23. Amending complaint after verdict bars judgment.** Complaint sought to reform a written contract on ground of mistake in its execution, and for damages when so reformed. A special verdict found the real contract to be as complaint alleged, and on the court's refusing to decree a reformation, the plaintiff on motion was allowed to amend the complaint, and again moved for a decree of reformation to make it conform to the amended contract. *Held*, properly refused—the contract as found by the jury was the only basis for a reformation of the contract, and the court could not properly allow an amendment of the verdict, much less grant

a decree as solicited. *Wilson v. McCormick et al.*, 10 Minn. 216.

**24. Contract requiring a seal cannot be reformed by parol.** Where a verbal agreement is established to reform a written contract, the contract when reformed must rest in parol, for a contract cannot rest partly in writing and partly in parol. Hence, if a seal was necessary to the contract in the first place, it cannot avail to effect a reformation unless a consideration for the reformed contract is shown, for that contract has no seal to raise a presumption as to consideration. *Sharpe v. Rogers*, 12 Minn. 174.

**25. Mistaken in spirit, not the letter.** Equity looks to the spirit and meaning, and not to the letter; it has power to reform a contract so as to make it conform in *substance* and *effect* to the agreement and intention of the parties, and this though the language used, is such as is agreed upon by the parties. *Smith v. Jordan et al.*, 13 Minn. 264.

**26. Deed may be reformed by parol.** Where no statutory enactment intervenes, it is competent for a court of equity to rectify a deed or written contract upon clear and satisfactory proof, by parol evidence, that it fails, either on account of fraud or mistake of fact, to express the agreement and intention between the parties. *Ib.*

**27. Cause of error immaterial.** Whether the error in a written contract, is the defendant's intentional or unintentional misstatements, is immaterial, for a court of equity has power to correct it as well in the former as in the latter. *Ib.*

## V. CORRECTING DEFECTIVELY EXECUTED INSTRUMENTS.

**28. Omission of witness.** Where an instrument at time of its execution was invalid as a mortgage by reason of being attested by one witness only, it would unquestionably be in the power of a court of equity, in a proper case, to remedy a defect of that character, not only as against the maker of the instrument, but also against

any person who acquired title from the maker with notice. *Ross v. Worthington*, 11 Minn. 438.

## VI. CANCELLATION OF INSTRUMENTS.

**29. Bond for deed.** Where the plaintiff held the legal title, but a bond for a deed was outstanding, which, though void at law by default of the obligee, was recorded under provisions of statute, and made notice to purchasers. *Held*, equity would cancel the same as a cloud on plaintiff's title. *Dahl et al. v. Pross*, 6 Minn. 89.

## VII. RELIEF AGAINST FRAUD AND STATUTE OF FRAUDS.

**30. Judgment—U. S. Patent.** A judgment or decree of a court, on a patent issued in virtue of a decision of U. S. land officers, even where the court or officers had acted within the sphere of their jurisdiction, may be impeached in equity for fraud or collusion in obtaining it. *State v. Batchelder*, 5 Minn. 223.

**31. Complainant must act in perfect faith.** A court of equity, when called upon to aid a party against the operation of the statute of frauds, and the acts of one who would take an unjust advantage of it, scrutinizes the conduct and acts of the party invoking its aid, and demands of him the utmost good faith and fair dealing. *Evans v. Folsom*, 5 Minn. 422.

## VIII. RELIEF AGAINST PENALTIES.

**32. Parties must be placed in statu quo.** Equity will only relieve against penalties when the relief can be granted with safety to the other party, and he can be put in as good position as if the agreement had been performed—where *the thing may be done afterwards*, or a *compensation made* for it. *Bidwell v. Whitney*, 4 Minn. 76.

**33.**—One having made a promissory note, with interest at five per cent. per month after due till paid, executed a

mortgage, with power of sale to secure it, permitted a foreclosure by advertisement of the mortgage, the mortgagee bidding in the property for the full amount of note and interest. *Held*, the mortgagor could not bring an action for money had and received to receive the excess of interest for which the property was bid in over and above the rate of 7 per cent. per annum, although the excess was in the nature of a penalty which would have been relieved against before the sale, for the mortgagor had waived his rights by laying by until the penalty had been enforced, and equity could not put the mortgagee in as good position as he would have been had there been no breach of the contract. *Id.*

## ERROR, WRIT OF.

(See PRACTICE, II., 15, B. III.)

## ESTOPPEL.

### I. GENERALLY.

### II. ESTOPPEL BY RECORD.

### III. ESTOPPEL BY DEED.

*a. When it does not exist.*

*b. When it exists.*

### IV. ESTOPPEL IN PAIS.

*a. Requisites of.*

*b. Miscellaneous Cases.*

*1. When it exists.*

*2. When it does not exist.*

(See EASEMENTS, II., *a.*)

### I. GENERALLY.

**1. Invoked only to prevent injustice and wrong.** The doctrine of estoppel is only invoked to prevent injustice and wrong, and when the party claiming its protection, would in the eye of the law, be defrauded, and the other party be guilty

of a fraud by the allegation or proof of the truth. *Rochester Insurance Co. v. Martin*, 13 Minn. 59.

### II. ESTOPPEL BY RECORD.

**2. Verdict no estoppel.** A former verdict does not operate as an estoppel—it must be merged in a judgment. *Schurmeier v. Johnson et al.*, 10 Minn. 319.

### III. ESTOPPEL BY DEED.

*a. When it does not exist.*

**3. Attorney in fact.** The covenants in a deed executed by an attorney in fact, do not estop him, only his principal and those in privity with him. *Kent v. Chalfaut*, 7 Minn. 487.

**4. Plaintiff not estopped by his grantor's deed to strangers.** Plaintiff's grantor deeded to certain private parties, certain parcels of land in the town of St. Paul, describing the land conveyed as "fronting on" and bounded by "Saint Charles Street." *Held*, plaintiff is, not estopped from denying as against the city of St. Paul, that his grantor did not dedicate the premises above referred to as "Saint Charles Street" to the public use, it no where appearing that he intended to dedicate, or that the public accepted the dedication, or acted on the faith of it, or that rights, vested on the faith of such dedication would be prejudiced by its revocation or denial. *Wilder v. City of St. Paul*, 12 Minn. 192.

*b. When it exists.*

**5. Erroneous description in bond for a deed.** When A. has entered into an agreement to purchase land of B., and taken a bond of the latter, and A. with the consent of B., and with his assistance, agrees upon and determines the limits of the same, and A. enters into possession; B. is estopped from taking advantages of any clerical



error in the description of the land in said bond in an action by A. to obtain *specific performance*. *Baldwin v. Winslow*, 2 Minn. 218.

**6. Recognition of a defective mortgage as a lien, by clause in conveyance.** A person may, perhaps, estop himself from questioning the validity of a certain mortgage (in itself void for want of two witnesses) by any appropriate clause in his deed recognizing it as a subsisting lien, and waiving its defects, but the mere admission of notice that such a mortgage existed by a recital of it in a deed through which he claimed title would not so operate. *Thompson et al. v. Morgan*, 6 Minn. 292.

**7. Conveyance under an official trust estops trustee from denying the grantee's right.** Under Act of Congress approved March 3d, 1855, where the trustee has conveyed to defendant, the presumption is that defendant was the beneficiary under the act and entitled to her deed, and the trustee or his assigns in an action to foreclose a mortgage given back by defendant to secure the trustee's lien on land for services, is estopped to deny it. *Morris et al. v. Watson et al.*, 15 Minn. 212.

#### IV. ESTOPPEL IN PAIS.

##### a. *Requisites of.*

**8. When estoppel in pais exists—may be retracted when.** The acts or admissions of a party operate against him in the nature of an estoppel, where they have been relied on, and their denial would prejudice the party in whose favor the estoppel is introduced; hence, acts or declarations retracted before they have been acted upon, do not raise an estoppel, and an estoppel may exist for one purpose and not for another, in favor of one person and not in favor of another, though growing out of the same transactions. *Wilder v. City of Paul*, 12 Minn. 192.

**9. Estoppel must be confined to the same transaction.** Statements or admis-

sions made in one transaction will not estop a party from retracting them in another. *Whittacre v. Culver*, 6 Minn. 297.

**10. An estoppel in pais exists when a party has—**1st, made an admission inconsistent with the evidence he proposes to give, or the title or claim he proposes to set up; 2d, and the other party has acted on such admission; and 3d, an injury would result to that other party by allowing such admission to be disproved. *ATWATER, J.*, quoting from *BENSON, J.*, in *Dazell v. Odell*, 3 Hill, 219. *Caldwell v. Auger & Herbert*, 4 Minn. 217.

**11. A party to be bound by an estoppel in pais**, must have been guilty of constructive fraud, or gross neglect, in regard to the subject matter claimed as an estoppel. Or, in other words, there must have been an express design that the act or statement should influence the action of another. *Combs v. Cooper*, 5 Minn. 254.

**12. To create estoppel in pais** a party must have clearly done or omitted to do, some act, or made or omitted to make some declaration, which has influenced the conduct of the party claiming the estoppel, and must have been intended to deceive or mislead the party who acted upon it. *Califf v. Hillhouse*, 3 Minn. 311.

**13.**—It seems that to operate as an estoppel in pais, or equitable estoppel, it is necessary that the act done, or the character assumed, should be of such a nature that the repudiation of the same by the defendant would work an injury to the party setting it up. *The County Com'rs of Hennepin Co. v. Robinson*, 16 Minn. 381.

##### b. *Miscellaneous cases.*

##### 1 *When they exist.*

**14. Acquiescence in sale of property.** The owner of property, who silently permits another to dispose of it as his own, when such silence was designed to and does induce the purchaser to think he is dealing with the true owner—shall not afterwards lay claim to the same as his own. *Califf v. Hillhouse*, 3 Minn. 311.

1. **By receiving a benefit under a fraudulent conveyance,** a creditor is estopped from avoiding it on the ground of fraud. *Lemay v. Bibeau*, 2 Minn. 293.

16. Plaintiff had foreclosed a mortgage, bidding the property in, afterwards discovering that it was defective, commenced a foreclosure in court, asking to have the first sale set aside as irregular, and a sale under decree of court. Defendant offered, and afterwards under the decision of the court, quit claimed all interest in the property that remained in him by reason of the defective foreclosure, the court dismissing the action of the plaintiff. The note being unpaid after crediting up amount of the sale on the foreclosure, plaintiff now asks judgment for balance, and defendant questions the validity of the foreclosure proceedings. *Held*, he cannot question those proceedings, he having at his own request waived the right to do so by quit claiming all interest. *Blake v. McKusick*, 10 Minn. 251.

17. A. agreed with B. to deliver to the latter at Zanesville, Ohio, on or before May 1, 1868, certain machinery, and B. was to pay down \$200, and on or before date of delivery deposit with C. \$2,100 cash, and \$1,100 note, to be delivered by C. to A. on performance. May 19, 1868, C. wrote A. saying, "B. has deposited with me \$2,100 certified check and \$1,100 note, all to be paid over to you when the engine arrives and is set up." On May 20th C. telegraphed A: "B. has made the required deposit; wrote you yesterday." Whereupon A. shipped the machinery. *Held*, C. was thereby estopped from denying that the information he communicated was true, and, as by the contract, A. was entitled, on actual or accepted performance, to receive from C. the deposit. C. cannot show that he received the deposit or any other understanding as between himself and B., but may show that the machinery had not been set up when the deposit was demanded. *Blandy et al. v. Raguet*, 14 Minn. 491.

2. *When it does not exist.*

18. A. & B. owned jointly city lots; both being ignorant of the true division line. No dispute existed as to where the line should be, but they measured off from what they supposed was the corner of the street the number of feet called for in the deed, and agreed verbally that such should be the line. B. built a fence thereon. Soon after C., wishing to purchase B.'s lot, asked A. where the dividing line was, and A. told him the fence was the division line. C. bought the lot of B. It was afterwards discovered that the supposed street corner from which the measurements had been originally taken by A. & B. was six and six-tenths feet too far west, and that the division line was actually that distance further east, thus including in A.'s lot a spring of water which before had been in C.'s. The line as originally established had been acquiesced in three years. *Held*, it does not appear that A. designed to influence C. in any means as to the purchase, he had nothing to gain whether C. purchased or not, or that C.'s purchase depended to any extent on A.'s information, that A.'s statement was an honest, though mistaken statement of fact, and that he was not estopped from claiming title to the tract of land between the former line and the actual line. *Combs v. Couper*, 5 Minn. 254.

19. **Negotiation of bond, etc., no estoppel.** If A. receives certain bonds from B. for the performance of certain services, and negotiates or otherwise disposes of them, he is not thereby estopped from denying their being of any value, for to constitute an estoppel *in pais* there must be: 1st, an admission inconsistent with the evidence which he has proposed to give, or the title or a claim which he proposes to set up. 2d, an action by the other party upon such admission. 3d, an injury to him by allowing such admission to be disproved. *Chaska Co. v. Board of Supervisors of Carver County*, 6 Minn. 204.

**20. Estoppel is confined to same transaction.** F. transferred to W. as collateral security, a note of C.'s which had been due some time, and was wholly paid, stated the fact to C. requesting him to say nothing about the fact of payment for he (F.,) would take it up in a few days. W. notified C. that he held the note, and that all payments should thereafter be made to him, C. replying that \$450 had been paid on the note, but said nothing about any other payments. About two years after W. settled with F., taking a new note and retaining the same collaterals. W. then notified C. that he still retained the notes as collateral, C. making no reply. *Held*, C. was not estopped from pleading full payment on the note, because, 1st, W. was not misled in taking the note originally, he having received the note before any conversation with C.; 2d, the settlement with F. was a new transaction, and statements of C. could not extend beyond the first transaction as an estoppel. *Whitacre v. Culver*, 6 Minn. 297.

**21. An averment that a sale was duly made, no estoppel.** In an action against a mortgagee for surplus money arising from sale of mortgaged premises the plaintiff by alleging in his complaint that the sale was duly made and proper and legal notice given, does not thereby estop himself from claiming that the legal amount due was the sum stated in the complaint, though less than the amount bid, the presumption being that such amount was claimed in the notice of sale, and that the premises sold for more than was claimed—which excess it is sought to recover. *Bailey v. Merritt*, 7 Minn. 159.

**22. Estoppel confined to the same state of facts.** Where C. notified W. that he held his over-due note in favor of F., as collateral security to a claim against F., and the note had been fully paid at maturity, and W. replied that a certain amount had been paid on the same, but not claiming that it was fully paid, and C. afterwards entered into a settlement with F. and under the new arrangement re-

tained W.'s note. *Held*, W.'s statements were made on the facts as they existed at the time they were made, and could not estop him from setting up any defense to the note, on a new state of facts different from what he supposed when he made them. *Whitacre v. Culver*, 8 Minn. 133.

**23. Wheat receipts.** S., a warehouseman, received of F. certain amount of wheat inferior to No. 2 grade, under an agreement to "safely store and keep the said wheat in his warehouse until a return thereof should be demanded by F. or his assigns," and issued to F. wheat receipts of the following form:

"No. 711. Account of A. P. Foster.  
41-25 bushels ——— No. 2 wheat.  
20 sacks.  
J. G. SWART."  
Dyer.  
Minniska, Sept. 29th, 1866."

Foster sold said wheat to plaintiff—transferring the wheat receipts—and an order on S. to deliver the wheat to bearer, plaintiff knowing nothing about the quality of the wheat, its amount, or the terms of the agreement of storage except as appeared from the wheat receipt. *Held*, S. was not estopped from showing against plaintiff that his agreement was to deliver the wheat in kind—he having kept it by itself—and not to deliver No. 2 wheat, there being in the written memoranda or wheat receipts upon which the plaintiff could rely for estopping S. from showing real character of the transaction. The receipts were silent as to the defendant's obligations and plaintiff should have informed himself, and cannot complain against S. if the wheat fell below No. 2. *Robeson v. Swart*, 14 Minn. 371.

**24. Presentation of an account.** The fact that plaintiff had presented on a former occasion a bill some \$300 less than he now claimed for the same services, is not conclusive as to the real value of the services, or the amount recoverable—the same not having been paid or agreed upon as correct. *Allis v. Day*, 14 Minn. 516.

## EVIDENCE.

**SCOPE NOTE.**—This title embraces all decisions pertaining to the subject matter thereof, except evidence in criminal actions, for which see title Criminal Law, and a few matters referred to in the cross notes, which are there arranged as being more directly related to those subjects.

## I. ADMISSIONS.

## II. OF WHAT THINGS JUDICIAL NOTICE WILL BE TAKEN.

## III. DECLARATIONS OF FORMER OWNER TO IMPEACH TITLE TO PROPERTY IN HANDS OF PURCHASER.

## IV. PRESUMPTIONS.

## V. COMPETENT, RELEVANT, MATERIAL, AND HEARSAY EVIDENCE.

a. *Generally.*

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## VI. BURDEN OF PROOF.

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## VIII. SECONDARY EVIDENCE, AND REQUISITES TO THE ADMISSION THEREOF.

## IX. PAROL EVIDENCE TO CONTRADICT OR VARY WRITTEN INSTRUMENTS.

a. *Generally.*

b. *When inadmissible.*

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## X. EVIDENCE ADMISSIBLE, ETC., IN PARTICULAR ISSUES.

## XI. EVIDENCE ADMISSIBLE, ETC., IN PARTICULAR ACTIONS.

## XII. WITNESSES.

a. *Who competent.*

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f. *Testimony on a former trial.*

(See CRIMINAL LAW, 88.)

(See SHERIFF, 19.)

(See PLEADINGS, B. VIII. m.)

(See PARTNERSHIP, VII.)

(See RAILROADS.)

## I. ADMISSIONS.

(See PARTNERSHIP, 30, 31.)

**1. Admission of one jointly liable will bind himself without proof of joint liability.** In an action under Sec. 38, p. 536, Comp. St., against one joint associate on an "obligation of all" admissions of the defendant of his interest in said "association," are competent as against him—the rule that before the admissions of one of several joint parties can be admitted, proof of the joint interest must be first made *aliunde*, not applying as against the admitant, but as against other parties jointly concerned with him. *Cooper v. Breckenridge*, 11 Minn. 341.

**2. Deliberate admissions are not the lowest degree of evidence.** When a voluntary, direct, plenary and explicit admission of partnership was made by a party to the record, and one sought to be charged as such, an intelligent man, extensively engaged in business, under circumstances that would not only repel a false statement of this character, but would strongly tend to impress silence as to the fact if true, made on separate occasions, both established by a different witness and testimony of "unchallenged verity," it is difficult to conceive of an extra judicial verbal admission entitled to greater weight, and is not the lowest class of proof. *Tozer et al., v. Hershey*, 15 Minn. 257.

## II. OF WHAT THINGS JUDICIAL NOTICE WILL BE TAKEN.

(See PLEADINGS, B. II. c.)

**3. Clerk's signature to file marks.** The court may take judicial notice of the clerk's signature to the file marks on papers, though from another district, but without an order from the court, records

should never be allowed to leave the files of the clerk's office for any purpose whatever. *Sherrerd v. Frazer et al.*, 6 Minn. 572.

**4. Laws of other States not judicially noticed.** Laws of other States must be proven, like other facts—court cannot take judicial notice of them. *Brimhall v. Van Campen*, 8 Minn. 13.

**5. Public laws and treaties.** Courts will take judicial notice of public laws and treaties, and of the authority conferred by them upon the President of the United States, but not of the fact that authority conferred upon him to do an act affecting but a small number of persons, and those not citizens of the United States, has been executed, such as the selection of lands for Indians, by the President, under a treaty. *Dole v. Wilson*, 16 Minn. 525.

**6. Calendar time.** Courts will take judicial notice of calendar time—the day of the month being pleaded, the court will take notice that it is on a given day—as Sunday. *Finney v. Callendar*, 8 Minn. 41.

### III. DECLARATIONS OF FORMER OWNER TO IMPEACH TITLE TO PROPERTY IN HANDS OF PURCHASER.

**7. Such declarations made subsequent to the sale, not admissible.** Declarations of a vendor, made subsequent to the sale, or at the time, and unconnected with the vendee, cannot be received in evidence to affect the vendee's title, or those claiming under him. *Burt v. McKinstry et al.*, 4 Minn. 204; *Derby & Day v. Gallup*, 5 Minn. 119; *Zimmerman v. Lamb et al.*, 7 Minn. 421; *Howland v. Fuller*, 8 Minn. 50; *Blackman v. Wheaton*, 13 Minn. 326.

**8. Declarations of assignor's agent in possession of the property, inadmissible.** G. assigned property to S., for benefit of creditors, part of which was in hands of an agent, N. The assignee notified N. of the assignment, requesting him to hold as his agent. The assignment being assailed for fraud. *Held*, declarations of N., made while he was G.'s agent, (*i. e.*, before the

assignment,) were inadmissible to prove that his principal's assignment, afterwards made, was with a fraudulent intent. So, as to his declarations after the assignment, to show the fraudulent intent of an assignment previously made. *Scott v. King*, 7 Minn. 494.

**9. Whether admissible if vendor is in possession, query?** Whether or not the declarations of an alleged fraudulent vendor, continuing in possession of the property sold, made subsequently to the sale, are admissible against the vendee for the purpose of impeaching his title, it is unnecessary here to determine; but in any event where the evidence fails to establish such possession at the time of the declarations, they are clearly inadmissible. *Shaw v. Robertson*, 12 Minn. 445.

**10. Such declarations competent to impeach the vendor when he testifies the other way.** When, in an action between a vendee and a creditor of the vendor who assails the sale as fraudulent, the vendee calls the vendor to testify concerning matters relevant to the issue of fraud, the creditor may, for the purpose of impeaching his testimony, show that he had made statement out of court conflicting with his testimony on the stand. *Hicks v. Stone et al.*, 13 Minn. 434.

### IV. PRESUMPTIONS.

(See PRACTICE, B. I. f. 5.)

(See JUSTICE OF THE PEACE, III. 12 *et seq.*)

(See OFFICE AND OFFICER, 1, 2.)

(See NOTES AND BILLS, XII.)

**11. Foreign laws presumed to be same as our own.** In all cases where the action is upon a foreign contract, and nothing is made to appear to the court that the *lex loci contractus* differs from the *lex fori*, the court will presume it is the same, and administer the law of the forum. The presumption being, until the contrary is shown, that the law of other States is the same as our own. *Cooper et al. v. Reaney*, 4 Minn. 528; *Brimhall v. Van Campen*, 8 Minn. 13.

**12. Foreign interest presumed to be same as our own.** In the absence of proof concerning the foreign rate of interest, it is presumed to be the same as our own; but if it is different, and a party wishes to take advantage of it, he must prove it—following *Cooper et al. v. Reaney*, 4 Minn. 528. *Desnoyer v. McDonald, Gusse & Co.*, 4 Minn. 515; *Cooper et al. v. Reaney*, 4 Minn. 528.

**13. Presumption as to publication of statute.** When the law (statutes) prescribes that every law shall go into effect in thirty days after its approval by the Governor, or otherwise become a law, in accordance with the organic law of the Territory; *provided*, that no general law shall take effect until published, and other statutes provided for the immediate publication of all laws—the court will presume the law was duly published, in the absence of allegation to the contrary. *Lowell v. North et al.*, 4 Minn. 32.

**14.—as to when payment was made.** When it is uncertain whether a payment was made before, on, or after the day it was due, the law presumes that it was made on the day it was due. *Johnson v. Carpenter*, 7 Minn. 176.

**15.—as to negligence, from child being in the street.** No legal presumption of negligence on part of a child or his parents exists, in the bare fact that it is found in the street, or upon the sidewalk, without an attendant—a question for the jury to determine from all the circumstances. *The City of St. Paul v. Kuby*, 8 Minn. 154.

**16.—**When defendant's negligence caused an injury to plaintiff's child, aged four and one-half years, there is no legal presumption that a child of such an age did not exercise ordinary care and prudence. *Ib.*

**17.—as to agent's authority being communicated to dealer.** Where B., as the agent of H., bargains and sells property of H. to P., the presumption is that the authority under which B. acted was communicated to P. *Durfee v. Pavitt et al.*, 14 Minn. 424.

## V. COMPETENT, RELEVANT, MATERIAL, AND HEARSAY EVIDENCE.

### a. Generally.

**18. Immaterial evidence.** Evidence tending to prove facts not in issue, cannot be admitted. *Taylor v. Bissell*, 1 Minn. 225.

**19. Collateral facts.** Collateral facts cannot be shown in evidence, except upon a cross-examination. *Ames v. The First Div. St. Paul & P. R. R. Co.*, 12 Minn. 412.

**20. Irrelevant, etc.** When the plaintiff was on the stand, and the defendant put a question tending to prove a matter which, if true, would not be inconsistent with plaintiff's claim, the same was properly excluded. *Tozer et al. v. Hershey*, 15 Minn. 257.

**21. Introductory circumstances.** Circumstances introductory or explanatory of a principal fact to be established, where proved by competent testimony, are admissible in evidence. *Yule v. Edgerton*, 14 Minn. 194.

**22. Hearsay.** In an action between G. and D., declarations of one T. could not be received to establish a real ownership of the ties in himself—hearsay. *Greene v. Dockendorf et al.*, 13 Minn. 70.

**23.—**Witness cannot testify as to what certain persons told him as to the mental condition of a defendant, when they brought him to witness for medical treatment—it being hearsay. *State v. Gut*, 13 Minn. 341.

**24.—**In an action for damages occasioned by defendant's dam overflowing plaintiff's land with water. *Held*, not competent for defendant to show the instruction he gave the workmen who constructed the dam as to its height, the same being no part of the *res gestæ*, but objectionable as hearsay. *Finch v. Green*, 16 Minn. 355.

### b. In particular cases.

**25. Record of deed executed by an attorney in fact, with no recorded power.** The record of a deed from J. H. H., by

S. V. R. H., his attorney in fact, to H. C. & Co., where there is no power of attorney authorizing the agent to convey, is inadmissible for any purpose. *Lowry et al. v. Harris et al.*, 12 Minn. 255.

**26. Copy of record of deed not admissible.** A certified copy of a record of a deed is not entitled to record, and is not admissible in evidence. *Lund v. Rice*, 9 Minn. 230.

**27. Justice's criminal docket.** Where a criminal docket is kept by a justice of the peace, and a record made of proceedings in a criminal case before such justice, the record is competent evidence. *Cole v. Curtis et al.*, 16 Minn. 182.

**28. Township plats on file in the United States Land Office** are not admissible in evidence, on the simple certificate of the Register or Receiver—they must be proved as at common law. Sec. 88, p. 686, Comp. St., not having the effect to change the rule. *Walsh v. Kutténburgh*, 8 Minn. 127.

**29. Certified copy of letter in General Land Office.** If a copy of a letter in the General Land Office, certified to by the commissioner, be admissible at all, it must be authenticated as required by Sec. 58, Chap. 73, G. S. *Kelley v. Wallace et al.*, 14 Minn. 236.

**30. An entry in the books of a corporation,** in the usual course of its business, made by one whose business it was to make the same, and verified by him, is admissible in evidence in behalf of such corporation. *Schell v. The Second National Bank, St. Paul*, 14 Minn. 43.

## VI. BURDEN OF PROOF.

(See PARTNERSHIP, 22.)

**31. Proof of insanity** rests on party setting it up. *Bonfanti v. State*, 2 Minn. 132.

**32. That an ordinance is within corporate authority, on whom lies the burden of proof.** When questions arise as to any particular ordinance which it is claimed interferes with the rights of individuals,

as enjoyed under the common law or by statute, the burden of proof should be on the corporation to show that it has not exceeded its authority in framing such ordinance. *City of St. Paul v. Laidler*, 2 Minn. 209.

**33. Burden of proving—partner's authority:** *Query*, whether when a party, innocently believing a partner has authority to act for the firm, when he has none, the *onus probandi* of want of authority is not on the firm? *Selden, Withers & Co. v. Bank of Commerce*, 3 Minn. 166.

**34.—as to fraud in sale, where vendee is in possession.** Where property is taken out of G.'s possession, which he claimed to own by virtue of a bill of sale. *Held*, possession was *prima facie* evidence of title, and the *onus* of proof of fraud in the sale lay on the party attacking it. *Derby & Day v. Gallup*, 5 Minn. 119.

**35.—as to fraud in an assignment.** An assignment for the benefit of creditors, in due form, and regular on its face, will not be presumed to be fraudulent, but the burden of proof is upon those who attack it. *Guerin v. Hunt et al.*, 8 Minn. 477.

**36.—as to want of negligence, when steamboat boiler bursts.** Under Sec. 13, 5 U. S. Statutes at Large, p. 306, which provides "that in all suits and actions against proprietors of steamboats, for injuries arising to person or property from the bursting of the boiler of any steamboat, \* \* \* the fact of such bursting shall be taken as full *prima facie* evidence, sufficient to charge the defendant, or those in his employment, with negligence, until he show that no negligence has been committed by him, or those in his employment," it is incumbent on the defendant to disprove negligence, which accords with the rule of the common law that where the subject matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true, unless disproved by that party. *McMahon v. Davidson, impt., etc.*, 12 Minn. 357.

**37.—of new matter in answer.** Where the reply puts in issue all the material aver-

ments of new matter in the answer, the burden of proof of such defense is on the defendant. *Day et al. v. Raguet*, 14 Minn. 273.

## VII. PROOF PRELIMINARY TO ADMISSION OF EVIDENCE.

(See EVIDENCE IN PARTICULAR CASES; RECORDS.)

### 38. Evidence prima facie, irrelevant.

To entitle testimony, *prima facie* irrelevant, to admission, counsel should prove other facts showing its relevancy. *State of Minnesota v. Anne Bilansky*, 3 Minn. 246.

**39. Where corporate charter showed certain acts were to be performed before it should take effect.** Where parties offered in evidence their incorporating act in a foreign state, and from the act it appeared that certain acts were to be performed before the act should take effect, viz., filing of a certificate with the Secretary of that State, and that thereupon the Secretary shall issue to the corporation another certificate, of a prescribed form; "record it in his office," and "said certificate, or a certified copy thereof, should be evidence of the fact therein stated." *Held*, not admissible until it was shown that all the steps required by the act to constitute the corporation, had been taken. *Becht v. Harris et al.*, 4 Minn. 504.

**40. Proof of agency, before admission of agent's testimony.** Where the statements of one who pretends to act as agent for another are offered in evidence to bind such other person, it is for the court first to determine whether the agency is sufficiently proved by other testimony than that of the pretended agent; and if the court is of the opinion sufficient proof of agency has been made to allow the statements, still the fact of agency must be made out to the satisfaction of the jury. *Gales v. Manny et al.*, 14 Minn. 21.

**41. Identifying justice's docket.** A docket of a city justice is sufficiently identified and authenticated where the acting

city justice testifies that he found it at the office of such city justice; that it is one of the records of that office; that a certain person by whom the entries in the docket purport to have been made, was city justice; that he knows the handwriting of such person, and that certain entries are in his handwriting. *Cole v. Curtis et al.*, 16 Minn. 182.

## VIII. SECONDARY EVIDENCE, AND REQUISITES FOR THE ADMISSION THEREOF.

**42. Proof of loss of written instrument.** To admit secondary proof of an instrument, it is sufficient to establish a reasonable presumption of its loss, except in cases of suspicion—and it is always discretionary with the judge. *Phoenix Insurance Co. v. Taylor*, 5 Minn. 492.

**43.**—Before a party can show by parol the contents of a written instrument *prima facie* in his possession, he must first prove its loss or destruction without his culpability. *City of Winona v. Huff*, 11 Minn. 119.

**44. Absence of written instrument must be explained.** Proof of the contents of a letter cannot be received until the absence of the letter itself has been explained. *Guerin v. Hunt et al.*, 6 Minn. 375.

**45.**—Witness cannot testify as to contents of a letter written by defendant to him or his firm, without first accounting, satisfactorily, for its absence. *Lowry et al. v. Harris et al.*, 12 Minn. 255.

**46. Proof of bona fide search for lost instrument.** Very much less diligence is required on the part of a party to find a paper that belongs to his adversary, to entitle him to prove its contents, than will be exacted when he seeks to prove the contents of a paper belonging to himself. *Desnoyer v. McDonald, Geisse & Co.*, 4 Minn. 515.

**47.**—To entitle a party to show by secondary evidence the contents of a lost instrument, he is required to give some evidence that a *bona fide* and diligent



search has been unsuccessfully made for it in the place where it is most likely to be found—the object being to establish a reasonable presumption of the loss. *Thayer v. Barney*, 12 Minn. 502.

**48. Non-residence of those who possess an instrument not sufficient excuse.** Secondary evidence of the contents of a written instrument is not admissible where it is not shown to be lost or destroyed, but rather that it is in hands of non-resident's defendants, and that no attempt was made by plaintiff to obtain it, by notice to produce or otherwise, except that one of his witnesses had asked for it, and been unable to "get hold" of it. Non-residence of those to whose hands it was last traced, is not sufficient to excuse diligent effort to procure it. *Wood v. Cullen, Impl., etc.*, 13 Minn. 394.

**49. What preliminary steps will allow secondary proof of lost recorded plat.** In an action to recover from defendant the possession of land which he had dedicated to the public use as a public square under the statute, by filing a plat, etc., the plat on record was partially missing—that portion showing the certificates and acknowledgments necessary to make it a valid statutory dedication—the plaintiff introduced evidence to show the actual survey and platting, and to identify such plat as the one recorded, and that the plat thus recorded (but then defective by want of certificates, etc.,) was delivered to defendant as preliminary to a notice to defendant to produce the original plat, for the purpose of laying the ground for the admission of parol testimony of the contents of the record. *Held*, the proper course. The record indicated the existence of the original map, which was the next best evidence, and until a proper excuse was shown for its non-production, parol evidence was inadmissible. *City of Winona v. Huff*, 11 Minn. 119.

**50.**—Where a record of a plat was missing, and its nature indicated that the original was in the possession of defendant, it is competent to introduce the "re-

ception book" of the Register, showing the date of reception, grantor, grantee, and that it was delivered to defendant, and thereby to enable plaintiff to introduce next best evidence if defendant failed to respond to a notice to produce. *Id.*

**51. Letters are themselves the best evidence of their contents.** Where the fact of a sale is in issue, and it appears that the contract which defendant claims was a contract of agency, was made by letters, such letters are, in the first instance, the only competent proof, and oral evidence is incompetent. *Steele et al. v. Etheridge*, 15 Minn. 501.

## IX. PAROL EVIDENCE TO CONTRADICT OR VARY WRITTEN INSTRUMENTS.

### a. Generally.

**52.** The rule that parol evidence is inadmissible to contradict or vary the terms of a valid written instrument, is applied only in suits between the parties to the instrument and their privies. *Van Eman v. Stanchfield et al.*, 10 Minn. 255.

### b. When inadmissible.

**53. Ambiguity—patent.** An agreement which acknowledges the receipt of \$2,000, and promises to pay the same out of the "proceeds of the sale of a certain lot of ground situate in the city of St. Paul, State of Minnesota, viz., the east half, north-west quarter, section thirty-two, and range twenty-one," contains a patent ambiguity which cannot be explained by parol, and operates only as a receipt for money, which is payable on demand, and constitutes no defense to an action for money had and received. *McNair v. Toler*, 5 Minn. 435.

**54. Agreements prior and contemporaneous to written contract.** Parol proof of the understandings and agreements of the parties, at and prior to the execution of a written contract, to show that the contract was to terminate, in a certain con-

tingency, before the period fixed by the contract itself, is inadmissible. *Morrison et al. v. Lovejoy et al.*, 6 Minn. 319.

**55.**—Parol evidence is inadmissible to show a contemporaneous verbal agreement by which a party to a written contract had the privilege of revoking the written contract by notifying the other party thereof. *Wemple v. Knopf, Jr.*, 15 Minn. 440.

**56. Bill of sale.** Where a bill of sale, with an inventory attached, has not been attacked, either in respect to the consideration or the *bona fide* character of the transfer, it is incompetent to show "that by mutual agreement the inventory was made for the purpose of completing the transfer of the property to vendee, in consideration of the existing indebtedness, from vendor to him," or "how the inventory came to be made, and what was the consideration for the transfer," or (after showing change of possession) whether, at time of making the instrument and delivering possession, the vendor was largely indebted to the vendee. *Cole v. Curtis et al.*, 16 Minn. 182.

**57. Bill to vary manner of payment.** Parol evidence is inadmissible to prove that a bill should be paid in any other manner than indicated in its terms. *Butler v. Paine*, 8 Minn. 324.

**58. Bond, to vary its conditions.** The original parties to a bond for a deed, on certain conditions therein expressed, cannot show by parol that the bond was given to secure the performance of a parol contract different from the one set out in the bond, except on ground of fraud, mistake or surprise in executing it—following *McClane v. White*, 5 Minn. 178. *Russell v. Schurmeir*, 9 Minn. 28.

**59. Contract, that signer did not observe a certain word.** It is incompetent to show that a party to an obligation did not observe the word "assumed" in the same—it being an attempt to vary the terms of a written instrument. *Keough v. McNitt*, 6 Minn. 513.

**60. Conveyance, absolute on its face, that it was conditional.** A written instrument of conveyance, purporting to be

absolute on its face, cannot be shown, by parol proof, to be a conditional one, on mere suggestion of counsel on the trial—such facts can only be shown on the ground of fraud, mistake, or surprise, fully and explicitly alleged in the pleadings. *McLane v. White*, 5 Minn. 178.

**61. Contract in writing not to be varied by parol, when.** When a contract between parties is made, by which one party incurs liabilities or obligations to the other, and the terms and conditions of such liabilities and obligations are fixed in writing and deliberately signed by the party assuming them, and the matter is free from fraud or mistake, the writing must control and supersede all allegations of other and different terms founded on any preëxistent or contemporaneous understanding. So in equity, except in case of fraud or mistake; and the rule holds as to bills and promissory notes. CHATFIELD, J. *Bank of Hallock v. Baker et al.*, 1 Minn. 266.

**62. Deed.** Parol evidence is inadmissible to show that a deed on a valuable consideration, purporting to pass all the grantor's rights, was not intended to have that effect, but simply pass a determinable estate on condition subsequent. *McKusick v. The Commissioners of Washington Co.*, 16 Minn. 161.

**63. Indorsement.** A party who indorses a note, without any qualification, cannot show by parol that at the time of making the same it was to be without recourse, and no liability attach to him. *Kern v. Phul et al.*, 7 Minn. 426.

**64.**—Defendants—payees on a note made by one Randall—indorsed the same to Washington, the plaintiff. *Heid*, that the contract of indorsement could not be shown by parol to be a contract to assume the liabilities of joint makers. *Levering & Morton v. Washington*, 3 Minn. 323.

**65. Mortgage.** Where no fraud or mistake is alleged, parol evidence is not competent to vary a mortgage, by showing any understanding prior to, or contemporaneous with its execution. *Berthold v. Fox et al.*, 13 Minn. 501.

**66. Promissory notes—to show contemporaneous agreement.** Action on promissory note. Defense that “at time of the execution and delivery of the note there was a verbal agreement between the plaintiff and defendants that an indorsement, of the same date of the note, should be made on it, of \$578.00,” admitting the balance to be due. *Held*, an attempt, by parol, to vary terms of a written instrument, and inadmissible. Equally objectionable as showing only a partial want of consideration—admitting it to be true—in contradistinction from a partial failure of consideration. *Walters v. Armstrong*, 5 Minn. 448.

**67.—to show that it was given as security.** The maker of a promissory note—in the absence of fraud, mistake or surprise being claimed in its execution—cannot show by parol that it was given to secure the performance of a contemporaneous verbal agreement. *Schurmeier v. Johnson et al.*, 10 Minn. 319.

**68. Power of attorney.** Defendant claimed, under a conveyance from plaintiff's grantor by an attorney in fact, under a power of attorney in evidence. *Held*, plaintiff could not show by parol that the parties to the power had an intention not expressed by it, even to defeat the power by showing its illegality, except on the grounds which would admit such proof in other cases. *Gilbert et al. v. Thompson*, 14 Minn. 544.

**69. Receipt containing agreement.** Though a mere receipt for money may be varied or contradicted by parol, yet where it contains an agreement, condition or stipulation between the parties, it is in the nature of a contract, and not liable to be so varied. *Sencorbox v. McGrade*, 6 Minn. 484.

**70. Wheat receipts.** It is incompetent to show by parol that “wheat receipts” did not call for No. 1 wheat, but simply “merchantable wheat,” they themselves are the best evidence. *Cowley v. Davidson*, 13 Minn. 92.

*c. When admissible:*

**71. Acknowledgment—certificate of.** Under Sec. 26, Comp. Stat., p. 400, the certificate of acknowledgment to a deed, affixed thereto by an officer empowered to take acknowledgments, and regular upon its face, is not conclusive evidence of the matters contained therein, and can be aided or disproved by parol testimony. *Dodge v. Hollinshead*, 6 Minn. 25; *Annan v. Folsom*, 6 Minn. 500; *Egerton et al. v. Jones et al.*, 10 Minn. 427.

**72. Ambiguity, latent—to identify subject matter of contract.** Though every description in a bond for a deed may apply to several distinct parcels of land, it is competent to identify the subject by extrinsic evidence, to which the instrument relates. *Baldwin v. Winslow*, 2 Minn. 216.

**73.—**Extrinsic evidence will be resorted to, to identify the object of a written contract, when they do not contradict or depart from a rational interpretation of the words of the instrument. *Ib.*

**74.—**The conveyance of “the half” of any particular property, conveys in law the *undivided half*. It is competent to show by averment which “half of a lot” was meant, when none is specified. *Ib.*

**75.—**Parol evidence is admissible to identify the lumber referred to in a writing. *Ames v. The First Div. St. Paul and P. R. R. Co.*, 12 Minn. 412.

**76. Bills of parcels,** tending to show upon their faces a sale of the property described, by A. to B., may be shown by parol to have been given B. by way of security or pledge. *Jones v. Rahilly*, 16 Minn. 320.

**77. Bond for a deed.** Complaint sought to determine defendant's rights under plaintiff's bond for a deed, on ground of default in payment. The answer alleged that plaintiff purchased the land at request of defendant, with the understanding that defendant should have the title on payment of certain amounts, etc., and that the bond for a deed was given to secure that agreement, and that plaintiff was only a

mortgagee in equity, and prayed the complaint be dismissed. *Held*, competent to show by parol the true nature of the transaction, as well where an instrument is sought to be enforced in a way not contemplated by the parties, as on ground of fraud, mistake or surprise in its execution; but inasmuch as a party must be *damaged*, to enable him to have relief against fraud, and the answer does not show fraud, nor but that plaintiff paid all the land was worth, and that defendant would suffer nothing by cancelling the bond, he was not entitled to a dismissal of the complaint. *Belote v. Morrison et al.*, 8 Minn. 87.

**78. Consideration of deed.** The expressed consideration in a deed may be impeached by parol. *Kumler v. Ferguson*, 7 Minn. 442.

**79. Contract only partly in writing.** Where a writing appears to express only some part of an agreement entered into between the parties, it seems it would be admissible to prove the other parts of the agreement on which it is silent. *Ruggles et al. v. Swanwick et al.*, 6 Minn. 526.

**80. Contract refers to verbal agreement.** Although a written contract cannot be varied by any previous or contemporaneous verbal agreements or understandings, yet where the writing directly refers to a verbal agreement, the latter may be proved, though it adds material terms and conditions to the writing. *Id.*

**81. Contract, fraud, mistake or surprise in its execution, or fraud in its performance.** *It seems* that parol evidence is admissible in equity, on the ground of fraud, mistake or surprise, in the *making* and *execution* of an instrument, to show that a deed absolute on its face was intended only as a mortgage, and also where fraud arises subsequent to the making or execution of the instrument, in an attempt to enforce it in a manner not authorized by the transaction, to the *prejudice* of the grantor or mortgagor—qualifying the dictum in *McClane v. White*, 5 Minn. 178. *Belote v. Morrison et al.*, 8 Minn. 87.

**82. Copartnership articles—verbal contract not covered by them.** Where K. took L. in as a partner, and it was agreed between them that the firm thus constituted (L. & Co.) should assume and pay K.'s debts. This contract was susceptible of proof, outside of the articles of agreement, (the latter relating simply to the manner of conducting the business, distribution of profits and losses, period of its existence and manner of dissolution, being silent as to the stock employed, or how it was to be obtained or paid for,) on the ground that parol evidence is admissible in case of written instruments, to prove collateral and independent facts about which the writing is silent. *Keough v. McNitt*, 6 Minn. 513.

**83. Indorsement.** When a party indorses a note in blank, contemporaneous with its making, it is competent to introduce extrinsic evidence to show, as between himself, the maker, and payee, his purpose and intention in so signing. *Pierse v. Irvine et al.*, 1 Minn. 373.

**84.**—In an action by the payee against a party who has written his name on the back of a note, parol evidence is admissible to show that it was placed there before delivery to the payee, and also to show the intention of the parties at the time his name was written on the note, concerning the character he sustains to the note. *McComb, Simpson & Co. v. Thompson*, 2 Minn. 145.

**85.**—When a person puts his name on the back of the note, if there is anything to be found in the writing itself that indicates what particular relation the party intends to assume to the note, then parol evidence is not admissible to vary such relation, but the party must be tried upon his written contract. The fact of the name being on the back of the note, where an indorsement is usually made, is not as absolute in indicating its character as if it had written over it a contract of indorsement, and is capable of an explanation as between all parties, before the note leaves the hands of the payee—not so in the hands

of a *bona fide* holder. *McComb, Simpson & Co. v. Thompson*, 2 Minn. 146.

**86.**—A party who writes his name upon the back of a negotiable promissory note, before its delivery to the payee, and for the purpose of giving it credit with him, becomes thereby a joint maker, and as between parties cognizant of the circumstances, parol evidence may be given to prove such facts—(following *McComb, Simpson & Co. v. Thompson*, 2 Minn. 139, and *Marienthal, Lehman & Co. v. Taylor & White*, 2 Minn. 147)—but such evidence is not admissible to show, that the liability of joint maker thus incurred, was, by a parol agreement at the time, to be restricted to that of an endorser, and thus entitle him to notice of non-payment, for such evidence would contradict the written contract of the parties, whereas in the former case, the parol evidence is to show that the contract of endorsement was *never made*, the signature having been put in the wrong place, through ignorance, or for the purpose of showing his relation to the (original) other joint maker. *Peckham & Spencer v. Gillman & Co.*, 7 Minn. 446.

**87. Notary's protest.** The notary's record of protest did not show pre-payment of postage upon the notices of demand and protest. *Held*, it might be proved by the notary's parol testimony. *Rogers v. Stevenson*, 16 Minn. 68.

**88. Promissory note, capacity in which maker signed.** A promissory note in these terms—

“\$1146.66.

“One year after date, we as Trustees of School District No. 10, etc., promise to pay, etc.

(Sgd) WILLIAM NEAL,  
WILLIAM B. SANBORN,  
JOHN BAILOR,”

—leaves the capacity in which the makers intended to sign in such doubt as to authorize *parol evidence* of the surrounding circumstances, the debt for which note was given, object sought to be obtained by the arrangement, declarations of the parties at the time and in the presence of each other, and disposition made of the money. *Sanborn v. Neal et al.*, 4 Minn. 126.

**89. Lease, assignment of—parol discharge of lessee.** Where a landlord gives written consent to the assignment of the lease to a third person, it may be shown that a parol agreement was entered into at same time, by which the lessee was to be discharged from any further liabilities under the lease—such an agreement not varying either the lease or the written consent to assign the same, and a surrender being always susceptible of parol proof. *Levering et al. v. Langley et al.*, 8 Minn. 107.

**90. Signature.** Parol admissions of A. are competent to show that the signature of A. was attached to an instrument by B. for A. *Pottgeiser v. Dorn*, 16 Minn. 204.

**91. Wheat receipts.** The following warehouse “wheat receipt” is not a complete contract, and the circumstances under which, and the purpose for which it was issued, may be shown by S., as against F. or his assigns for value, without notice of any further terms of the contract.

“No. 711. Account of A. P. Foster.  
41–25 bushels, . . . No. 2 wheat  
20 sacks.”

Dyer. J. G. SWART.  
Minneapolis, Sept. 29, 1866.”

—*Robson v. Swart*, 14 Minn. 371.

## X. EVIDENCE ADMISSIBLE, ETC., IN PARTICULAR ISSUES.

**92. Another action pending.** Where the pendency of another action is set up, it is competent to show by parol that the matters relied upon in this action have been withdrawn from the issue in said prior action, or were withdrawn prior to its final submission. *Estes v. Farnham*, 11 Minn. 423.

**93.**—Where, under a plea of “another action,” the plaintiff had introduced the answer in such action. *Held*, competent for the other party to show that the pleadings in said action were lost while in hands of the referee, and then show by *parol* that the answer was *amended* so as to leave out of the issues the matters set up in this action. *Id.*

**94.**—To sustain a plea of another action pending, it is not competent for a party to introduce what purports to be a copy of an answer in said suit, without preliminary proof that the same was made in said former action, loss of the original, that the paper was a copy, or served on the party as a copy of the answer in said former action. *Ib.*

**95.** Acceptance of work done under a contract. Where defendants contracted with A. to build a building of the best materials and in a good and workmanlike manner, and let it out to sub-contractor, who did the work in such a way that the walls fell on plaintiff's ground. *Held*, the use of the walls by defendants for the purpose of doing wood-work on them, and their payment of the sub-contractor for the material and work done, would be strong evidence to show that defendants accepted the same as performance, *pro tanto*, of the sub-contract, and sanctioned the character of the materials and work done. *Bast v. Leonard et al.*, 15 Minn. 304.

**96.** Association of different individuals in business. Parol evidence is competent to show that a defendant was "associated" with sundry other persons for the purpose of holding him responsible under the statute for the indebtedness of the association. *Cooper v. Breckenridge*, 11 Minn. 341.

**97.** Agency. Neither the declarations of a man, nor his acts, can be given in evidence to prove that he is the agent of another. *Sencerbox v. McGrade*, 6 Minn. 484.

**98.**—Agency cannot be proved by the declarations of the pretended agent. An original authority, or ratification by the principal, of the acts or declarations of the agent, must be shown by evidence *aliunde*, but not invariably in the first instance—the better way is to prove the agency, then the acts of the agent, but the order of proof is discretionary with the judge. *Woodbury et al. v. Larned*, 5 Minn. 339.

**99.**—The general custom or practice of an agent in doing the business of his principal, may not be material in this case,

but it was competent to show that the agent signed the notes, receipts, etc., in this case, (where they were given for the purchase money of property which the principal claimed,) for the benefit of his principal, and that the business, although contracted in his name, was the business of his principal. *Ames v. The First Div. St. Paul & P. R. R. Co.*, 12 Minn. 412.

**100.**—To render the testimony of an agent competent against his principal, the agency must first be established, and the admission must first have been made as part of the *res gestæ*. *Lowry et al. v. Harris et al.*, 12 Minn. 255.

**101.**—Before the act of B. can be given in evidence as the act of A., it must be shown that B. was the agent of A., and the agency must be proved from other facts than the acts of B. But such agency may be inferred from the habit and course of business of A. and B., but not B. alone, though his acts be done in A.'s name. *Lawrence v. Winona and St. Peter R. R. Co.*, 15 Minn. 390.

**102.** Administrator's bond, want of. In an action by an "heir," to set aside an administrator's sale for want of the filing of the requisite bond prior to the sale, parol testimony of the Probate Judge and administrator is admissible to show the want of any bond—it not being a collateral action, which allowed any presumption in favor of the probate proceedings. Sec. 50, Comp. Stat., p. 423. *Babcock et al. v. Cobb*, 11 Minn. 347.

**103.** Age of sheep. One who has been a shepherd abroad, and kept and owned sheep here, and swears that he can tell the age of a sheep by its teeth, till it is four years old, may be asked the age of a sheep, by its teeth, which is under four years old. *Clague v. Hodgson*, 16 Minn. 329.

**104.** Bank bills, worthlessness of. To prove the worthlessness of bank bills, it is incompetent to show "Bank Note Detectors"—they are simply opinions of individuals not under oath—they are no better than opinions of medical writers even of standard reputation, which are not allowed

to be read to a jury. *Payson v. Everett*, 12 Minn. 216.

**105.**—Evidence that a person had passed a \$20 bill of bad money, and been taken up for it, is incompetent to prove that a particular bill is bad. *Ib.*

**106. Bankruptcy assignment.** Complaint alleged that the Register in Bankruptcy executed and delivered to the plaintiff (as assignee) an assignment, in due form of law, "which, or a certified copy thereof, is ready to be produced, as the court shall direct." *Held*, the certified copy was competent evidence, and it need not have been acquired before bringing suit—during the trial was sufficient. *Rogers v. Stevenson*, 16 Minn. 68.

**107. Contract to board, etc.,—custom.** The existence of a contract by which plaintiff was to board defendants, stage drivers, at a lower rate than customary, in consideration that defendant would run his stages to plaintiff's hotel being in issue, it was competent for defendant to prove a custom to board such men lower than others, as tending strongly to support defendant's theory, and a corroborating circumstance in aid of his having made such a contract—but such a custom must be shown to have existed when and where the contract was made, as well as uniform. *Walker v. Barron*, 6 Minn. 508.

**108. Contract to cut wheat, existence of.** The question being whether defendant has contracted to cut plaintiff's wheat, as soon as he cut a forty-acre piece of his own, testimony of defendant's employee that he heard defendant say that "after he got that 40-acre piece done, he was going over to the plaintiffs' to cut their grain," is admissible, though not made in plaintiffs' presence, and it seems it was relevant. *Baldwin et al. v. Blanchard*, 15 Minn. 489.

**109. Contract of sale of logs.** Complaint alleged a special contract between plaintiff and defendant, made in fall of 1860, whereby defendant agreed, in consideration of certain logs sold to him at

that time by plaintiff, to pay the latter a given price before the spring of 1863, and then set up non-payment, and prayed judgment for the same. *Held*, competent for plaintiff to show in evidence a bill of sale to defendant, made in fall of 1860, passing this property from plaintiff, for consideration of \$2,000, receipt whereof was acknowledged, but that same was given as security for an existing indebtedness; and an agreement, executed April 28, 1862, which recited the purchase from plaintiff by defendant of the property, in 1860, and that defendant was to pay plaintiff the price charged in complaint, "and out of the amounts due" plaintiff, defendant was to pay A., B., and C., and then pay balance "in summer, fall and winter after date of instrument," for the payment by the agreement of 1860 being executory, could be changed by the parties at pleasure both as to price, mode and time of payment, as was done by the last agreement, and the promises to plaintiff to pay A., B., and C. was a promise to pay plaintiff, and the liabilities under the last agreement are as set out in the complaint. And there was no departure, for it is not necessary to state only that portion of a contract which is complained of as broken, and that according to its legal effect, and as altered by the parties. *Estes v. Farnham*, 11 Minn. 423. BERRY, J., dissenting.

**110. Common carrier, that he received goods in good order.** Where the defendant's agent at port of delivery, delivered to plaintiff, with the goods, on payment of freight and charges, a certain instrument in form of a bill of lading for the goods in question, dated September 30, 1864, but without signature, such instrument is admissible as evidence that defendant received the goods in good order, in an action by plaintiff to recover damages for injuries thereto; and the fact that defendant's agent at port of shipment had attached a certificate to the effect that the instrument was a copy of the manifest of the boat on which said goods were transported, does not show that the instrument

was not original, but a copy. *Weide et al. v. Davidson et al.*, 15 Minn. 327.

**111. Consideration of chattel mortgage.** To prove title to personal property under a chattel mortgage from a former owner, plaintiff, the mortgagee, may show in evidence—to establish the fact of a consideration—notes of the mortgagor in favor of plaintiff's former husband, deceased, equal in amount to the consideration stated in the mortgage, even though said notes are not endorsed over to plaintiff, for her ownership can be established by parol—following *Pease, Chalfant, et al., v. Rush, Pratt et al.*, 2 Minn. 107. *Foster v. Berkeley et al.*, 8 Minn. 351.

**112. Consideration of deed.** Where the actual consideration of a deed is drawn in question, the actual value of the land at time of sale is material. *Kumler v. Ferguson*, 7 Minn. 442.

**113. Damages for breach of contract to cut wheat.** In an action against defendant for failing to cut plaintiff's wheat when he agreed to, it is competent to show "what, if anything, did the grain yield less in quantity, than it would have yielded if defendant had cut it when he agreed to," there being evidence that defendant knew the wheat would be ripe at that time, when he made the contract. *Baldwin et al. v. Blanchard*, 15 Minn. 489.

**114. Demand and refusal.** Demand and refusal being in issue, one witness testified that "immediately after levy he told defendant goods belonged to the plaintiff, that he had better give them up; if not, witness would replevy them—and defendant said he was indemnified." Another witness testified that he "told defendant the goods belonged to plaintiff, and defendant said he did not care." Held, sufficient to sustain a finding of demand and refusal. *Caldwell v. Bruggeman*, 8 Minn. 286.

**115. Dedication.** Where the record of a town plat, claimed to have been filed by the defendant, was in issue, and one of defendant's witnesses testified he had recorded it without defendant's knowledge, it was

competent for plaintiff to show conveyances by defendant to different parties, describing the premises conveyed, according to this plat, and distinctly referring to the record of the plat, thereby to show a recognition and ratification of its record. *City of Winona v. Huff*, 11 Minn. 119.

**116.**—Where a city (plaintiff) claimed that defendant had dedicated the land in question under the statute by filing plat, etc., it is incompetent for him to show that he has been paying taxes to the county since such alleged dedication—otherwise, it seems, had the plaintiff claimed a dedication *in pais*. *Ib.*

**117.**—In arriving at an alleged intent of a party to make a common law dedication, it is competent to show a conveyance of the premises as private property about the time of the alleged dedication, by the alleged dedicator; possession and occupation of the property by the owner during the time alleged to have been in the occupation of the public; and the assessment of taxes on the premises as private property, and payment of the same. *Case v. Fuvier*, 12 Minn. 89.

**118.**—In determining whether or not a given piece of land was dedicated to the public as a street, it is competent to show that the city collected taxes thereon, also that a map of the city made by the city authorities, did not show any street over the land in question, also that a former owner of a part of said alleged street, dedicated the same for such use or under such circumstances, consented to the dedication of the same by the alleged dedicator. *Wilder v. City of St. Paul*, 12 Minn. 192.

**119.**—On the question of an acceptance of a dedication by the public of an alleged street, it is competent to show that a person in erecting a building on the corner of Third street and the premises in dispute, had made a smooth front to said building at the side bordering said premises, and had placed in the cellar thereof seven or eight places for windows or doors, with sills, etc., one of which sills appears above the line of said street. *Ib.*



**120.**—Where the question of a common-law dedication is in issue, and where no positive act of dedication exists, it is competent to show the alleged dedicator's declarations made during the use of the premises by the public, also a map or plan of the town made by the proprietors and signed by the alleged dedicator; but it is not competent to show a map made by third parties—entire strangers—as a private speculation, where no act of affirmance or recognition of the alleged dedication is shown. *Ib.*

**121. Deed: that it was a mortgage.** A deed absolute on its face, given as security for a debt, is a mortgage, and the character of the transaction may be shown by parol evidence of the circumstances under which the deed was made, and the relation subsisting between the parties; so letters of the grantor accompanying the same may be shown, but evidence of the grantor as to what was his intention at the time of executing it, is inadmissible—the question is what was the contract between the parties. *Phoenix et al. v. Gardner et al.* 13 Minn. 430.

**122. Election, regularity thereof.** The certificate of the County Canvassing Board is *prima facie* evidence of the facts stated (result of the election), but may be rebutted, and the District Court can inquire as a matter of fact whether the election was fairly conducted, and whether the result of the election is truly set forth in the certificate, but the proof is on the contestant to show irregularities and that they affected the result. *Taylor v. Taylor*, 10 Minn. 107.

**123. Execution sale.** Where a sale of land on execution had been legally made, and the sheriff had returned the execution satisfied, but failed to deliver to the purchaser the certificate of sale, and has left the State, the purchaser has the right to furnish other evidence of his purchase if the certificate cannot be obtained, and also to have the sheriff's return, and the entry of satisfaction of judgment modified so as to conform to the amount for which the

property was sold. *Barnes v. Kerlinger*, 7 Minn. 82.

**124. Fraud.** In an action by a purchaser against a vendor for fraudulent representations in the sale of mill property as to the capacity of the mill, the declarations of a stranger employed to run the mill, made after the sale, as to why the mill would not grind as much as represented are inadmissible. *Faribault v. Suter et al.* 13 Minn. 223.

**125.**—Where fraudulent representations are claimed to have been made by a vendor, and relied upon by the purchasers—one purchaser cannot testify as to the effect of the representations upon his co-partner in the purchase. *Ib.*

**126.**—Evidence that a vendor, after the completion of the sale, made representations concerning the property, does not tend to prove that he made such representations at time of sale. *Ib.*

**127. Fraudulent assignments, transfers, etc.** Where the plaintiff makes an issue of actual fraud, the defendants have a full and perfect right to prove any fact or circumstances which will in any way tend to avoid the actual fraud, and prove the real intention under which the parties acted. Hence, where B. being indebted, conveyed to his wife real estate, which conveyance was assailed by B.'s creditors as fraudulent. *Held*, defendants can prove that the property was partly purchased with money belonging to B.'s wife, and, that years before, it had been agreed between B. and his wife, that he should convey the property to her, and that the conveyance was carrying out that agreement which had been made when B. was not indebted to plaintiffs. *Filley et al. v. Register et al.* 4 Minn. 391.

**128.**—To establish fraud in a bill of sale of goods under which plaintiff claimed, defendant offered to show that the average profit on such goods at that place was 25 per cent. and the capital necessary to carry on that kind of business. *Held*, too remote for such a purpose, and properly ruled out—such facts, if admitted, not being suffi-

cient to warrant comments to a jury, and from which they might infer fraud. *Derby & Day v. Gallup*, 5 Minn. 119.

**129.**—The validity of certain deeds, assailed for fraud, being in question, it was incompetent to show a record of another suit between defendants and third parties where certain assignments of personal property in trust for the benefit of creditors made by defendants, was declared void on verdict of jury for fraud, though made on same day of the deeds in question—for the transaction was concerning different matters and between different parties. *Mower et al. v. Hanford et al.*, 6 Minn. 535.

**130.**—Where fraud is sought to be established by showing large indebtedness and insolvency at the time of the execution of the conveyances, it may be rebutted by showing that down to the eve of the execution of the conveyances, the parties were paying off their indebtedness as fast as money could be realized from the sale of property—proper to go to the jury. *Ib.*

**131.**—When a deed is impeached for fraud; *query*, whether it can be shown that certain persons *claimed* the grantor to be indebted, to them at time of conveyance. *Kumler v. Ferguson*, 7 Minn. 442.

**132.**—On the question of fraud in an assignment for benefit of creditors, the intent is the only subject of inquiry, and acts wholly independent of the fact of assignment, cannot be considered by the jury. *Guerin v. Hunt et al.*, 8 Minn. 477.

**133.**—Where the plaintiff claims to own property, seized by the defendant—an officer—on an execution against one S. and the title to the property was in issue, and plaintiff on his examination in chief produces and identifies a bill of sale of the property from S. to himself—the defendant may cross-examine the plaintiff to show all the circumstances of the sale, character of the consideration, disposition of the goods after delivery, and any circumstances tending to show fraud in the sale. *Dodge v. Chandler*, 13 Minn. 114.

**134.**—As between the assignee of H. and a creditor of H., who assails the as-

signment as fraudulent against him, it is competent to show that goods were seen in an upper story of H.'s house about a week prior to the assignment, from which place he had a short time before removed his stock to another store; that the window was subsequently covered with a blind; that two large trunks were removed from the room up stairs, in H.'s house, to the railroad depot, marked H. L. E., St. Louis, Mo.; that such address was subsequently changed to William Constans, etc., on the agent of the road refusing to receive the trunks with the former address, and this within three days after the assignment. *Blackman v. Wheaton*, 13 Minn. 326.

**135.**—The retention of some portion of the goods assigned by the assignor, does not in and of itself, necessarily invalidate an assignment, but such retention may be evidence proper for the consideration of the jury, in connection with other testimony in the case, upon the question with what intent, on the part of the assignor, the assignment was made. *Ib.*

**136.**—The perpetration of fraud in the transfer of property to the prejudice of creditors, must ordinarily be proven, if at all, by circumstantial evidence, which is recognized as badges and ear-marks of fraud—such acts, except as to those immediately participating in its perpetration, being usually committed with a secrecy and cunning which hide it to a greater or less extent from common observation. *Hicks v. Stone et al.*, 13 Minn. 434.

**137. Goods: that they conformed to the contract.** Where defendants set up defects in the goods purchased under a contract, delay in making any examination is evidence tending (not strong evidence as matter of law) to show that the goods conformed to the contract. *Day et al. v. Raguet*, 14 Minn. 273.

**138. Horse: that a person had charge of him.** The fact that a person *claims* and takes away a runaway horse, immediately after he is caught, is sufficient to sustain a finding that the party had charge of the horse when he started, and was responsible

for the injuries committed by the runaway, occasioned by said party's negligence in leaving the horse standing unhitched in a public street. *Courtneir v. Seacomb*, 8 Minn. 299.

**139.**—that he was balky at time of sale. Proof that a horse was "balky" within three or four days after he was purchased, will sustain a finding that he was "balky" at time of sale, so as to show breach of warranty, that he was "sound, perfect in every respect, and true, gentle and willing to work." *Finley v. Quirk*, 9 Minn. 194.

**140.**—that he was not sick. Where the complaint alleged that the horse purchased of defendant was diseased, and communicated the same to another horse of plaintiff's, and the answer denied any such sickness of the other horse. *Hoid*, defendant could not show that the other horse was, when plaintiff purchased, ill of a disease, that unchecked would have run into the disease it then had, for the purpose of showing that it did actually run into such disease—nor to impeach the former owner of the horse who testified that it was sound when he sold it to plaintiff. *Johnson v. Wallower*, 15 Minn. 472.

**141.** "Having or claiming title"—vacant and unoccupied land. In an action to determine adverse claims to real property under Sec. 1, Chap. 75, G. S., as amended Chap. 72 Laws 1867, the complaint alleged ownership in plaintiff, and that the land was vacant and unimproved. Issue was joined on the allegations, dated 1859. Plaintiff offered in evidence a U. S. patent for the land to W., dated 1859; a record of a contract of W.'s to convey the land to H. when W. acquired title thereto, dated 1856, and H.'s warranty deed to plaintiff dated 1857. *Held*, sufficient showing of plaintiffs "having or claiming title" to the land, within the statute, and this though the contract might not have been recorded in the proper book to make it notice to purchasers—it being executed so as to entitle it to record. (Sec. 87, Chap. 73, G. S.) But such evidence was not proof that the land

was vacant and unoccupied. *Conklin v. Hinds*, 16 Minn. 457.

**142.** Insolvency. Insolvency of a person may be established by proof that in the community where he resides he is generally reputed to be insolvent. *Nininger v. Knox et al.* 8 Minn. 140.

**143.**—Where a person's financial ability is in issue, it is incompetent for him to testify whether he "had means" to do so and so; that is for the jury to determine on facts concerning the amount of his property—what composed it, etc. So, as to whether he would have been able to run a certain mill had he been held liable in a given instance. *Ib.*

**144.** Judgment: of Superior Court—its existence. To prove, as a fact, a domestic judgment of a Superior Court, it is not necessary in the first instance to establish any of the preliminary proceedings upon which the judgment depends, the presumption *prima facie* being that the proceedings are regular. *Williams et al. v. McGrade et al.* 13 Minn. 46.

**145.**—Where the statute requires the clerk of court to keep, 1st, a Register of Actions, containing minutes of all proceedings in each action; 2d, a Judgment Book in which judgments shall be entered; 3d, a Judgment Docket, in which judgments shall be docketed, a book endorsed, in ink, on the outside of the cover, "Judgment Book" at top of the back, in ink, 1st, "Judgment Book," 2d, in gilt letters, "Records," and lastly, in ink, "Register of Actions and Judgment Book," the entries in which (as concerns this case) are all in the form of mere notes or memoranda of the action, the last of which was without date and as follows: "Judgment entered against defendant, and in favor of said plaintiff for \$328.50," is a book of minutes of proceedings in the action, and receivable in evidence in proof of the existence of a judgment. *Brown v. Hathway & Briggs*, 10 Minn. 303.

**146.**—docketing thereof. Under our statute the making and filing of the judgment roll is the duty of the clerk, for which

neither the party nor his attorney is responsible, and, it would seem, that the omission of this duty cannot render the subsequent proceedings absolutely void. And when it appears that a judgment was docketed, the presumption, *prima facie* at least, is that the docketing is regular and the roll duly filed, therefore the transcripts of the judgment book are competent and sufficient *prima facie* evidence of the judgment, and the docketing of the same. Sec. 252, Chap. 66, G. S. *Williams et al. v. McGrade et al.* 13 Minn. 46.

**147.—filing and subsequent loss.** For a statement of facts which show a filing of a judgment roll and subsequent loss of the same. *Jorgensen v. Griffin*, 14 Minn. 468.

**148.—satisfaction thereof.** Where the sheriff's return on an execution sale of plaintiff's property in favor of the county, shows only that he realized therefrom in excess of costs a given amount, and the plaintiff claims that the sale being void, still he actually paid such money to the sheriff to be applied on the judgment against him, he may show such facts by competent testimony as the County Treasurer, who may state that he gave his receipts showing the money was paid on the judgment and was told it was so paid—such facts being *res gestæ*. *Shelley et al. v. Lash*, 14 Minn. 498.

**149.—**Defendant showed a *prima facie* title under an execution sale Dec. 27, 1859, in favor of Ramsey county, against plaintiff's grantor. Plaintiff then offered to show that the commissioners of Ramsey county had taken out execution on said judgment and sold said land, bidding the same in themselves, on the 19th of February, 1858, for a given amount, that (although said sale was void and passed no title under *Williams v. Lash*, 8 Minn. 496) the said county had actually received the amount realized on such void sale from persons paying the same at the instance of plaintiff's grantor and for his benefit, to thus show that such judgment had been satisfied prior to the sale under which de-

fendant claims. *Held*, competent evidence for that purpose. *Ib.*

**150.—**Though the sheriff's return on an execution shows that a given amount was made, on sale, and fact showing the sale void, hence no satisfaction of judgment, the judgment debtor may show that he actually paid that amount, or any other amount, by agreement with the plaintiff, as satisfaction of the judgment. *Ib.*

**151. Married woman's interest in subject of suit: degree of proof.** *It seems*, that when a married woman sues for her separate property without joining her husband as plaintiff or defendant, she should be held to very strict proof of the fact that the property belongs to her and not to her husband. *Nininger v. Commissioners of Carver County*, 10 Minn. 133.

**152. Marriage** may be proved by the oral testimony of one of the married parties. *Leighton et al. v. Sheldon*, 16 Minn. 243.

**153. Notice to defendant by plaintiff's agent.** Plaintiff sued defendants for damages arising from their neglect to notify an endorser on a promissory note of its non-payment, and thereby discharging him to plaintiff's loss. Defendants denied notice of the residence of the endorser. *Held*, plaintiff could prove that one J. acted as his agent for the delivery of the note to defendants, and that his orders were, when so employed, to deliver note and state residence of endorser—there being two of same name living in different places—admissible on ground that it was necessary to establish the special agency, to show the instructions. *Nininger v. Knox et al.*, 8 Minn. 140.

**154. Notice of school district meeting, what record evidence of.** The records of a special meeting of a school district recited the fact, that, "pursuant to notice previously given in writing, agreeably to the provisions of the statute, the legal voters of school district No. 10 met," etc. *Held*, the law requiring the clerk to give notice, and keep a record of the proceedings, and no other mode of the record of the notice, or evidence of the same being

prescribed by statute (Sec. 67 and 68, Comp. St., p. 359), the record is *prima facie* evidence of a regular notice. *Sanborn v. School District No. 10, Rice Co.*, 12 Minn. 17.

**155. Negligence.** Where a passenger on a stage was drowned by the uncoupling of the defendant's coach in going on a ferry-boat on the line of its route, the fact that the ferry-boat was removed from its usual landing to a place more exposed and dangerous, and the defendant's agent so knew, or that the boat was insecurely attached to the shore, or that the coach was insecurely attached to the forward axle, or overloaded, or improperly loaded with baggage or otherwise, or without light, or that each or any of these facts might have been prevented by the use of the highest vigilance and caution, is evidence of negligence on part of defendant. *McLean v. Burbank*, 11 Minn. 277.

**156.**—Where a passenger on a stage was drowned by the uncoupling of the defendant's coach in going on a ferry-boat on the line of their route, the fact that "the place of crossing the ferry at the time of the accident was one of danger, and on account of there being no notice given to the passengers of the approach to the ferry, so that they might have got out, or been apprised of their danger, and the highest degree of vigilance and caution was not used by the agents of the defendant in warning the passengers," is evidence of negligence in defendants. *Ib.*

**157.**—In an action under Sec. 3, Chap. 68, Comp. St., against a stage company for damages from the wrongful act of defendant causing the death of one, McL., it being undisputed that the accident was caused by the uncoupling of the coach, and its precipitation into the river, while being driven on to the ferry-boat, and that the occurrence transpired on the road, while the coach was in transit, the driver in his place in charge of the horses, the passengers inside the coach. *Held*, in view of these facts proof that the plaintiff's intestate was a passenger of the defendant's,

and that the accident occasioned the death, cast on the defendants the burden of exonerating themselves, by proof of diligence. *Ib.*

**158.**—In an action brought by a passenger upon one boat against the owner of another boat, for injuries sustained by the bursting of the boiler of such boat, the fact of bursting is (under Sec. 13, Chap. 1915, U. S. St. at Large) full *prima facie* evidence sufficient to charge the defendants, or those in his employment, with negligence until he shall show that no negligence has been committed by him or those in his employment. *Fay v. Davidson*, 13 Minn. 523.

**159.**—In an action by a passenger against the owner of a steamboat for injuries received from the explosion of the boiler under the control, as alleged, of an unlicensed, unskilled, and unqualified engineer, in consequence of whose wrongful and unskillful management the same exploded. *Held*, although the laws of the United States made it unlawful to employ an unlicensed engineer, still the defendant may show that the engineer was "competent," that is, that he possessed the requisite skill, for the purpose of reducing the exemplary damages, but not to reduce the purely compensatory damages. *Ib.*

**160.**—Where plaintiff's horse standing unhitched in the street of a town was injured by being struck by another team which was, through defendant's negligence, running away, it is competent for plaintiff to show that he exercised ordinary care and prudence regarding his horse, although neglecting to hitch him, in view of his trustworthy disposition to stand unhitched in the street. *Griggs v. Fleckenstein*, 14 Minn. 81.

**161.**—Whether the mere falling of a building in process of construction is evidence tending to show negligence on part of persons constructing the same, or not, it may be evidence of such negligence in connection with other circumstances. If not accounted for by showing that its fall was occasioned by the act of God, third persons, by some other cause

independent of the negligence of its builders, the *fact* that it fell in connection with other facts showing unfit materials were used, or the work improperly performed, would have a clear tendency to show that it was not constructed as safely as a due regard for the rights of adjoining proprietors required. *Bast v. Leonard et al.*, 15 Minn. 304.

**162.**—In an action against defendant for negligently erecting a building for and under contract with A., whereby it fell on plaintiff's lot, and a defendant seeks to avoid the same by showing that he had subcontracted with B, to do the work, and that the work had not been accepted by him, nor had he anything to do with it; the plaintiff may introduce evidence to show: 1. The contract between A. and defendants, showing their liability to erect the building of the best materials and in a workmanlike manner. 2. Whether A. complained to defendants, during the progress of the work, of the manner in which it was being done. 3. Who directed the subcontractor where to lay the foundations. 4. How many anchors were furnished by defendants to put in, and how far they ought to have been put in. 5. The opinion of a competent witness as to the cause of the fall of the building. 6. Whether builders and contractors present when mortar was being made could tell whether it was being well made. The contract making defendants responsible for the material furnished and character of the work. *Ib.*

**163.**—In an action against defendant for killing plaintiff's cow, if the cow was lawfully on the track, the killing is *prima facie* evidence of defendant's negligence. *Lock v. First Div. St. Paul & P. R. R. Co.*, 15 Minn. 350.

**164.**—Where plaintiff's cow, being wrongfully on defendant's track, was killed by a passing train, the fact that for half a mile west from where the cow was struck the track is straight, is immaterial without evidence to show that one could see down to the place of collision, and the fact that a clear view could be had for sixty rods west

of same place and thirty rods back from the track, is incompetent to prove want of care on part of defendant without evidence to show that it was practicable by any prudent management to avoid striking the cow, had her peril been discovered at that distance, which cannot be assumed for the presumption was that due care was used. *i. e.* that it was not practicable. *Ib.*

**165. Ownership.** Under a complaint alleging ownership in plaintiff and right to immediate possession, plaintiff may show that he became owner by purchase from a former owner who had pledged the property, and that plaintiff had redeemed the property by tendering to the pledgee the amount secured by the pledge of the same. *Jones v. Rahilly*, 16 Minn. 320.

**166. Possession.** To show plaintiff's possession in action to determine adverse claim to real estate, it is incompetent to show that another person redeemed the land from taxes. *Wilder v. City of Saint Paul*, 12 Minn. 192.

**167.**—Possession is *prima facie* evidence, not only of right of possession, but of title in fee, at least as against a stranger. *Rau v. The Minnesota Valley R. R. Co.*, 13 Minn. 442.

**168. Possession, actual, insufficient proof.** In an action brought under G. S., Chap. 75, Sec. 1, for the purpose of determining an alleged adverse claim of defendant to land of which the complaint alleged the plaintiff to be the owner and in possession, it appeared that plaintiff owned the land; that from 1856 to April, 1866, he resided upon and occupied it as a homestead; that in April 1866 he removed from it temporarily, and with the intention of returning thereto at or before the expiration of one year, but had not in fact done so; that however he had never abandoned or changed his intention to return; that in the fall of 1866, after the levy thereon of an execution, under which defendant claims, and before sale, he notified the sheriff that he claimed it as his homestead. *Held*, these facts do not furnish proof of the *actual possession* necessary to sustain

such action. *Byrne v. Hinds*, 16 Minn. 521.

**169. Payment to county.** A county treasurer is a competent witness to prove payment of money to the county on a liability in its favor. *Shelley et al. v. Lash*, 14 Minn. 498.

**170. Payment in full, or in part.** Whether a payment by defendant on a judgment owned by A. and B. which was barred by the statute of limitations was made as a *part* payment or in full, cannot be shown by evidence that before such payment A. told B. that defendant was in town and had \$275, and said that was all he then had and offered to pay it on the judgment, and if he became able to pay the balance he would do it, and that B. told A. (plaintiff and assignee of B.) to take the money, and B.'s statement that he never gave A. any authority to fix it up. *Brisbin v. Farmer*, 16 Minn. 215.

**171.**—An instrument executed by the judgment creditor wherein "for value received" he thereby acknowledged satisfaction of the (therein described) judgment, and authorized "the same to be discharged of record" is competent evidence to show that a payment for which said instrument was given was in full of said judgment. *Ib.*

**172. Foreclosure notice and sale.** The printer's affidavit of the publication of foreclosure notice and sheriff's affidavit of sale are under the Statute Comp. St., p. 645, Sec. 14, 15, presumptive evidence of those facts. *Griswold v. Taylor*, 8 Minn. 342.

**173. Promissory note—title to.** In an action on a promissory note, defendant offered in evidence an *assignment* made by plaintiff to a third party for the benefit of his creditors, for the purpose of proving that title was not in the plaintiff—which evidence was ruled out by the District Court—held to be *error*. *Hartshorn v. Green's Administrators*, 1 Minn. 92.

**174. Partner, whether he made a fair statement of settlement.** T. and B. had been copartners in the hotel business. On dissolution B. bought T. out, giving his note for part of the consideration to be

paid, on which this action was brought. Defendant claimed that T. had defrauded him in the settlement and had not made a full transfer of the money received by him as the book-keeper of the partnership, and failed to make a full showing of the business, and set up a counter claim more than sufficient to meet the note. T. upon the defense offered to show that "during the six months following the dissolution, the expenses of carrying on the hotel by defendant were greater than during the copartnership; that the number of guests and boarders at the hotel during that period, was less than entertained there during the copartnership, and that the receipts during this period, from these guests and boarders exceeded \$2100, over and above all expenses." *Held*, the number of guests without regard to the length of time they remained, furnished no basis for comparisons and the evidence was immaterial. If the receipts and expenses before and after the dissolution could be shown to establish the fact that the firm made more than \$2100, and consequently that plaintiff made a full return at the settlement, the proper way was to show each separately, and deduct one from the other, and then show what the difference was. The evidence was too loose and uncertain. *Thayer v. Barney*, 12 Minn. 502.

**175. Partnership, members of.** One partner can testify as to who composed the partnership. *Gates v. Manny et al.* 14 Minn. 21.

**176. Petition to Supervisors to open a road, existence thereof.** When the statute required the petition of six legal voters residing within one mile of the road to be altered, discontinued or laid out, and the same to be posted, etc., to authorize the Town Supervisors to act in the premises (Chap. 13 G. S.) in an action of trespass by the owner of land against the overseer who justified under such proceeding. *Held*, the statute being silent as to what evidence shall be competent to prove the proceedings prescribed by statute in such cases oral *ex parte* testimony, or any other mode is

sufficient. Since the only record required is the petition and orders of the supervisors, embracing the report of the surveyor, and map of the survey (Sec. 36, 37, Chap. 13, G. S.) while other acts are necessary to authorize the board to act, and must be proved to the board before they proceed, and such order, so required to be kept, recites in the form of a legal conclusion the existence of all the jurisdictional facts, it is sufficient *prima facie* evidence in this collateral proceeding. *Cassidy v. Smith*, 13 Minn. 129.

**177. Quantum Meruit.** Plaintiff sued on a *quantum meruit*, claiming \$185, less \$150 paid. Answer denied the allegations in the complaint and set up a contract to do the work at \$150, which was paid. On trial, plaintiff introduced evidence tending to show that said contract was made, but before plaintiff had performed, defendant changed his mind, and changed the whole character of the work, increasing it without any new contract, and that plaintiff had performed the services under the new arrangement. *Held*, sufficient testimony to permit plaintiff to prove the value of services under the new arrangement, and that the contract for \$150 had nothing to do with the new arrangement. *Marcoth v. Beaupre*, 15 Minn. 162.

**178. Records, authentication thereof.** Plaintiff, as preliminary to the introduction in evidence of a book purporting to be the records of a school district (defendant), showed by the present clerk that it came from his possession, although he received it from plaintiff and not from his predecessor, and then showed by a former clerk that it was the book of records kept by him as clerk. *Held*, sufficient authentication *prima facie*. *Sanbon v. School District No. 11, Rice Co.*, 12 Minn. 17.

**179. Record of plat.** As secondary evidence of the record of a town plat, plaintiff offered an act of the Legislature which distinctly recognized the fact of the record of said plat, as laid out by defendant, and surveyed by H., and recorded in the office of the Register of Deeds, for the county of

Winona, Jan. 1, 1865. *Held*, admissible as evidence of the fact of the record of the plat, the presumption being that the statutory requisitions to entitle the plat to record were complied with. *City of Winona v. Huff*, 11 Minn. 119.

**180. Record, contents.** After proof of the loss of a record, its contents may be proved like any other document, by any secondary evidence, where the case does not from its nature disclose the existence of other and better evidence. *Ib.*

**181. Signature to instrument.** Sec. 80, Comp. St., p. 685, changes the burden of proof of signature or execution of a written instrument, and casts, on the party denying the signature, the duty of first denying the signature or execution by his oath or affidavit. Perhaps the statute would not authorize the courts to infer that a signature of a partnership was the partnership of any particular individuals, *e. g.*: "Tufts, Reynolds & Whittemore" would not perhaps, under the statute, "purport to have been signed" by James C. Tufts, Henry Reynolds and H. W. Whittemore, but the party would be compelled to prove that these three defendants composed such a firm and authorized the signature, etc. *Pennsylvania Ins. Co. v. Murphy et al.*, 5 Minn. 36.

**182. Statute laws of another State.** Statute Laws of another State of the Union can only be proven by the production of printed copies thereof, purporting to be published under the authority of the government where they were passed, or on proof that they are commonly admitted and read in evidence in the courts of that State. Where a law is proved to exist at a given time, there may be a presumption that it continued so, but not that it was so prior to its passage—the presumption cannot run retrospectively. *State v. Armstrong*, 4 Minn. 335.

**183. Sale of personal property.** In claim and delivery of personal property, defendant pleaded that he took the same under execution against one Griggs. Plaintiff claimed under bill of sale from Griggs. *Held*, defendant could not show



by Griggs that one Wood was jointly interested as silent partner with him, at time of making the sale, for the purpose of showing that Griggs could not sell the property—for Wood was the only party who could object to it on that ground. *Derby & Day v. Gallup*, 5 Minn. 119.

**184. Sheriff's sale.** To establish the facts and circumstances of a sheriff's sale, there can be no better evidence than the sheriff's certificate of sale or his deed. *Bidwell v. Coleman*, 11 Minn. 78.

**185. Steamboat ownership.** Parol testimony is admissible to prove the ownership of a steamboat. *Fay v. Davidson*, 13 Minn. 523.

**186. Title to land.** Where a given deed is so defective as not to be entitled to record and inadmissible in evidence, and a subsequent deed between the same parties is executed for the express purpose of curing the defects in the former, the former deed thereby becomes admissible in evidence as proof of a chain of title. *Lowry et al. v. Harris et al.*, 12 Minn. 255.

**187.**—The certificate of the Register of a land office is admissible under the statute, Sec. 86, Chap. 73, G. S., to prove plaintiff's right to land prior to issuing of the patent, in an action to recover damages for injuries resulting from defendant's mill dam,—and thereby showing the filing of the declaratory statement by plaintiff upon the land, which was essential to show his right. *Dorman v. Ames & George*, 12 Minn. 451.

**188. Value.** The market value of property or the usual rate of compensation for services, must be proved by witnesses who know the value or rate of compensation at the time and place where specified, and who testify to the same as a fact not as their opinion. *Elfelt v. Smith*, 1 Minn. 125.

**189.**—The owner of certain real estate could testify to its value without showing himself competent to give an opinion—the rule that witnesses cannot generally speak as to matter of opinion, does not apply to questions of the value of the

property, and the presumption being that the owner is better acquainted with its value than a stranger. *Derby & Day v. Gallup*, 5 Minn. 119.

**190.**—The quantity and value of certain goods alleged to have been unlawfully taken, were in issue. When defendant took the goods, one P. called off the same, their quantity and price in New York city; the plaintiff and defendant both taking lists of the same. On the trial the plaintiff's list was offered in evidence of the value of the goods in New York city. Held, such list was inadmissible, it having been made by one who knew nothing, personally, of the facts therein stated. It could only be admitted as auxiliary to the testimony of the person making it, and not as a substitute for such testimony, its accuracy having been first duly certified to by him who made it, and he then having been able to speak from memory without the aid of the paper. The correctness of the memorandum in this case could not have been established without the testimony of the person who examined and called off the prices. *Sticking v. Bronson*, 5 Minn. 215.

**191.**—*Seemle*, that the actual value of an article can be established by showing its cost at another place, and then having the witness testify as to its actual value in reference to the standard thus established. *Ib.*

**192.**—What "a good and responsible party offered" for a horse is no evidence of its value. *Finley v. Quirk*, 9 Minn. 194.

**193.**—Defendant conveyed to plaintiff land by a deed which contained covenants of warranty and seizin, and also with the following recital: "It being expressly understood between the parties hereto, that the consideration expressed above; to wit: eight thousand dollars, is the estimated value of certain lots in Lyman Dayton's addition to St. Paul, in exchange for which lots the above described premises are hereby conveyed as aforesaid. The deed for the conveyance of said lots in Lyman Dayton's addition to St. Paul, from said M. B.

D., to (defendant), bearing even date herewith." The title to the property conveyed by this deed having failed, plaintiff claims damages on that account, and that the amount was settled by the recital aforesaid at \$8,000. *Held*, the parties' estimate of the value of the property was wholly immaterial, so long as they did not covenant to abide by that estimate, and that the value could be inquired into. *Dayton et al. v. Warren*, 10 Minn. 233.

**194.**—In an action to recover the value of certain old watches taken out of a pile of old watches, and converted, it is competent to show the average value of the watches in the pile. *Illingworth v. Greenleaf*, 11 Minn. 235.

**195.**—A person who is engaged in buying for, and selling wheat in an eastern market, and kept constantly informed by circulars and letters of the state of the market, is competent to testify as to the price of wheat in that market. *Brackett v. Edgerton*, 14 Minn. 174.

**196.**—A witness may testify from his own knowledge as to the market value of wheat at a given time and place. *Ib.*

**197.**—A practising attorney is a competent witness to show the value of a lawyer's services, it being an exception to the rule that opinions of witnesses are not admissible. *Allis v. Day*, 14 Minn. 516.

## XI. EVIDENCE ADMISSIBLE, ETC., IN PARTICULAR ACTIONS.

**198. Money had and received.** In an action against A. for money had and received from B. to plaintiff's use, it is not competent for plaintiff to prove any agreement between himself and B., not known by A. *Gales v. Thatcher*, 11 Minn. 204.

**199. Action by infant for injury to personal property.** In an action by an infant, in the name of his guardian *ad litem*, against defendant for taking property under a chattel mortgage which the plaintiff claimed had been avoided on the ground of infancy, it is competent for the plaintiff to establish in evidence his owner-

ship of the property. *Cogley v. Cushman*, 16 Minn. 397.

**200. Injuries to real estate.** The fact that changes had been taking place in different lands as to the quality, etc., of the grass, would not tend to show that similar changes on plaintiff's land were not caused by the flowing thereof by defendant's dam. *Dorman v. Ames & George*, 12 Minn. 451.

**201. Negligence.** In an action against bankers for negligently discharging an endorser, by failure to give due notice of non-payment, plaintiff may show any instructions given defendants concerning the note at any time they had possession, and before the same was due. *Borup et al. v. Nininger*, 5 Minn. 523.

**202. Flowage of land by defendant's mill-dam.** In an action to recover damages occasioned by an overflowing of plaintiff's land by defendant's dam, where no claim is made that the same was done *willfully*, it is not admissible to introduce evidence tending to show that the acts were not wilfully performed, to mitigate exemplary damages. *Finch v. Green*, 16 Minn. 355.

**203. False imprisonment.** In an action for false imprisonment, it is competent for defendant to show threats made by plaintiff's brother, after plaintiff's arrest, to the effect that he would take his brother out of defendant's hands, for the purpose of justifying defendant in putting plaintiff in irons. *Cochran v. Toher et al.*, 14 Minn. 385.

**204.**—Plaintiff, in an action for false imprisonment, cannot introduce, as testimony in chief, evidence of good character, when his character is not put in issue by the pleadings. *Ib.*

**205. Libel.** To prove the publication of a newspaper, it is not necessary to produce a copy which has been actually published, but upon the production of a copy not actually published, the witness may swear that papers of the same kind were published. *Simmons v. Holster et al.*, 13 Minn. 249.

**206.**—In libel, evidence of the general speech “of the people” about the plaintiff’s having stolen the horses, (as charged by defendant in the libelous article,) limited to a time subsequent to the writing and transmitting of the libel by mail, for publication in a newspaper, is inadmissible. *Ib.*

**207.**—In libel, where the defendant has shown, by way of disproving malice, that a third person had told him that she saw the plaintiff do the act charged in the libel, it is competent for the plaintiff to impeach the character of such third person, to show defendant had no excuse for acting upon such information. *Ib.*

**208.**—In an action against defendant for libel, caused by them to be published in a newspaper, proof that the same was published in said paper, without some proof connecting the defendant therewith, is inadmissible. *Ib.*

**209. Malicious prosecution.** Where a defendant is charged with instituting criminal proceedings against plaintiff, before a justice, without probable cause, depositions of witness, taken by the justice on the examination, are not evidence for the defendant to show probable cause, for that only tends to show the grounds for the justice’s judgment—the defendant must show he had probable grounds for the prosecution, and the existence of such grounds is an original question in this action, and cannot be determined by what was shown to the justice; hence the depositions, not being the best evidence, are inadmissible—the witnesses themselves must be produced, and this is true of the defendant himself, he being a competent witness under our statutes—although *contra* at criminal law. *Chapman v. Dodd*, 10 Minn. 350.

**210.**—In an action for malicious prosecution, to establish want of probable cause is to prove a negative; the same degree of proof, therefore, is not required as to prove an affirmative proposition, but slight evidence will generally be sufficient. *Ib.*

**211.**—Plaintiff, in an action for ma-

licious prosecution, may prove express malice on part of defendant; and the conduct and declarations of the defendant toward the plaintiff about the time of the prosecution, are proper to go to the jury in proof of the same. *Ib.*

**212.**—Where a magistrate has authority only to bind over or discharge an accused person, and he discharges him, the discharge is equivalent to an acquittal, and will avail the accused as evidence to support an allegation of acquittal in an action for malicious prosecution. *Ib.*

**213.**—In malicious prosecution, an acquittal of the plaintiff by a jury in a criminal prosecution, is not evidence of want of probable cause, and the same rule obtains where a defendant is discharged by a magistrate for want of prosecution. *Ib.*

**214.**—In malicious prosecution, where all the facts in regard to the commission of the crime charged are stated as within the personal knowledge of the defendant, and he is examined before the magistrate by whom the party charged with the crime is discharged, such discharge is *prima facie* evidence of want of probable cause. The calling of witnesses for the defense *on the examination*, does not affect the discharge as evidence, for all the evidence is to be considered, to determine whether there is *probable cause*. *Ib.*

**215.**—In an action for malicious prosecution, the docket of the justice mentioned, as part of the files in the proceedings claimed to have been maliciously instituted, a complaint by defendant charging plaintiff with larceny, another complaint by defendant against plaintiff, alleging that the stolen property was concealed, etc., a search warrant, with a return of the officer endorsed thereon, that he had searched the premises, found the property, and brought it with body of plaintiff into court, and a recognizance of plaintiff, with surety to appear at the adjourned day. *Held*, the original complaint for larceny, the complaint for search warrant (which recited the original complaint), the warrant and return, and the recogniz-

ance, were parts of one proceeding, and admissible in evidence. *Cole v. Curtis et al.*, 16 Minn. 182.

**216. In malicious prosecution,** where the witnesses for the defense (in the alleged malicious suit), including the defendant himself, may be examined on the hearing, as in our State, and the cause of the former proceedings was not peculiarly within the knowledge of the present defendant—the then complainant—the discharge of the plaintiff by the examining magistrate is not, *per se*, *prima facie* evidence of want of probable cause. *Ib.*

**217. Seduction of daughter.** In an action by a father for the seduction of his daughter, proof that the defendant was influential in procuring the plaintiff the position of chairman of the Town Board, and of conversations between defendant and plaintiff about the daughter marrying the defendant's son, made prior to any illicit intercourse between defendant and the daughter, is competent as tending to negative negligence of the plaintiff in respect to his daughter. *Fox v. Stevens*, 13 Minn. 272.

**218.**—In an action by a father for the seduction of his daughter, it is competent for the daughter to testify as to promises made to her by defendant, during his guilty visits, and propositions made at the same time to induce the witness to procure an abortion, and of defendant's request of the daughter to marry his son, as showing the fact of seduction at least. *Ib.*

**219. Action against one of two or more joint associates on an obligation of all.** Plaintiff claimed that defendant was one of several persons associated and transacting business under the common name of "The Proprietors of Superior," and asked judgment against him for a joint debt of said association, under Sec. 38, Comp. St., 536. *Held*, proof that the agent of said association used "letter-heads" designating the association as "The Proprietors," etc., was improper, without showing that he was authorized by such association to use that common name, and

that it was used in "transacting the business" of the company. *Cooper v. Breckenridge*, 11 Minn. 341.

**220. Action by personal representative of person killed, etc.** As to certain evidence which is immaterial on the issue of whether the death of a passenger was caused by the "wrongful" act of a common carrier, see *McLean, admin., v. Burbank et al.*, 12 Minn. 530.

**221. Action to cancel instrument for fraud.** Plaintiff, seeking to cancel his mortgage to defendant on the ground that it was fraudulently obtained, was asked, on his examination, "Did you know the instrument was a mortgage when you signed it?" *Held*, inadmissible, as the witness could by no possibility be contradicted, nor held for perjury—the proper evidence was the facts and circumstances surrounding the transaction, from which the jury could find what knowledge or means of knowledge the witness had. *Roehl et al. v. Baasen*, 8 Minn. 26.

## XII. WITNESSES.

### a. Who competent.

**222. Parties.** A party may call his adversary, under our statute, and it is no objection that it is to give evidence against himself. *Simmons v. Holster et al.*, 13 Minn. 249.

**223. On trial of indictments.** In all trials of indictments, complaints, and other proceedings against persons charged with the commission of crimes or offenses, a co-defendant, not on trial, is a competent witness, under Sec. 7, Chap. 73, G. S., as amended by Chap. 70, Laws 1868, p. 110. *State v. Dee*, 14 Minn. 35.

**224. Under the statute disqualifying one party to a transaction, when the other is dead.** F. loaned S. money, afterwards S. executed a chattel mortgage to the wife of F.; afterwards F. died, and his wife, on default, became entitled to the property. B. seized the property as the property of the mortgagor. In an action by the mortgagee against B. to recover the

property. *Held*, that the death of F. did not render S. incompetent as a witness, under Chap. 36, Gen. Laws 1861, p. 148. *Foster v. Berkey et al.*, 8 Minn. 351.

**225.**—Where defendant contracted with McN., deceased, through his wife, and the wife testifies as to the contract after her husband's death, defendant can testify also, under the statute, Sec. 8, Chap. 73, Gen. St. *McNab et al., Ex'rs. v. Stewart*, 12 Minn. 407.

*b. Liability for non-attendance.*

**226.** A witness is not liable to an attachment for non-attendance, without being regularly subpoenaed and fees tendered or paid for the day. *Beaulieu v. Parsons*, 2 Minn. 37.

*c. Questions tending to criminate, etc.*

**227. Degradating questions.** Questions tending to *degrade* or *disgrace* a witness have been divided—1st, Into those where the testimony sought to be elicited is "*relevant and material to the issue*," in which case it may generally be put. 2d, Into those where it is *collateral, and proposed only to discredit the witness*, in which case it should be excluded. 3d, Into those where the testimony *will not directly and certainly show his infamy, but only tend to that end*, in which case it seems he may be compelled to answer. But in any and all of these cases the admissibility or rejection of the testimony must rest in the sound discretion of the court—and will only be reviewed in cases of manifest abuse. *State of Minnesota v. Anne Bilansky*, 3 Minn. 246.

**228. Criminating questions.** In an action for damages for the signing and publication of a libel, it being an indictable offense, the defendant cannot be required to say whether he signed the manuscript from which the libel was published, the same being in evidence, and *per se* actionable. *Simmons v. Holster et al.*, 13 Minn. 249.

*d. Witness's opinion.*

**229. Information and belief.** A witness must testify of *his own knowledge*, and from his recollection of facts within his *own knowledge*, and not to his information and belief. Except in questions of *identity* and *personal skill*, a witness may testify to a *belief* (not founded in knowledge). An impression derived from the *recollection of facts*, is admissible. *Bank of Commerce v. Selden, Withers & Co.*, 1 Minn. 340.

**230. Impressions.** Witnesses' impressions of facts or circumstances, or opinions they entertained concerning the liability of parties ought not to be admitted. *Selden, Withers & Co. v. Bank of Commerce*, 3 Minn. 166.

**231. Opinion as to value.** Where witness knew that the premises were mortgaged, and overflowed at time of sale, but was not acquainted with the property until one year afterwards, though familiar with the value of property at that time and place, he cannot give his opinion as to its value. *Burke et al. v. Beveridge*, 15 Minn. 205.

**232. Opinions: when admissible.** The only exceptions to the rule that, the opinion of witnesses are not evidence for the jury, proceed upon the principle that the question is one of science or skill, or has reference to some subject upon which the jury are supposed not to have the same degree of knowledge as the witness—the opinion of a witness as to whether a given fence would turn stock, not admissible. *Sowers et al. v. Dukes*, 8 Minn. 23.

*e. Impeaching witnesses.*

**233. Hostility.** To show hostility in the mind of a witness, facts directly tending to establish it, such as threats, quarrels, etc., must be shown, and not such facts as when proven would only show a *reason why* hostility might exist, and thus leave it inferential. *State of Minnesota v. Anne Bilansky*, 3 Minn. 246.

**234. Immaterial issues.** The State cannot, on pretense of discrediting a wit-

ness by impeaching her on a matter immaterial to the issue, prove a distinct felony on part of prisoner not charged in the indictment. *Hoberg v. State*, 3 Minn. 262.

**235. Collateral matters.** Witness can not be impeached upon immaterial and collateral matters. *Derby & Day v. Gallop*, 5 Minn. 119.

**236.**—A witness can be contradicted only on facts material to the issue. *State v. Staley*, 14 Minn. 105.

**237.**—Evidence that the witnesses of the other side had made statements out of court contrary to what they testified to on the trial, is competent for the purpose of impeaching them, but only as to such matters as are relevant to the issue. *Hicks v. Stone et al.*, 13 Minn. 434.

**238. Witness's affidavits in another action may be explained.** Where affidavits, made by plaintiff in other proceedings had, some years before the commencement of this action, having been introduced in evidence by defendant to contradict plaintiff's testimony on the trial, the plaintiff could explain the circumstances under which the affidavits were made. *Yale v. Edgerton*, 14 Minn. 194.

**239. Witness must first have opportunity of explaining contradictory statements before other evidence is admissible.** It is improper to admit evidence of what a witness stated on a former trial between other parties, without first asking the witness whether he had so stated, so that he might explain. If, when so interrogated, he denied it, the proof would be admissible. *Castner v. Echard*, 6 Minn. 149; *Castner v. Lowry*, 6 Minn. 149; *Castner v. Gunther*, 6 Minn. 119.

**240.**—Where the attention of a witness has not been called to a particular act, admission or declaration, other evidence of these matters cannot be introduced to discredit his testimony, by showing them to be inconsistent with his testimony. *Scott v. King*, 7 Minn. 494.

**241.**—To prove the previous statements of a witness to contradict his testi-

mony on the stand, it is generally necessary in the case of verbal statements, to first ask the witness as to the time, place, and persons involved in the supposed contradiction—although the precise date is not necessary—so that he may have an opportunity of correcting his statement on the stand or explaining it. *State v. Hoyt*, 13 Minn. 132.

**242.**—The right to ask a witness, upon cross-examination, whether he has expressed feelings of hostility towards the party against whom he is called, is well settled—object is to affect his credibility by showing bias, and it would seem that no rule has been established as to the lapse of time allowed between the expressions and time of trial, and an inquiry into the particulars of the hostile feeling sufficient to ascertain the extent and nature thereof, is allowable. Whether the witness should first have been interrogated as to such hostile feeling before admitting other evidence undetermined; although it would seem to be the course usually pursued, but without such preliminary examination such testimony is allowable to show that defendant had reason to believe that the complaining witness had expressed and exhibited such hostile feeling as to warrant defendant in believing that such witness intended to kill him, or do him great bodily harm, and thereby justify his conduct as necessary in self-defense. *State v. Dee*, 14 Minn. 35.

**243. Party calling may show witness's contradictory statements.** It seems that, where a party's own witness testifies contrary to what he was expected to say, it is competent to ask him if he has not formerly made a different statement, either to correct the witness's testimony, or save the party calling him from being sacrificed. *State v. Johnson*, 12 Minn. 476.

*f. Witness's testimony on former trial.*

**244.** The fact that a witness "is not in the State, but departed therefrom during the trial, without knowledge" of the party, will not allow the introduction of said

witness's testimony on a former trial. *Wilder v. City of St. Paul*, 12 Minn. 192.

## EXECUTORS AND ADMINISTRATORS.

(See LIMITATION OF ACTION, 23, 24.)

**1. Want of bond, fatal to administrator's sale.** A failure of an administrator licensed to sell real estate of minors to give the bond, previous to such sale, as required by act of 1860, approved March 10, is fatal to the validity of such sale, and this though license was issued under the prior law. *Babcock et al. v. Cobb*, 11 Minn. 347.

**2. Action against, when not barred.** Action against representative of deceased, is not barred by a failure to present claim to the commissioners within six years, or within any less time, after the cause of action accrues, or the granting of letters of administration where no commissioners were appointed until six years after both these events. *Wilkinson, Stetson & Co. v. Estate of Winne*, 15 Minn. 159.

**3.—survivors.** Under Sec. 2, Chap. 68, Comp. Stat., a cause of action in favor of one against another survives, against the personal representatives of the latter, but this liability in the first instance may be terminated under Chap. 44, Comp. Stat., Sec. 14 and 15, by an appointment of commissioners to adjust claims, in default thereof they are still liable under Sec. 59, Chap. 44. *ib.* And inasmuch as commissioners should be appointed as soon as it is ascertained that there is any occasion to appoint them, a delay of seven years is an undoubted omission to appoint within Sec. 59 ante. *ib.*

**4. Publication of notice of sale.** The statute required notice of administrator's sale, (Sec. 15, p. 415, Comp. Stat.) to be published in a newspaper "for three weeks successively next before such sale." The averment in the answer was that the notice was published for "three successive weeks

previous." *Held*, insufficient. *Montour v. Purdy et al.*, 11 Minn. 384.

**5. What claims can be presented against.** In an action upon the bond of an administrator, brought by a creditor under Sec. 2, Chap. 55, G. S., the plaintiff can only embrace in the complaint claims which have been ascertained and directed by the decree of distribution to be paid; and it is a good defense *pro tanto*, in an action on such bond, that one of several claims in favor of a creditor plaintiff, was not presented to the proper probate court, and that such court has never directed or ordered its payment. *Wood v. Myrick*, 16 Minn. 494.

## EXECUTION.

(See CRIMINAL LAW, 131.)

## EXCEPTIONS.

(See PRACTICE, II. 11, B. h.)

## EXEMPTION LAWS.

(See CONSTITUTIONAL LAW, V. 11.)

## EXAMINATION OF WITNESS.

(See NEW TRIAL, II., a.)

## EX POST FACTO LAWS.

(See CONSTITUTIONAL LAW, V., 2.)

## EXTORTION.

(See CRIMINAL LAW, 133.)

## FALSE IMPRISONMENT.

(See EVIDENCE, 183, *et seq.*)

**1.** Defendants, peace officers, arrested plaintiff without a warrant on suspicion of his having committed a felony, and detained him in custody five days without taking him before a magistrate, although there was nothing to prevent their so doing, and at the end of that time released him from custody. *Held*, the time of detention in this case, was clearly unreasonable as a matter of law, and is not a question of fact to be submitted to a jury. *Cochran v. Toher et al.*, 14 Minn. 385.

## FERRY.

(See MASTER AND SERVANT, 11.)

**1.** The right to operate a ferry is a franchise to be disposed of by the legislature, and not an incident to riparian ownership. *McRoberts v. Washburn, et al.*, 10 Minn. 23.

**2.** The granting of a ferry charter to one man does not exclude others, unless the charter expressly excludes them. *Perlin v. Oliver*, 1 Minn. 206.

## FEES.

(See SHERIFF, IV.)

## FERRY COMPANY.

(See PLEADINGS, 39.)

## FIRE INSURANCE.

**1. Damages resulting from removal of property at a fire.** An insurance policy declared that, "where property is damaged by removal from a building in which it is exposed to fire, such damage shall be borne by the insured and insurers in such proportion as the whole sum insured bears to the whole value of the property insured, of which proof in due form shall be made by the claimant." Again, "To make good unto the assured, all such immediate loss or damage not exceeding the amount insured (\$2,500) as shall happen by fire to the property," etc., "said loss or damage to be estimated according to the true and actual cash value of the property *at the time the same shall happen.*" *Held*, by this contract the damage resulting from the removal of property from a fire must be borne by the parties according to their respective interests or risks—the share of either bearing the same proportion to the whole damage that his interest in the property, or risk, bears to the whole value of the property, estimated at the *time of the loss*. *Peoria Fire and Marine Insurance Co. v. Wilson*, 5 Minn. 53.

**2. "Survey and description" a representation, not an absolute warranty.** An insurance policy provided that, "when a policy is made and issued upon a survey and description of certain property, such survey and description shall be taken and deemed to be a part and portion of such policy and warranty on the part of the assured." The "survey and description" contained this stipulation: "And the said applicant hereby covenants and agrees to and with said company, that the foregoing is a full, just and true exposition of all the facts and circumstances in regard to the condition, situation and value of the property to be insured, so far as the same are known to the applicant, and material to the risk." *Held*, this "survey and description" constituted, not an *absolute warranty*, but a *qualified warranty*, which had the same effect as a *representation* of the facts,



within the law of insurance, *i. e.*, though untrue, does not avoid the contract, unless *material to the risk*. *Aetna Insurance Co. v. Grube*, 6 Minn. 82.

**3. Keeping gunpowder for retail is not storing it.** Keeping gunpowder for retail purposes in a store, is not *storing* such article, within the meaning of a policy prohibiting the "*depositing, storing or keeping*" of the same, where the written portion of the policy describes the property insured as "their stock of goods, consisting of a general assortment of dry goods, groceries, boots and shoes, and such goods as are usually kept in a general retail store," it being proved that gunpowder is usually kept in a general retail store, in quantities as large as in this case—20 pounds. *The Phoenix Insurance Co. v. Taylor*, 5 Minn. 492.

**4. Waiver of preliminary proof.** When the insured, after a loss by fire, verbally notified the local agent of the company, who delayed proceedings until the arrival of the adjusting agent of the company, who, on arriving, examined the accounts and books of the insured, took affidavits of parties, and expressed himself satisfied; told the insured no more was required of him, he would present the claim to the company, and the company, on refusing to pay, making no objection to the insufficiency of preliminary proof. *Held*, this constituted a waiver of that condition in the policy requiring further preliminary proof on part of insured, in case of loss. *The Phoenix Insurance Co. v. Taylor*, 5 Minn. 492.

**5. Change in occupation, and failure to notify company—mortgagee's interest.** An insurance policy stipulated that "if the \* \* building, at any time during the life of the policy, should be used for the purpose of carrying on therein any trade, or occupation denominated hazardous, or extra hazardous, or specially hazardous in the second class of the classes of hazards annexed to this policy, from thenceforth so long as the same shall be so used, the policy shall be of no force." Among

the hazards were enumerated "all workshops, manufacturing establishments, trades and mills not enumerated above as hazardous or extra hazardous." It further stipulated that "the insurance as to the interest of the mortgagee only therein, should not be invalidated by any act or neglect of the mortgagor or owner of the property insured, nor by the occupation of the premises for purposes more hazardous than are permitted by the policy,"—providing also that "the mortgagee shall notify the company of any change of ownership or increase of hazard, not permitted by the policy to the mortgagor or owner, as soon as the same shall come to his knowledge, and shall, on reasonable demand, pay the additional charge for the same," etc. *Held*, if at, and prior to time of fire, the building insured had been changed to, and was used as a workshop, (currier shop,) denominated "specially hazardous" in the second class of the classes of hazards annexed to the policy, and the mortgagee had knowledge thereof, and failed to notify the company—he cannot recover of the company. *Gasner v. Metropolitan Insurance Co.*, 13 Minn. 483.

## FIRST MORTGAGE BONDS OF R. R. COMPANIES.

(See BONDS, IV.)

## FIRST DIVISION ST. PAUL AND PACIFIC R. R. CO.

**1. Its authority to construct its road on any highway, etc., extends to the public easement only.** The charter of the defendant, Sec. 7, p. 6, Laws 1857, Extra Session, provided that "the said company shall have the right and authority to construct their railroad, etc., upon, etc., any public or private highway, road, street,

\* \* if the same shall be necessary." \* \* \* *Held*, even supposing the act to be a public law, still a dedication of land to the public for the purposes of a common street, made subsequent to the passage of said charter, could not be said to have been made in reference to said law, and in contemplation of subjecting the land to the possible servitude of a railroad. The provision was designed to confer a privilege or right so far only as the *public easement* of a common street or highway was concerned, leaving the defendant to deal with the private rights of individuals in the street, as in other cases. *Gray v. The First Division of the St. Paul and P. R. R. Co.*, 13 Minn. 315.

**2. Was not created by special act within meaning of Sec. 2, Art. 10, Constitution.** The St. Paul and Pacific R. R. Co. being a duly organized corporation, with roads, lands and franchises, entered into an agreement with L. & Co. for the construction of its road; to secure the payment to L. & Co., according to contract, the railroad, under an act dated March 4, 1864, S. L., amending its charter, entered into another agreement, (for which see opinion,) in accordance with which, together with act, February 6, 1866, Sec. 1, 2 and 3, certain holders of preferred stock, including L. & Co., became a body corporate, capable of suing and being sued, with all the rights, benefits, privileges, property, franchises and powers purported to be thereby conveyed, under the name of the "First Division of the St. Paul and Pacific Railroad Company," and such acts do not amount to the creation of a corporation by special act, within the meaning of Sec. 2, Art. 10, State Const. *The First Div. St. Paul and Pacific R. R. Co. v. Pacher et al.*, 14 Minn. 297.

## FORECLOSURE OF MORTGAGES.

(See MORTGAGES, XII.)

## FOREIGN JUDGMENTS.

(See LIMITATION OF ACTIONS, 18.)

## FORGERY.

(See CRIMINAL LAW, 34.)

## FORCIBLE ENTRY AND DETAINER.

(See PLEADINGS, B. VII. d. 15.)

(See CIVIL ACTION, XX.)

**1. Perhaps** the Forcible Entry and Detainer Act of the Territory, requiring the *venire* to be issued on same day as the *summons*, is directory. *Lewis v. Steele et al.*, 1 Minn. 91.

**2.** The law of forcible entry and detainer confers upon *two justices* the authority to try such cases, and an adjournment by *one justice*, in absence of another, to a future day, when both meet and continue the hearing, is *error*. *Id.*

**3.** The statute of forcible entry and detainer, (R. S. 1851, Chap. 87, Sec. 12,) does not confer upon a Justice of the Peace jurisdiction to oust a mortgagor holding over after sale, *until the period of redemption has expired*. *Stone v. Bassett*, 4 Minn. 298.

**4.** In a proceeding under the Forcible Entry and Detainer Act, (Sec. 12, Comp. St., 651,) the complaint alleged non-payment of rent, service of written notice, etc. The answer did not deny the service of written notice. Plaintiff, on the trial, relied upon such failure to deny as an admission of notice, and offered no evidence of the fact. Defendant objected that service of notice was necessary to confer jurisdiction over the subject matter, and such jurisdiction could not be obtained by *consent* of parties. *Held*, the sworn complaint on which the summons issues, con-

fers jurisdiction on the justice, and all he has to do is to try such issues as are made by the pleadings—and that a failure to deny notice, properly pleaded, admits it. *Chandler v. Kent*, 8 Minn. 524.

5. In an action under the Forcible Entry and Detainer statute, the plaintiff set forth a lease to defendant, the latter's entry and possession thereunder, expiration of term, non-payment of rent, and service of notice. Defendant denied leasing, and set up pendency of another action. Plaintiff offered in evidence a lease to defendant of "all the interest which he (plaintiff) has in the N. W. quarter of Section 15," etc. *Held*, the sole object of the action was to restore the possession, not to try any other right; hence, whether the premises are covered by the lease, and whether defendant took possession under the same, are the chief questions. This lease shows only a letting of plaintiff's "interest,"—the extent of the interest, whether it covered the whole or a part of the land only, in fee or otherwise, separate or undivided, is uncertain—the lease, without other proof, is too uncertain to entitle plaintiff to recover. *Id.*

## FORMER ADJUDICATION.

1. No adjudicated case can be authority for another, without the facts are identical in both. "The positive authority of a decision is co-extensive only with the facts upon which it is made." (12 Wheat. 333.) *Grimes v. Bryne*, 2 Minn. 102.

2. Randall executed to Hart a bond, for \$7,000, to secure two acceptances, one of \$1,333.33, the other of \$1,666.67. drawing interest, giving also a power of attorney to confess judgment in debt for \$3,635.13, or on a *mutuatus* for said sum as "borrowed" money. Judgment was entered by confession as for borrowed money amounting to the given sum (\$3,635.13), and on motion of Randall's assignee to set aside the judgment and execution issued thereon. *Held*, that the judgment being

confessed as authorized by the law then in force, it was regular, and that no variance existed between the actual bond and the bond referred to in the warrant, they being identical—and the judgment debtor himself having moved to set aside the judgment, and his motion being denied, the plaintiff could not repeat the same motion, he being bound as a privy by what his assignor had done. *Marshall v. Hart*, 4 Minn. 450.

3. Where a former action for the same cause has been determined upon some defect which precluded an inquiry into the merits, the former judgment is no bar to a second action—*e. g.*, where judgment was rendered on a motion for judgment on the pleadings, without the introduction of any testimony or the determination of any issue, save only that the complaint did not contain a cause of action by reason of the insufficiency or informality in the statement of the cause of action. *Gerrish et al. v. Pratt et al.*, 6 Minn. 53.

4. B., payee, sued the maker of a promissory note, Van C.; pending the suit, B. assigned the note to plaintiff. Judgment on the note against Van C., in District Court, was, on appeal, reversed, and cause remanded to District Court. Whereupon the assignee (plaintiff) brings another action on the note, against Van C., setting up new matter. *Held*, under Sec. 37, p. 535, Comp. St., and Sec. 34, p. 629, *ib.*, the plaintiff was the real party in interest in the former suit, and the same being pending in the District Court, was a bar to this action. *Capehart v. Van Campen*, 10 Minn. 158.

5. A pleading which sets up a former verdict in the party's favor on same state of facts, is insufficient—there must have been a judgment. *Schurmeier v. Johnson et al.*, 10 Minn. 319.

## FORNICATION.

(See CRIMINAL LAW, 141.)

## FRAUD.

(See PLEADINGS, 38, 68.)

(See EVIDENCE, 112, *et seq.*)

(See EQUITY, VII.)

**1. Definition.** Fraud is every kind of artifice made use of by one person for the purpose of deceiving another. *Brown v. Manning*, 3 Minn. 35. Opinion, FLANDRAU, J.

**2. Intent.** If the owner of a horse sells him as sound, knowing that he is not sound, the existence of an intent to defraud necessarily follows. *Johnson v. Wal-lower et al.*, 15 Minn. 472.

**3. Silence.** A joint owner being present at a sale of the joint property by the other joint owner, and hearing fraudulent representations made, is as much a party to such representations as though he made them. *Ib.*

**4. Contract for sale of land.** In a contract for the purchase of land, if defendant, by representing to the plaintiff facts about the ownership or possession of the land, which he knew to be false, induced plaintiff to enter into a contract which he otherwise would not have done, and which is to his damage, the contract was tainted with fraud and void. *Brown v. Manning*, 3 Minn. 35.

**5. Making warranty deed, when one is on record.** The mere giving a warranty deed to the plaintiff, while there was a "warranty deed in writing" on record of the same land to a third person from the same grantor, would not *per se* constitute fraud, for the purchaser may have intended to rely on his covenants for title, and such a transaction could take place in perfect good faith. But a false representation that there is no such deed to a third party, made with the intention of deceiving the purchaser, would make the transaction fraudulent. *Ib.*

**6. Fraudulent representation.** It seems that to constitute a fraudulent representation, the party making the representation must know that it is untrue; or must represent that as true of his own knowledge,

which is not true, but as to the truth or falsity of which he has no knowledge; or must represent that as true which is false, and the truth or falsity of which he is presumed to know, and is therefore estopped to deny that he knew it was false. *Brooks v. Hamilton*, 15 Minn. 26.

**7. False promise to do something in the future.** Plaintiff signed, with her husband, a mortgage on the homestead to secure a note of one S. in favor of defendant, Fletcher. She now charges that she signed it on the following representations of defendant, viz.: that, if plaintiff would sign, defendant would never do anything with it, would collect the note of the maker, and that when collected of S. the note would be paid, mortgage cleared off, and homestead free, and that S. could not touch the house and lot for the debt," and charges that on her belief defendant made said representations, knowing the same to be untrue, and with the intent, etc., to deceive plaintiff into executing the mortgage, and without them she would not have made it. *Held*, the facts show only a parol promise, contemporaneous with the written contract, which cannot be held valid; as to the fraud charged; it cannot be predicated of a promise, not performed for the purpose of avoiding a written instrument or bargain of any kind—a false promise to convey does not taint the proceedings with such fraud as a court of equity will relieve against, and the charge that the promises were false at time they were made is unsupported by any facts, and rests solely on belief, which is entirely insufficient, so as to the alleged misrepresentation of the legal effect of the instrument as to S. being able to avail himself of it, for it was matter of opinion concerning an immaterial fact, and fraud in making such representations will not avoid the instrument, were there facts enough to show fraud. *Catlin v. Fletcher*, 9 Minn. 85.

**8. Plaintiff must be injured.** Where one grounds his cause of action on a fraud, he must show that he has been injured by the fraud. *Johnson et al. v. Piper*, 4 Minn. 192.

**9.**—Damage or injury to the complainant must concur with the alleged fraud to authorize the interposition of a court of justice. *Belote v. Morrison et al.*, 8 Minn. 87.

## FRAUDULENT CONVEYANCES.

**1. Good against all but judgment creditors.** A conveyance of real estate in due form, even if made with intent to defraud creditors, is good as between parties and privies, and can only be avoided by a creditor of fraudulent grantor. *Lemay v. Bibb*, 2 Minn. 293.

**2.**—A fraudulent conveyance so far as creditors are concerned, can be avoided by them, only after they have obtained judgment. *Gorton v. Massey et al.*, 12 Minn. 145.

**3. Several deeds at same time.** The fact that different conveyances are in preparation at same time, were executed on same day, does not make them all one transaction as a matter of law, so that if one is void for fraud, the remainder are—it is a question for the jury. *Mower et al. v. Hanford et al.*, 6 Minn. 535.

**4.**—Where B. & M. executed several deeds, some as copartners, others as individuals, on the same day to different individuals, the whole were not void as a matter of law, though one was executed with the intention of hindering, delaying, and defrauding creditors. Question of fact for the jury. *Ib.*

**5. Question of mixed law and fact.** The question of a fraudulent intent in the examination of fraudulent conveyances, is a mixed question of law and fact. The jury is to determine the existence of a certain intent (where it is not disclosed by the papers), and the court pronounces whether it is fraudulent or otherwise. *Gere v. Murry*, 6 Minn. 305.

**6. Existing creditor.** In order to entitle a creditor to relief against a fraudulent disposition of his property by his debtor, he must show himself to have been such

creditor at the time the act was done, which he claims to be in fraud of his rights. *Stone v. Myers*, 9 Minn. 303.

**7. Father and son, dealings between.** It is not unnatural that transactions between father and son should be characterized with mutual confidence; they are not thereby unreasonable or fraudulent *per se*. And because a father in taking a conveyance of land from his son, in satisfaction of his debt, absorbed the fund from which a judgment creditor expected to satisfy his execution, and in that way hindered him from collecting it, only shows that he was foremost in the race of diligence. *Ferguson v. Kumler et al.*, 11 Minn. 104.

**8. The insolvency of defendant** at time of transfer of property, taken into consideration with his application for a discharge from his debts, is not conclusive evidence of fraudulent intent, for it may have been transferred on good consideration.—Question for the jury, in view of all the circumstances. *Teller v. Bishop et al.*, 8 Minn. 226.

**9. Assignment of contract of sale.** H. had verbally contracted with A. for the purchase of land, and paid the purchase money; A. holding the title, but to convey on request. Subsequently and prior to conveyance by A., H., by his agent B., for a valuable and adequate consideration, paid by P., transferred to the latter all his interest in the land, and ordered A. to convey to P., which was accordingly done. Held, the original payment of the purchase money for the land by H. ceased to be such by the assignment of his right to P., and the latter thereby occupied as to A., the position of one who originally furnishes the purchase money, so that the conveyance from A. to P. was not presumptively as fraudulent as against existing creditors of H. under Sec. 8, Chap. 43, G. S. *Durfee v. Pavitt et al.*, 14 Minn. 424.

**10. Indebtedness of grantor at time of conveyance.** A voluntary conveyance is not void *per se*, simply from the fact that the grantor was at the time of executing it indebted—without regard to the relation

between his debts and property reserved—no fraud actually appearing. In all cases of alleged fraudulent intent, it is a question for the jury under Sec. 1 and 4, Stat. of Frauds, Comp. St., p. 459, except where the facts appear from the instrument or record, in which case the court will pass upon it without the aid of a jury—following *Greenleaf v. Edes*, 2 Minn., 265; *Truett Bros. & Co. v. Caldwell*, 3 Minn. 364; and *Scott v. Edes*, 3 Minn. 377. *Filley et al. v. Register et al.*, 4 Minn. 391.

**11. Void as matter of law.** An insolvent debtor executed to his creditor an instrument of conveyance, whereby, for a consideration of \$2,810, he conveyed absolutely his goods, etc., in his store. It then recited, that the debtor was indebted to the creditor on sundry promissory notes past due, and the conveyance was made to secure the notes. Debtor was to remain in possession, sell in the ordinary course of business for cash at wholesale and retail, place no incumbrances on the goods, account to the creditor for the receipts from all sales, and deliver up the whole remaining unsold at any time, on demand of the creditor (vendee), who was to apply the proceeds of the sale when turned over to him, toward the payment of the notes. *Held*, it bore on its face an intent to hinder and delay creditors, and void, as a matter of law—without any inquiry by a jury—under Chap. 51, Comp. St., 459, the instrument not being a mortgage, inasmuch as the debtor retained the power to sell the property. *Chopard & Son v. Bayard & Co.*, 4 Minn. 533.

**12. Creditor must have a lawful claim.** Plaintiff sought to reach land conveyed to defendant by a judgment debtor of plaintiff, one K., alleging that at time of conveyance the said K. was indebted to him, and conveyance was made to hinder and defraud him within Sec. 1, p. 459, Comp. St. The indebtedness was for money advanced by plaintiff for the purchase of K.'s preemption claim, before preemption. *Held*, money so paid was not recoverable (following, *The Saint Peter Company*

*v. Banker*, 5 Minn. 192) it being in violation of law and against public policy, hence plaintiff's claim was not a "lawful" debt, etc., within the statute, so as to affect the conveyance to defendant, although made with intent to defraud him,—nor could K., by permitting judgment to be recorded against him, affect defendant's title. *Bruggerman v. Hoerr et al.*, 7 Minn. 337.

**13.—no legal defense.** Where a judgment creditor assails a conveyance from his debtor to defendant, as fraudulent, if it is competent for defendant to show that the creditor's claim is not "lawful" within the rule laid down in *Bruggerman v. Hoerr et al.*, 7 Minn. 337. The matter he must allege and prove in order to assail the judgment successfully, must be something which would have constituted a legal defense in the action in which the judgment was rendered—in the absence of fraud or collusion in obtaining said judgment. *Ferguson v. Kumler et al.*, 11 Minn. 104.

**14. Homestead.** A., being indebted to plaintiff, conveyed property, including his homestead, to his wife, through B. as trustee, without consideration and with intent to defraud plaintiff. *Held*, in an action by plaintiff to set aside the deeds, that so far as A. was concerned, the deed to B. was good and conveyed his entire estate, so that he could no longer claim a homestead right, nor, on the death of his wife, had he any estate by *curtesy*, for as to the plaintiff the deed to the wife was void. Nor if the whole property conveyed had been exempt under the law (then in force), plaintiff's judgment was a lien on a homestead and liable to execution in case of sale, removal, etc. *Piper v. Johnson et al.*, 12 Minn. 60.

**15. Bona fide purchaser, when he takes subject to creditor's claim.** If W. and P. collude with F., and take from him a conveyance of land, with intent to hinder, delay, and defraud creditors of F., duly recording said conveyance, and R., a creditor of F., attaches the land in the hands of W. and P., and duly filed such attachment under the statute, making it a lien from the time of filing, on all land described as

attached in the officer's return thereon; such lien is good against a grantee of W. and P. who takes subsequent to such filing, although actually ignorant of the fraud in F.'s conveyance, for the statute makes the filing notice to every one of R.'s claims, whatever they may be. *Arper v. Baze*, 9 Minn. 108.

**16. Fraudulent conveyance of goods and chattels.** The mere omission of a provision embracing "goods, chattels, and things in action," from a section of the statute, declaring conveyances and assignments of estates or interests in land, made with intent to delay, hinder, or defraud creditors, etc., will not be construed to be a repeal of the common law rule, which renders a conveyance of goods and chattels, made with such intent, fraudulent and void as to creditors, etc. *Blackman v. Wheaton*, 13 Minn. 326.

## GARNISHMENT.

- I. REQUISITES.
- II. THE AFFIDAVIT.
- III. WHAT PROPERTY CAN BE REACHED BY GARNISHMENT.
- IV. THE GARNISHEE.
- V. THE SUMMONS.
- VI. NOTICE TO DEFENDANT.
- VII. REMEDY WHERE GARNISHEE DENIES LIABILITY.
- VIII. JUDGMENT.
- IX. SATISFACTION OF JUDGMENT.

### I. REQUISITES.

**1.** Under the R. S. (1851) Chap. 91, and amendments, p. 17, Sec. 75, to give a court jurisdiction in a garnishee proceeding, there must, be "an action founded on contract, express or implied," or on a judgment or decree; 2d, an affidavit must have been made and filed as required by statute; and, unless these pre-requisites exist, no summons can issue. *Black v. Brisbin & Bigelow*, 3 Minn. 361.

### II. THE AFFIDAVIT.

**2. Requisites.** Under Sec. 1, Chap. 70, p. 245, G. L., 1860, the party applying for a garnishee summons must aver in his affidavit that he "has good reason to believe" either that the party is indebted or has money, etc., in his hands, the garnishee must be summoned in either one capacity, or the other, or both. If he cannot state in which capacity the garnishee is liable, then he has not that "good reason" the statute requires. *EMMETT, C. J., dissenting. Prince v. Hendy*, 5 Minn. 347.

**3. Appearance waives defects.** If, on an insufficient affidavit in a garnishee, proceeding is filed, and the garnishee appears and answers without objection, he cannot afterwards raise the objection. *Ib.*

### III. WHAT PROPERTY CAN BE REACHED BY GARNISHMENT.

**4. Property in hands of garnishee at service of summons.** Chap. 1, R. S., p. 405, merely renders garnishee liable to the plaintiff for the amount of the property, money or effects in his hands or possession, or under his control, or due from the defendant in *such suit, at the time of the service of the summons upon him*—such liability cannot be made to extend to property, etc., that may come into his hands, or indebtedness that may accrue *subsequent to such service.* *Nash v. Gale*, 2 Minn. 311.

**5. Negotiable papers.** Negotiable paper is not such "property, money, or effects," as the statute contemplates in describing what species of property shall be the subject of garnishment. *Hubbard v. Williams*, 1 Minn. 54.

**6. Property controlled by garnishee.** "Property, money, or effects," must be in the hands or possession, or under the control, or due from the person garnished to the defendant, in the judgment or decree which forms the basis of the writ, at the time the writ is served upon him. *Ib.*

**7. R. R. bonds.** "R. R. bonds," issued by the State are property and evidences of

debt within the garnishee statute—Sec. 3, p. 451, R. S., (1851) and sub. div. 4, Sec. 148, Comp. Stat., p. 553. *Banning v. Sibley*, 3 Minn. 389.

**8. Property assigned.** Where an assignment is void as to creditors, they may garnishee the trustee and show by the terms of the assignment that it is void, and thus that the property in his hands is the property of the debtor—no title having passed. *Ib.*

**9. Pay of public officer.** Whether public policy will furnish the pay of a public officer to be garnisheed, whether the same comes to him by way of a fixed salary or in the shape of fees only—*query?* *Pioneer Printing Co. v. Sanborn, French & Lund*, 3 Minn. 413.

**10. Amount of insurance policy.** Where the policy of insurance provides that certain notice of loss, proof, etc., shall be made etc., after a loss, the performance of such conditions are precedent to the liability of the company to pay, and the insurance is not due within the meaning of Sec. 7 and S. G. L. 1860, p. 247—8—hence, the company is not liable as a garnishee, prior to that time. *Gies & Bechtner v. Koltman et al.*, 12 Minn. 279.

#### IV. THE GARNISHEE.

**11. Corporations.** Sec. 23, Comp. St., 662, which authorizes "corporations to be proceeded against as garnishees in the same manner and with the like effect as individuals," applies only to private corporations, and was not designed to include municipal corporations charged with the interest of the public, and counties are such public corporations. *McDougal v. Board of Supervisors of Hennepin Co.*, 4 Minn. 184.

**12. Plaintiff is bound by disclosure.** A party summoning a garnishee takes his disclosure at his own risk, and is bound by it as by his own witness. *Banning v. Sibley*, 3 Minn. 389.

**13.** The garnishee act, Chap. 80, Comp. Stat. 659, compels the party calling the garnishee to take his answers at his own

risk—makes him his own witness, and can not contradict him. If any other testimony is taken, it must be in corroboration of the garnishee. And if the facts disclosed leave reasonable doubt that the garnishee is liable as such, judgment must be in his favor. Following *Banning v. Sibley*, 3 Minn. 389, and *Pioneer Printing Co. v. Sanborn, French & Lund*, 3 Minn. 413. *Chase v. North & Carll*, 4 Minn. 381.

**14. Fees.** Under Sec. 27 and 28, Laws 1860, p. 247, pre-payment of fees to a garnishee is not essential to bind him to appear. *Goodrich & Terry v. Hopkins & Barry et al.*, 10 Minn. 162.

**15. In case of doubt, should be discharged.** If the facts stated by a garnishee leave a reasonable doubt, as to whether he is owing the principal debtor, or has property in his hands belonging to him, judgment must be rendered in favor of the garnishee. *Banning v. Sibley*, 3 Minn. 389. *Pioneer Printing Co. v. Sanborn, French & Lund*, 3 Minn. 413.

**16.** To recover against a garnishee he must admit an indebtedness to the principal debtor. *Cole v. Sater*, 5 Minn. 468.

#### V. THE SUMMONS.

**17. An attorney may issue a garnishee summons after filing the proper affidavit without its allowance by a judicial officer** *Hinkley et al. v. St. Anthony Falls Water Power Co.*, 9 Minn. 55.

**18. Title.** A garnishee summons must run in the name of the State of Minnesota, under Art. 6, Sec. 14, Constitution of State. *Ib.*

**19. A garnishee may waive any irregularity in the summons, as where it does not run in name of "The State of Minnesota," and may also waive his fee, and the defendant in the principal action cannot object.** *Ib.*

#### VI. NOTICE TO DEFENDANT.

**20. Proof of services on default.** On failure of defendant, a corporation, to appear at a garnishee disclosure, the plaintiff



to prove service of notice of time and place of hearing, etc., filed an affidavit that notice was served "upon Richard Chute, the agent and attorney in fact of the defendant, etc., by them and there, etc., handing, etc. *Held*, proper proof would have been that he served it upon the defendant, etc., by handing it, etc., to Richard Chute, who was then and there the *managing* agent of said defendant, under Sec. 53, p. 538, Comp. Stat., but the defect could be amended under Sec. 94, p. 544, Comp. Stat. *Ib*.

**21. Publication of notice.** Under the garnishee act of 1860, where the defendant cannot be found within the State, notice to him may be published. *Broom et al. v. The G. D. D. & M. Packet Co.*, 9 Minn. 239.

## VII. REMEDY WHERE GARNISHEE DENIES LIABILITY.

**22.** A garnishee denying any indebtedness to defendant, or the possession or control of any property, money, or effects belonging to him, the plaintiff can only proceed further by filing a supplemental complaint, making the former a co-defendant under the statute. *Ingersoll v. First National Bank*, 10 Minn. 396.

## VIII. JUDGMENT.

**23. When no property to garnishee.** When a garnishee before disclosure is notified that the debtor has assigned the claim against him to B., also that the garnishee summons is irregular, and then discloses in obedience to the summons without objecting to the irregularity of the proceedings, or suggesting the assignment of the claim, and thus allows judgment to pass against him, he will still be liable to B. the assignee. *Black v. Brisbin & Bigelow*, 3 Minn. 361.

**24. Who bound by judgment.** No one is concluded by the judgment on a garnishee disclosure where it passes against the garnishee, but the judgment debtor; and a writ of error does not lie in behalf of a stranger who claims to be the owner of the

debt garnished. *Hollinshead v. Banning & Co.*, 4 Minn. 116.

**25. Judgment for delivery of note.** To recover against a garnishee under the statute he must admit an indebtedness to the principal debtor, and where the garnishee debt is evidenced by a "note, bill, bond or other chose in action," the judgment must be that he deliver the same to the officer having the execution in the principal suit, who is to hold the same for use of the plaintiff, who may sue the maker, etc., Comp. Stat. 661, Sec. 15. Where the garnishee is the maker of note in favor of the judgment debtor, it was never intended to compel him to try his defense to the same in the garnishee proceeding, without the aid of the usual trial at law. Sec. 7, S. L. 1860, 244-248—was passed with direct reference to former decisions of this court, and makes the rule more definite, and certain, *Cole v. Sater*, 5 Minn. 468.

**26. Opening judgment on default—practice.** Where judgment on default has been entered against a garnishee, the same should not be opened without appointing a time and place for him to appear and answer, otherwise the plaintiff would be compelled to renew his proceedings to bring the garnishee before the court, even if that could be done. And this though the statute authorizes the court to "permit" the garnishee to appear and answer etc. Sec. 13, p. 249, Comp. Stat. *Goodrich & Terry v. Hopkins & Barry et al.*, 10 Minn. 162.

## IX. SATISFACTION OF JUDGMENT.

**27. Effect of.** W. sued plaintiff in justice court, publishing the summons under Chap. 38, Laws 1860, defendants being summoned as garnishees, under Chap. 70, Laws 1860, judgment was rendered against plaintiff on default, also against defendants. Defendants paid the judgment without any execution being issued against them, voluntarily at the instruction of said justice, and on demand of W.'s attorney, stating that unless it was paid he

should issue execution, etc.; afterwards plaintiff appeared, opened and reversed said judgment, and now brings this action to recover the debt formerly due him from plaintiff. *Held*, under Sec. 32, Chap. 70, Laws 1860, the payment by the garnishee operated to acquit and discharge them from all claims on part of plaintiff for the amount so paid. *Troyer v. Schweizer et al.*, 15 Minn. 241.

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### GIFT.

(See HUSBAND AND WIFE, 6.)

**1. Gift of note cancels the debt.** The holder of a promissory note of a third person, may donate the same either to the maker or any other person, and such donation carries with it the debt in either case, and if to the maker it operates, as a cancellation of the debt and note which secures it. *Stewart v. Hidden*, 13 Minn. 43.

**2.**—The holder of a promissory note “agreed with the maker to deliver up fully satisfied,” and did deliver the same up to the latter for a sum less than was due, and now brings this action to recover the balance called for by the note. *Held*, though the amount paid being less than the amount due, would not be a legal consideration for a promise to surrender the note, or extinguish the debt, still the agreement being executed, the fact that there was no legal consideration, proves that it was the intention of the owner of the note to donate it, and the balance remaining due on it. A consideration is only necessary to support an agreement or *executory* contract, but a gift, made perfect by delivery, is an *executed* contract irrevocable by the donor. *Ib.*

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### GOODS SOLD.

(See CIVIL ACTION, IV.)

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### GOVERNOR OF THE STATE.

(See MANDAMUS, 8.)

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### GRAND JURY.

(See CRIMINAL LAW, 62.)

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### GRANTS.

**1.** The act of Congress approved June 29th, 1854, granting certain lands to the Territory of Minnesota, to aid in building a railroad, vested a *present* estate in the Territory. *United States v. Minn. and N. W. R. R. Co.*, 1 Minn. 128.

**2. Grants of the United States bordering on the Mississippi.** Grants of land from the United States, bordering on rivers navigable in fact, carry title in fee to the middle thread of the stream, subject to the easement in the public to use the stream as a public highway. *Schurmeier v. The St. Paul and Pacific R. R. Co. et al.*, 10 Minn. 82.

**3.**—The entries in the field notes of the United States surveys showed that the line which bounded lot one in section five, on the north, ran east until it intersected the left bank of the Mississippi River, at which point a post was set, called a *meander corner*; that the line bounding it on the west ran south until it again intersected the left bank of the river, at which point another “meander” post is set. The United States statutes (act concerning the mode of surveying the public lands of the U. S., approved Feb. 11, 1805,) provided that in such cases—where townships are made fractional by a water course—the water course shall be the *external boundary* on that side of such fractional township. When the survey was made the “meander” line of this lot was not run on the bank of the river proper, but along “the left bank of a small channel or slough separated

from the river proper by a piece of land called "Island No. 11," which in high water was submerged, but in low water was high and dry, leaving only pools of water standing in the slough. The plat on file, in accordance with which the grant by the United States to R. was made, showed no island opposite lot number one. The question being whether R. took, by his grant, title to the piece of land known as "Island No. 11," or was confined to the meander line as actually run. *Held*, the "meander line" of the river between the two posts on the north and west boundary, commences at the former, and runs "thence up stream" to the last mentioned post, and it cannot be distinct and separate from the river line, and neither party can show that the river is in a different place from that designated by the field book and plat. That the meander line actually run was not to fix the river boundary—for the law establishes that—but to ascertain the quantity of land included in the fractional township, and that R. took title to "Island No. 11." *Ib.*

4. Under the United States Statutes providing for the surveying of lands, where by reason of water courses fractional townships are created, the boundary lines must run to the water course, and such water course is designated as the *external boundary* of the fractional township; and a survey of the banks of the stream (called the "meander line,") is only provided for to ascertain the quantity of land in such fractional township. *Ib.*

## GUARANTY.

(See LIMITATION OF ACTIONS, 13.)

1. Where one endorses a note for the purpose of assuming the liability of a guarantor, the act is held to authorize the holder to write over the signature the contract of guaranty in full, and that being done, it is a sufficient note or memorandum

in writing to take the case out of the statute. *Moore v. Folsom, impl.*, 14 Minn. 340.

## GUARDIAN AND WARD.

(See EXECUTORS AND ADMINISTRATORS, 4.)

1. **Oath.** A guardian took the following oath, viz.: "In conducting the sale of the real estate of the said minors, under the order of the Probate Court, I will in all respects conduct the same according to law, and for the benefit and best interest of the wards." *Held*, a substantial compliance with Sec. 14, p. 415, Comp. St. *Montour v. Purdy et al.*, 11 Minn. 384.

2. **Guardian's sale, may be attacked by the ward in ejectment.** Though a sale may have been authorized and confirmed by a probate court, it may be attacked in an action in the nature of ejectment, brought by the ward or his representatives, against the purchaser or his representatives, being the tenant in possession. *Ib.*

3. **Foreign guardian, authority in this State.** The authority of a guardian conferred by the courts of another State, will extend beyond the local jurisdiction of such State, and authorize its exercise within the limits of this State. *Townsend v. Kendall*, 4 Minn. 412.

4.—The courts of this State will recognize the foreign appointment of a guardian, as creating that relation in this State, subject, of course, to the laws of this State as to any exercise of power by virtue of such relation, either as to the property or the person of the ward. *Ib.*

5.—The "Probate Court of competent jurisdiction," within the meaning of Sub. 1, Sec. 23, p. 416, Comp. St., signifies the *Probate Court whose jurisdiction it is proper to invoke* in the particular case in hand, or in other words, (Sec. 6, Chap. 38, p. 415, Comp. St.,) the Probate Court of the county in which the guardian was appointed. *Montour v. Purdy et al.*, 11 Minn. 384.

## HABEAS CORPUS.

1. Judges of Probate of the Territory have no power to issue the writ of *habeas corpus*. *Col. Lee, ex parte*, 1 Minn. 69.

2. A court commissioner has power to grant a writ of *habeas corpus* returnable before himself, when the applicant is detained in his own county, and also where it appears on the application that the applicant is detained in an adjoining county, and there is no officer in that county authorized to grant the writ, or if there be one that is absent, or for any cause is incapable of acting, or has refused to grant the writ, under Comp. St., p. 635, Sec. 26. *State v. Hill*, 10 Minn. 63.

## HEIR.

(See U. S. LAND, 23.)

1. Right of possession of ancestor's real estate. The right of possession of real estate owned by deceased at time of his death, is in the heir, until the executor or administrator takes possession, or otherwise claims his right of possession, under Sec. 5 and 6, Chap. 52, G. S., these provisions conferring a right on the personal representative, which he may perhaps exercise in all cases, but is not bound to exercise unless the real estate, or the rents and profits, may be needed in settlement of the estate. *Paine v. The First Division St. Paul and Pacific R. R. Co. et al.*, 14 Minn. 65.

## HIGHWAYS.

(See COUNTIES, III.)

(See PLEADING, 40, 72.)

(See CONSTITUTIONAL LAW, V. 13.)

1. Damages in laying out. It seems that where the Legislature, by special act, authorizes or requires a public road or

highway to be made or established, and provides no means of paying for the same, or for ascertaining or paying the damages occasioned thereby, or for the property taken, the reasonable presumption is that it is intended such damages shall be ascertained, assessed and paid, and such improvements made, under the provisions of the general laws appertaining to the subject. *Warner v. Commissioners of Hennepin County*, 9 Minn. 139.

2. Requisites to location of a road. An act of the Legislature, approved March 4, 1863, entitled "An act to locate and open a State Road from Yorkville, Carver County, to intersect the St. Paul road, south," etc., provided that on "filing the plat and the field notes of survey of said road in the office of the Register of Deeds of Carver County, and a duplicate thereof in the office of the Register of Deeds of Hennepin County, the location of said road shall be deemed complete." *Held*, until the map and duplicates were filed in the counties designated, there was no location of the road, and until such location the commissioners had no authority to take or condemn the land over which the road was laid, and thereby divest an owner of his title. *Teick v. Board of Commissioners of Carver County*, 11 Minn. 292.

3. Notice to remove fence on opening road. The statute provided that where a road was laid out through improved land, the supervisors should give the occupant twenty days' notice to remove the fence, before proceeding to remove it themselves, and in case of appeal to the county commissioners, the notice should be given after the filing of the decision on appeal—Sec. 22 and 23, Chap. 4, Art. 3, Laws of 1860. *Held*, this provision was to enable the owner or occupant of improved land, over which a road is laid, ample time to remove and build his fences before opening the road, or exposing his crops. Where the land is uninclosed, the rule is inapplicable, and so where the fence is voluntarily removed by the owner. If after the road has been opened, while owned by C., a

subsequent owner, re-incloses the road with the fence, he is entitled to no protection. And no order to open the road is required by the statute, unless the land over which it was laid was inclosed, and the owner neglected or refused to remove it. *Hunter v. Jones*, 13 Minn. 307.

## HIRING.

(See BAILMENT, III. 1. 2.)

## HOMESTEAD.

(See MECHANIC'S LIEN, 1.)

(See TRUST AND TRUSTEE, 14.)

**1. Lien on homestead.** The homestead exemption in Sec. 93, R. S. (1851), p. 363, as amended by Law of 1854, p. 103, is restrained in its operation by the following Sec. (94), from extending to—1st, Claims against the homestead by reason of work or labor performed, or materials furnished to increase its value. 2d, Claims on the part of the public for taxes and assessments. 3d, Mortgage liens voluntarily created. And as to these "exceptions" no exemption exists. *Olson v. Nelson*, 3 Minn. 53.

**2.**—Under Sec. 76 and 77, Comp. St., 566, and Comp. St., p. 569, Sec. 92, the homestead of a judgment debtor was subject to the *lien of*, but not to a *sale on* the judgment. Where this homestead right had ceased—*i. e.*, not occupied by debtor, his widow or minor children as a residence—it could then be sold on execution. Hence, where the judgment debtor conveyed the homestead to a third person, the exemption ceased, and the land became liable, in the hands of that third person, to be sold on execution to satisfy any judgment which operated as a lien against it when transferred. *Folsom et al. v. Carli*, 5 Minn. 333.

**3.**—No "release or waiver" is necessary to render a homestead liable for the class of claims "excepted" from the homestead exemption in Sec. 93 and 94, R. S., (1851,) p. 363, as amended by Law of 1854, p. 103; and a mortgage lawfully obtained is among the "exceptions." *Olson v. Nelson*, 3 Minn. 53.

**4.**—The statute secures a homestead against a claim for materials furnished to erect or repair a house situated thereon—(1866). *Cogel et al. v. Mickow et al.*, 11 Minn. 475.

**5. Signature of wife.** Sec. 93 and 94, R. S. (1851), p. 363, as amended by the Session Laws of 1854, p. 103, does not make it essential to the validity of a mortgage on a homestead, that the wife should sign the mortgage with her husband—a mortgage "lawfully obtained" on a homestead is specially excepted from exemption, hence as to such mortgage there is no exemption. *Olson v. Nelson*, 3 Minn. 53. *EMMETT, C. J., dissenting.*

**6.**—A mortgage of a homestead by the owner thereof, if a married man, need only be *signed* by his wife to be valid, under Sec. 93, Comp. St., 570. *Lawrer v. Slingerland*, 11 Minn. 447.

**7. Homestead, how determined.** Under the homestead law of 1858, (Comp. St., p. 569, Sec. 92, etc.,) to constitute a homestead it must be occupied as a residence by the debtor and his family—following *Folsom v. Carli*, 5 Minn. 333. *Tillotson v. Millard et al.*, 7 Minn. 513.

**8.**—Under Art. 1, Sec. 12, State Constitution, which provides that "a reasonable amount of property shall be exempt from seizure or sale for the payment of any debt or liability," the homestead of a debtor may be determined by measurement of its area, as well as by a cash valuation. *Cogel et al. v. Mickow et al.*, 11 Minn. 475.

**9.**—In order to sustain the claim of the owner of land to hold the same as a homestead exempt from forced sale, under the act of 1860, (G. S., p. 499,) his residence must be or must have been situated thereon. *Kresin v. Mau*, 15 Minn. 116.

**10. Form and shape.** Under the homestead exemption statute, prior to the amendment of 1860, (Sec. 92, p. 559, Comp. St.,) a debtor within city limits can select the homestead in any form or shape, provided it is in one compact quantity; and this is so although a portion of the premises so selected are occupied not wholly by himself, but partly by others as his tenants. *Kelly v. Baker et al.*, 10 Minn. 154.

**11.**—Two tracts of land mutually touching only at a common corner—a mere point—does not constitute one body or tract of land, within the Homestead Exemption Act, so as to allow a residence upon one piece to be treated as a residence upon the other. *Kresin v. Mau*, 15 Minn. 116.

**12. An undivided half of two lots**, in an incorporated town, city or village, is not exempt from forced sale upon execution, as a homestead. *Ward v. Huhn & Co. et al.*, 16 Minn. 159.

## HORSES.

(See EVIDENCE, 126, *et seq.*)

## HUSBAND AND WIFE.

- I. LIABILITY OF HUSBAND FOR WIFE'S TORTS.
- II. LIABILITY OF WIFE FOR HER TORTS.
- III. POWER OF HUSBAND AND WIFE TO DEAL WITH EACH OTHER.
- IV. WIFE'S CONTROL OVER HER SEPARATE PROPERTY.
- V. WIFE'S LIABILITY ON HER PERSONAL CONTRACT.
- VI. LIABILITY OF WIFE'S SEPARATE ESTATE FOR HER CONTRACTS.
- VII. WIFE, AS SURETY FOR HER HUSBAND.
- VIII. WIFE'S POWER TO DISPOSE OF HER ESTATE.

(See EVIDENCE, 138.)

(See MORTGAGES, VII., c.)

(See TRUSTS AND TRUSTEES, 6.)

(See MECHANIC'S LIEN.)

### I. LIABILITY OF HUSBAND FOR WIFE'S TORTS.

**1. Husband alone liable for tort of wife committed in his presence.** M. and his wife were together, alone, a short distance from where others were beating the plaintiff; the husband, instead of dissenting from, seems heartily to have approved of, if not instigated, what the wife said on that occasion; both endeavored to incite the other defendants to further violence, but she is not shown to have said anything until after her husband set the example. *Held*, the husband alone was liable for the act of his wife, it being presumed she was under his control or acted by his direction, and mere physical superiority of the wife over the husband, arising from recent sickness of the husband, was not sufficient to rebut that presumption, although there might be circumstances which would rebut that presumption and make a wife liable for torts committed in the presence of her husband. *Brazil v. Moran et al.*, 8 Minn. 236.

### II. LIABILITY OF WIFE FOR HER TORTS.

**2. When committed in husband's absence—jointly liable with him.** It seems a *feme covert* is jointly liable with her husband for all torts committed by her when not in his company. *Id.*

### III. POWER OF HUSBAND AND WIFE TO DEAL WITH EACH OTHER.

**3. Husband may convey land purchased with wife's money directly to her as against subsequent creditors.** T. purchased land in his own name with money of his wife, which she received from a

former husband as her separate property, and afterwards conveyed the same directly to her by deed duly recorded. B. afterwards recovered judgment against T., docketed the same and claimed a lien on the land so conveyed to T.'s wife. Said conveyance covered the whole of T.'s estate. *Held*, it not appearing that B. was a creditor of T. at the time of the transfer to the wife, or that the transfer was made in contemplation of incurring the indebtedness to B., the circumstances gave rise to no presumption of fraud, actual or constructive, and though it conveyed all of T.'s estate, yet it not appearing that it amounted to more than a reasonable and suitable provision for her maintenance, the conveyance was valid. *Wilder et al. v. Brooks et al.*, 10 Minn. 50.

**4. Husband cannot deliver property to wife in consideration for her supporting the family, etc.—will be ordered to bring such property into court, etc.** A judgment debtor, the real and beneficial owner of a promissory note, continues such owner although he has transferred and delivered the same—without endorsement—to his wife, upon condition that the wife should retain and use the same for his benefit, or the support of himself and his family. If the wife, to place such note beyond the reach of her husband's judgment creditors, delivers the same to a third person in exchange for such third person's note, payable to her order, and retains the latter in her possession, she and her husband will be ordered to bring such note into court, that its proceeds may be applied in satisfaction of plaintiff's judgment. But the original note delivered to the third party—where the latter is not a party—cannot be reached by the court, and the husband and wife cannot be compelled to produce them. *Brown et al. v. Matthews and wife*, 14 Minn. 205.

**5. Transfer to the wife on a bona fide antecedent debt, will be upheld in equity against existing creditors.** B. borrowed \$500 of his wife and gave her certain promissory notes as part re-payment. She after-

wards purchased land with said notes and other property, afterwards received from her husband (undivided interest in his butcher shop) as full re-payment of the loan of \$500. B.'s creditors claim the land belongs to B., on the ground that B. could convey to his wife no title to the notes or butcher shop, with which the land was purchased, consequently B. owning the consideration with which the same was purchased, his wife held the title as his trustee. *Held*, whether B.'s wife took any title to the notes and shop from her husband, even under the change in the common law made by the statute, may be seriously questioned, but if she failed in getting the legal title, she was equitably entitled to the same and the proceeds thereof, and inasmuch as her money went into the land, she had a right to hold it as against B.'s creditors. *Teller v. Bishop et al.* 8 Minn. 226.

**6. As between the parties, equity will sustain the gift of a promissory note from a husband to his wife.** Where a husband gave his wife a promissory note directly, without the intervention of trustees. *Held*, that at law she obtained no title, notwithstanding Sec. 106, p. 571, Comp. Stat., but where the rights of creditors are not concerned, such a transaction will be sustained in equity. *Tulles v. Fridley*, 9 Minn. 79.

#### IV. WIFE'S CONTROL OVER HER SEPARATE PROPERTY.

**7. Wife's separate estate defined—she may deal with it as a feme sole under the statute.** At common law, contracts of a *feme covert* were absolutely void. To this rule equity recognized an exception, viz., allowing them to deal with their separate equitable estates as though *sole*, and our statutory provisions seem intended to confer on our courts of law power to administer this equitable rule—which is as follows: That a *feme covert* may dispose of or charge her separate estate in any manner, and for any purpose, not conflicting with the instrument under

which she acquired it—where the conveyance contains no restrictions, she may deal with it as a *feme sole*. The “separate estates” including only such rights and interests of the wife as would belong to the husband, but for the limitation to her particular use; *e. g.* rents, and inchoate title by curtesy. But a legal estate—as the reversion in lands to the wife, where she owned them at time of marriage, which would descend to her heirs, was under such provisions as the law provided, and not governed by these equitable rules. *Carpenter and Wife v. Leonard*, 5 Minn. 155; *Carpenter and Wife v. Wilverschied*, 5 Minn. 170.

**8. Wife may complete payment on school land certificate owned before marriage with her separate property.** Sec. 106, Comp. Stat. 571, was intended to secure to a married woman any property, by her owned before marriage, by whatever means acquired, or acquired after marriage by any means except her own personal industry. Where a wife, at the time of her marriage, owned a school land certificate on which she had made one payment, she had the right to use any money, which was her separate property, in perfecting her rights, or protecting her interest in and to said school land. *Rich v. Rich*, 12 Minn. 468.

**9. Where wife takes to her sole and separate use.** A married woman takes property during coverture, to her sole and separate use, under Sec. 2 and 3, Chap. 69, G. S., *only* when the instrument conveying the same to her contains a power of disposition by deed, will or otherwise. *Leighton et al. v. Sheldon*, 16 Minn. 243.

**10.**—Sec. 2 and 3, Chap. 69, G. S., which relate to the manner in which a married woman during coverture may acquire property to her sole and separate use, relate to *personal* property as well as real. *Ib.*

**11. Married woman, under the statute, has the profits and increase during coverture of her personal property free from her husband.** A married woman, under Sec. 106, Chap. 61, p. 571, Comp. Stat.

which provides, that “Any real or personal estate which may have been acquired by any female before marriage, either by her own personal industry or by inheritance, gift, grant, or devise, or to which she may at any time after her marriage, be entitled by inheritance, gift, grant, or devise, and the rents, profits, and income of any such real estate, shall be and continue the real and personal estate of such female after marriage, to the same extent as before marriage” \* \* \* secures to the wife, by implication, the profits, and increase during coverture of her personal property, as her separate estate free from her husband or his creditors. *Williams et al. v. McGrade et al.*, 13 Minn. 46.

**12. Married woman may contract for sale of her land if her husband signs—and be liable in specific performance.** A *feme covert* under Sec. 106, p. 571, Comp. Stat., has power to dispose of her property to the same extent as if she were *sole*, with husband's consent, and this power extends to the making of a valid, binding and effectual contract for the sale of her land, as by a bond for a deed, so that the contractee upon fulfilling upon his part, can enforce specific performance, provided the husband signs it, and Sec. 12, Chap. 35, p. 298, Comp. Stat., does not require that such a contract should be acknowledged by the wife, since it does not fall within the definition of other the “conveyance” as used in that chapter. *Kingsley v. Gilman et al.*, 15 Minn. 59.

## V. WIFE'S LIABILITY ON HER PERSONAL CONTRACTS.

**13. Statute does not allow wife to make herself personally liable on her contract.** It is clearly established that a married woman cannot, either at law or in equity, bind her person or her property generally by contract, and the only remedy allowed will be against her separate property. Nor did the statute, Comp. Stat. Chap. 61, Sec. 106, remove the general disability to contract imposed



by coverture, nor allow a wife living with her husband to make herself personally liable on her contract—following *Leonard v. Carpenter*, 5 Minn. 156. *Pond v. Carpenter et al.*, 12 Minn. 430.

#### VI. LIABILITY OF WIFE'S SEPARATE ESTATE ON HER CONTRACTS.

**14. Statutory lien attaches to her separate property, as if she were sole.** Sec. 106, Comp. Stat., p. 571, relieves married women of the disabilities of coverture in regard to the use, enjoyment and disposal of their property, acquired as provided in the statute, whether the estate be legal or equitable, and to the fullest extent with one statutory exception—viz., "She shall not give, grant or sell, any such real or personal property during coverture, without her husband's consent, except by order of court." This enables her to make the property liable for her debts, and a statutory lien will attach to her property whenever it would were she an unmarried woman. *Carpenter and Wife v. Leonard*, 5 Minn. 155; *Carpenter and Wife v. Wilberscheid*, 5 Minn. 170.

**15. Wife's power to charge her separate estate, only limited by the instrument through which she acquired title.** While a married woman, cannot, either at law or equity, bind herself personally by any contract she may make, yet her separate estate will, in equity, be held liable for all the debts, charges, incumbrances, and other engagements which she does, expressly or by implication, charge thereon, in any manner not inconsistent with the instrument by which she acquired her title to the property. *Pond v. Carpenter et al.*, 12 Minn. 430.

#### VII. WIFE AS SURETY FOR HER HUSBAND.

**16. Wife as surety entitled to all the rights of surety.** Married woman may pledge her separate estate to secure the

debts of her husband, and become his surety, and she is entitled to the same rights and immunities as attach to the relation, of principal and surety among strangers. *Wolfe and Wife v. Banning & Bucknell*, 3 Minn. 202.

**17.**—A wife mortgaging her separate property for the debts of her husband, is entitled to all the rights and remedies of a personal surety, so that she would be discharged by a contract between the creditor and her husband (without her assent) by which the latter obtained an extension of time. *Agnew v. Merritt et al.*, 10 Minn. 308.

#### VIII. WIFE'S POWER TO DISPOSE OF HER ESTATE.

**18. Wife's mortgage invalid unless all the forms of the statute are observed.** H. and wife signed and delivered a mortgage on the wife's separate estate. The wife never examined the instrument, was ignorant of its contents, did not know it was a mortgage on her separate estate, although she had actually signed it, received no consideration therefor, the notary having failed to examine her as required by statute, or take her acknowledgment in any way, although so set forth in his certificate. Held, the right or power of a married woman to convey is created by statute solely, so all the forms or restrictions imposed by statute in order to its enjoyment must be observed and complied with, and in this case no acknowledgment having been actually taken, the mortgage was void as to the wife's interest in the land. *Dodge v. Hollinshead*, 6 Minn. 25.

**19. Husband's consent necessary to disposition of wife's personal property.** A married woman, under Sec. 106, Chap. 61, Comp. Stat., cannot dispose of her separate (personal) property without consent of her husband. *Strong v. Colter*, 13 Minn. 82.

**20. Wife may charge her estate with her husband's consent—where consent appears.** Where the statute required that a married woman, to dispose of her estate,

must procure the consent of her husband. *Held*, she might charge her estate with such consent, and where goods were sold and delivered to her for her sole use and benefit, and on credit of her separate estate and property, and at her instance and request, and at the instance and request of her husband, and that the defendants (husband and wife) jointly and severally promised to pay for the same, the consent of said husband sufficiently appears to charge the wife's separate estate. The fact that the husband also assumed a joint and several liability for the indebtedness, does not deprive the creditor of his remedy against the wife's separate property. *Pond v. Carpenter et al.* 12 Minn. 430.

### IGNORANCE OF FACT.

**1.** Where a party pleads *ignorance* and it becomes important, the courts will carefully scrutinize the *means of knowledge* possessed by him, and consider whether he has been guilty of laches in neglecting to avail himself of information within his reach. If so, *actual ignorance* will not protect him from the consequences of his own acts. *Scott v. Edes*, 3 Minn. 377.

**2. Paying forged draft.** Where a forged draft has been paid, the loss must fall on the one who pays the same, where both parties stand on an equal footing as to good faith. *Bernheimer v. Marshall & Co.*, 2 Minn. 83.

**3. Sale on execution of property of stranger, through mistake in description.** Where the sheriff attached defendant's real estate, and afterwards sold an equal amount on execution in the same action, and plaintiff bid it in and filed satisfaction piece. And it appearing, subsequent to the sale, that the description in the notice of sale did not cover the property attached or of the judgment debtor, and the land sold belonged to a stranger, but in the meantime other creditors of defendant, relying on the satis-

faction of plaintiff's judgment, sold certain other of defendant's property, leaving him insolvent. *Held*, a mistake of fact which entitled plaintiff to be restored to the position he occupied before the sale. *Lay et al. v. Shaubhut et al.*, 6 Minn. 273.

### ILLEGAL CONTRACT.

(See CONTRACTS, XI., a.)

### INDICTMENTS.

(See CRIMINAL LAW, II.)

### INDEMNITY BOND.

(See CIVIL ACTION, IX., 3.)

### INDIAN AGENT.

(See TRUSTS AND TRUSTEES, 9.)

### INDIAN RESERVATION.

**1.** So much of the Chippewa Indian Reservation as was excepted from the cession to the United States by the Treaty with the Chippewa Indians, of May 7, 1864, and which was granted to the Chief Hole-in-the-Day, an Indian of unmixed blood, continued to retain its character as an Indian Reservation, notwithstanding such grant. *The United States v. Shanks et al.* 15 Minn. 369.

INFANCY.

**1. Infant may avoid contracts relating to personalty.** An infant may avoid a contract relating to personal property, by any act clearly demonstrating a renunciation of the contract. *Cogley v. Cushman*, 16 Minn. 397.

**2.—even where executed.** It seems that an infant can avoid an executed contract, relating to personal chattels, during his minority, in the absence of fraud. *Ib.*

**3. Voidable only.** When an infant executes a mortgage on personal property, which mortgage may be beneficial to the infant, said mortgage is voidable only, not void. *Ib.*

**4. Must return property received.** Where an infant has purchased property, and given a chattel mortgage as security for the purchase price, he cannot rescind the mortgage without disaffirming the sale, and, upon such disaffirmance, the title to the property reverts to the mortgagee, and he is entitled to the possession. *Ib.*

**5.—An infant cannot avoid a mortgage and keep the property acquired by virtue thereof.** *Ib.*

**6.** The effect of certain admissions relating to a chattel mortgage and proceedings under it, made upon the trial by a guardian *ad litem* in a suit brought in behalf of an infant, upon the right of the plaintiff to show a disaffirmance of the mortgage, on the ground of the mortgagor's infancy, considered and determined. *Ib.*

INJUNCTION.

(See PRACTICE, II., 7.)

(See SHERIFF, VII.)

**1. Where it will issue.** It is a well settled rule, that an injunction ought not to be granted unless the injury is pressing and delay dangerous, or where the injury might be irreparable. *Goodrich v. Moore*, 2 Minn. 63.

**2.** A temporary injunction will not issue, unless the act about to be committed is of such a nature that the consequences of its commission would be irreparable—and the erection of a railroad trestle work on a street is not such damage to adjoining owners, it being a mere trespass susceptible of pecuniary compensation. *Schurmier v. The St. Paul & Pacific R. R. Co.*, 8 Minn. 113. *Whitman v. The St. Paul & Pacific R. R. Co.*, 8 Minn. 113.

**3. An infringement of a ferry franchise will be restrained by injunction on the ground, among others, that otherwise the party would be compelled to institute a multiplicity of suits to obtain redress for repeated acts of trespass.** *McRoberts v. Washburn et al.*, 10 Minn. 23.

**4. Restraining motion to set aside a foreclosure.** No injunction, by means of a distinct action, will be granted to restrain a motion to set aside a foreclosure sale in another action on grounds which constitute a good defense to the motion, and are cognizable by the court before whom said action is pending. *Rogers v. Holyoke*, 14 Minn. 220.

**5. A levy upon and consequent sale of plaintiff's land under an execution against a third party, is not such an irreparable injury within the rule of Goodrich v. Moore,** 1 Minn. 61, as will authorize the issuing of an injunction. *Hart & Caldwell v. Marshall*, 4 Minn. 294.

**6. Mortgage sale.** An injunction will not issue to restrain a mortgage sale, on the ground that the mortgagee proposes to sell the property absolutely, without privilege of redemption, under and by virtue of a waiver clause—the relief, if any there be, being at law. *Armstrong v. Sanford*, 7 Minn. 49.

**7. Collection of tax.** Plaintiff sought to enjoin the collection of a tax, on the ground that, contrary to the vote of the town, two supervisors had caused to be issued certain orders, and the county auditor had extended on the tax roll of the town a tax to pay said orders. *Held*, plaintiff had an adequate remedy at law by *certiorari*,

which undoubtedly lies to such subordinate tribunals, that it does not appear that the acts would lead to an irreparable injury, multiplicity of suits, or that the proceedings are valid on their face, so as to constitute a cloud upon his title for the execution of a deed (which by statute is *prima facie* evidence of title,) does not appear to be threatened—the fact that it may hereafter be executed will not confer jurisdiction. *Scribner v. Allen et al.*, 12 Minn. 148.

**8. Nuisance—Parties.** Where no peculiar and special damage is sustained by a private person in consequence of the obstruction of a public highway, which obstruction is a public nuisance, the remedy is only by indictment, or perhaps by suit in the name of the State, or of some one authorized to act for and vindicate the rights of the public, hence no injunction will be granted at suit of a private person. *Dawson v. St. Paul Fire and Marine Ins. Co.*, 15 Minn. 136.

## INJURIES TO REAL PROPERTY.

(See CIVIL ACTION, XV., 1, 2.)

(See EVIDENCE, 181.)

## INJURIES TO PERSONAL PROPERTY.

(See CIVIL ACTION, XII.)

## INSANITY.

(See CRIMINAL LAW, 53.)

## INSOLVENT LAW.

(See EVIDENCE, 129.)

**1.** Sec. 24, Chap 79, Comp. St., relating to the discharge of insolvent debtors, and the ground on which the validity of judgments discharging them will be destroyed, is not exclusive of other. *Ullman v. Lion*, 8 Minn. 381.

**2.** Under the insolvent act, Comp. St., Chap. 79., an omission to make the requisite proof of publication of notice required on first day of hearing, will destroy the validity of the discharge. *Ib.*

## INTOXICATION.

(See CRIMINAL LAW, 40.)

## INTEREST.

### I. GENERALLY.

### II. ON WHAT INTEREST IS RECOVERABLE.

### III. FOR WHAT TIME INTEREST IS RECOVERABLE.

### IV. RULE OF COMPUTATION.

### V. PENALTY CLAUSES.

### VI. INTEREST DURING TIME OF WAR.

### I. GENERALLY.

**1.** Under the interest law of 1858, a contract to pay more than 7 per cent. interest per annum must be in writing. *Allen v. Jones*, 8 Minn. 202.

### II. ON WHAT INTEREST IS RECOVERABLE.

**2. Interest on interest not due.** A contract to pay interest *on interest which is not due*, is inequitable, and will not be enforced, while on the other hand if the interest *is due*, it may be added to the principal, and a contract to pay interest on such *new principal* will be enforced. *Mason et al. v. Callander et al.*, 2 Minn. 365.

**3. Reciprocal accounts.** When the par-

ties have reciprocal accounts, which do not constitute a mutual open account, carrying unlimited credit between them; in an action by one of them to recover his account, in which the other party sets up his account as a counter claim, and a balance is found for the plaintiff, interest may be allowed from the date of the last item of the plaintiff's account. *Leyde v. Martin et al.*, 16 Minn. 38.

**4. Breach of contract.** On breach of a contract to deliver wheat, the injured party is entitled to interest on his demand from date of breach only, and not from date of contract. *Brackett v. Edgerton*, 14 Minn. 174.

### III. FOR WHAT TIME INTEREST IS RECOVERABLE.

**5. After maturity of claim, interest accrues.** Under Chap. 35, R. S., p. 155, the rate of interest continues as agreed upon by the parties after maturity until paid. *Brewster v. Wakefield*, 1 Minn. 354.

**6.—does no accrue.** Interest being the creature of contract, is recoverable *strictly as interest*, only during the continuance of the contract, and as provided by its terms *before breach*, and *not after*; what he pays after breach of contract, is paid as *damage*, though it may be the legal rate of interest. *Muson, Craig et al. v. Callendar, et al.* 2 Minn. 365.

**7. Damages after maturity.** Promissory note drawing no interest before due, but, "5 per cent. per month after due till paid" will entitle the holder to "damages at the rate of 7 per cent. per annum after due till paid" only. *Kent v. Brown*, 3 Minn. 347.

**8.—**A promissory note that draws interest at a given rate without stipulation, whether until maturity, or after maturity, draws the given rate until due, and if not then paid, damages may be recovered at rate of seven per cent. per annum for non-payment. *Miller v. Rouse*, 8 Minn. 124.

**9.—the same as legal rate of interest.** Promissory note stipulated for the pay-

ment of interest "at the rate of six per cent. per annum until due, and five per cent. per month after due until paid." The statute provided "any rate of interest agreed upon by the parties to a contract, specifying the same in writing, shall be legal and valid." *Heid*, no *interest*, within the meaning of the statute, accrued after the note became due, and the promise to pay five per cent. per month after due till paid, was without consideration and void, the contract itself having been broken by non-payment, and no promise of further forbearance, etc., on part of payee, and it was simply a penalty, or an attempt to liquidate, the damages in a case where the law would not allow either—and that instead of recovering five per cent. per month after due as interest, *damages* only could be recovered, and their measure is the same as the rate of interest established by law—not by the contract of the parties, either before or after breach—7 per cent. per annum. *Talcott v. Marston*, 3 Minn. 329.

**10.—**Under Statute 1860., Chap. 56, Sec. 1, providing that all agreements and contracts shall bear the same rate of interest after they become due, as before, if the same shall be clearly expressed therein—(not to exceed 12 per cent. per annum)—a bond conditioned to pay the principal in five years from date, with 12 per cent. interest per annum, payable semi-annually, will not draw such interest after due, but fall within the settled rule of this State, and entitle the holder to damages by way of interest at 7 per cent. *Lash v. Lambert et al.* 15 Minn. 416.

### IV. RULE OF COMPUTATION.

**11.** In computing interest upon contracts for the payment of money, bearing interest at the maximum rate allowed by statute, the rule has been to compute the interest on the principal debt from its date to time of payment or judgment, and not stop at maturity, and figure compound interest. *Brewster v. Wakefield*, 1 Minn. 356.

## V. PENALTY CLAUSES.

**12. Increased rates of interest after due is a penalty, not recoverable.** The stipulation of a promissory note bound the maker, on default of payment of principal and interest on a certain day, to pay that sum *with increased rate* of interest upon principal and interest till paid. *Held*, that the greater sum—*increased rate*—was a *penalty*, and not liquidated damages. *Mason, Craig, et al. v. Callendar et al.* 2 Minn. 369.

**13.** Where a promissory note drew interest at 3 per cent. per month until due, and 5 per cent. per month after due, till paid. *Held*, that interest could not be recovered after due, but *damages*, and that the stipulation for 5 per cent. per month till paid after due was a *penalty*, and not liquidated damages, and under our statute, R. S., p. 155, Chap. 35, Sec. 1 and 2, the true rate of *damages* was the principal with *interest* at 3 per cent. till default, and *damages* at rate of 3 per cent. after default till judgment. *Mason, Craig, et al. v. Callander et al.*, 2 Minn. 369.

**14.** The damages cannot be stipulated at any certain amount in money contracts. The law fixes the damages in such cases at the legal rate of interest. A stipulation for interest at 5 per cent. per month after maturity is in the nature of a penalty, and will be relieved against in equity. *Daniels v. Ward*, 4 Minn. 168.

## VI. INTEREST DURING TIME OF WAR.

**15. Where lender was in the rebellion, and principal not due until after the war.** Plaintiff loaned defendant money in Minnesota before the rebellion, taking bond due Aug. 1, 1865—after the rebellion,—drawing interest at 12 per cent. per annum, payable semi-annually. During rebellion, the plaintiff resided in North Carolina, but had an agent in Minnesota, and defendants resided in Minnesota. *Held*, on such semi-annual payments of interest as fell due, and were not paid during the war, no dam-

age by way of interest are recoverable, but the principal not being due until after the war, interest is recoverable on that for the whole period. *Lush v. Lambert et al.*, 15 Minn. 416.

**16. Effect of the rebellion on rate of interest.** It seems that the rule that interest is not demandible for the period during war, where the citizen was in the enemy's country, or with the enemy, and had no known agent in the country competent to receive payment and give a valid discharge (where the debt was due, and no express contract to pay before the war?) does not apply to a debt due from a citizen of a State in rebellion in the late war, to a citizen of a loyal State, because the debtor cannot take advantage of his treason, but that it would apply to a debt due from such loyal citizen to such disloyal citizen. But where there is an express contract to pay interest until principal is paid, it is recoverable, though prevented by law, unless the use of the money by the debtor has been actually prevented. *Ib.*

**17. General rule, qualification thereof.** *It seems*, that those cases where it has been held that interest is not recoverable for the period of war, where the citizen was in the enemy's country, or with the enemy, and had no known agent in the country, competent to receive payment and give a valid discharge now where the debts were due before the war, and no express contract between the parties for the payment of interest after maturity. *Ib.*

## INTOXICATING LIQUORS.

**1. License.** By Chap. 16, G. S., it is made the duty of the board of county commissioners to exercise discretion and discrimination as to the persons to whom licenses to sell intoxicating liquors shall be granted, and such board has no right to grant such licenses except upon an *application*, in each case, by the person desiring

a license. And the board is to determine, on such application, whether the applicant is a fit person to be trusted with the traffic. *The County Com'rs, Hennepin Co., v. Robinson*, 16 Minn. 381.

**2. County Commissioners cannot delegate their power.** In determining upon the sum to be paid for a license, as well as the sufficiency of the applicant's bond, the board of commissioners must exercise their judgment, and the duty and responsibility thus imposed must be discharged by the board, and by no other person. *Ib.*

**3.**—The board of county commissioners cannot confer upon the county attorney, either as such, or as a simple agent, the power to, or impose upon him the duty of issuing licenses or accepting bonds. A county attorney cannot, either as such, or as simple agent, legally be authorized to hear and determine upon an application for a license, nor to fix or receive the price of the same, nor to accept or approve the requisite bond, nor to issue the license itself; and licenses issued by him in either of those capacities are absolutely void, and the county cannot recover the moneys received for such void licenses by such attorney, in whatever capacity assumed to have been received. *Ib.*

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## JOINDER OF ACTIONS.

(See PLEADINGS, VII.)

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## JOINDER OF OFFENSES.

(See CRIMINAL LAW, 16.)

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## JUDGE OF PROBATE AND HIS COURT.

(See COMMISSIONERS TO ADJUST CLAIMS, ETC.)

**1.** The act of the Territory of Minnesota creating a Court of Probate, superseded in its powers and duties the functions of Judges of Probate under the laws of Wisconsin. *Col. Lee, ex parte*, 1 Minn. 69.

**2. Power—habeas corpus.** Judges of Probate of the Territory have no power to issue the writ of *habeas corpus*. *Ib.*

**3. Acknowledgments.** Judges of Probate had no power to take acknowledgments of deeds until the act of March, 6th 1852, (Comp. St., 495,) making them Courts of Record, when that power was conferred. *Base v. Arper*, 6 Minn. 220.

**4. No jurisdiction over Indians on reservations.** A full-blood Indian, residing at the time of his death upon an Indian reservation within Cass County, Minnesota, was not a citizen of the United States, nor of the State of Minnesota, nor does the Probate Court of Morrison County, to which Cass County was attached for judicial purposes, have jurisdiction over his estate. *The United States v. Shanks et al.*, 15 Minn. 369.

**5. Appointing commissioners.** The Probate Court is not prohibited by Sec. 1, Chap. 44, Comp. St., from appointing commissioners after letters testamentary or of administration shall be granted, but may appoint them, if not previously appointed, at any time during the progress of the administration. *Wilkinson, Stetson & Co., v. Estate of Winne*, 15 Minn. 159.

**6. Succeeding an administrator.** The Probate Court has the power, under Sec. 11, 14 and 15, Chap. 42, Pub. St., to succeed an administrator who has been removed, by another, after the lapse of three years, or so long as the estate remains unadministered in whole or in part. *Ib.*

**7. Vacancy, how filled.** Under Sec. 7 and 10, Art. 6, State Constitution, when a vacancy occurs in the office of Judge of Probate, it shall be filled by appointment, until the election of a successor at an annual election occurring more than thirty days after the vacancy shall have happened, and when such successor is elected, it shall be for the full constitutional term

of two years. *Crowell v. Lambert*, 9 Minn. 283.

**8. Decree not to be attacked collaterally.** The decree of a Probate Court under Sec. 4, Chap. 56, G. S., cannot be attacked collaterally; a defense going to establish error in the decree, but conceding the jurisdiction of the court to make the decree, is demurrable. *Wood v. Myrick*, 16 Minn. 494.

**9. Decree of partition.** Sec. 8, Chap. 56, G. S., so far as it requires the service of notice upon all persons interested, etc., before any partition is ordered as directed in that chapter, embraces and applies to the decree of the Probate Court, authorized by Sec. 4 of the same chapter. Hence a decree assigning the residue of an estate, as provided in Sec. 4, Chap. 56, G. S., if the notice required by Sec. 8, Chap. 56, has not been first given, is void for want of jurisdiction; and when such decree is pleaded in the manner provided by Sec. 91, Chap. 66, G. S., the want of such notice may be set up in the answer as a defense. *Id.*

## JUDICIAL NOTICE.

(See EVIDENCE, II.)

## JUDICIAL SALES.

**1. Notice of sale.** The correction of every immaterial typographical error in notice of tax, mortgage, or judicial sales may not vitiate a sale, nor would an alteration in such notice, made in good faith to correct an error in a material particular, be *per se* fatal in all cases. In applications for relief in such cases, prejudice resulting from the mistake or alteration is always considered an essential feature by the courts, whether it exists in fact, or is presumed by law from the circumstances. *Dana & Brown v. Farrington*, 4 Minn. 433.

**2. Adjourning sale on service of injunction.** The sale of property on execu-

tion was restrained by injunction, the sheriff adjourned the sale to a future day, on that day the creditor purchased—the injunction having been dissolved in the meantime. *Held*, the sale to the creditor was void on account of irregularity on part of the officer—his duty being, on service of injunction, not to adjourn the sale, but to stay all proceedings, and if the injunction was dissolved during life of execution, then to advertise the property under the original levy, and proceed with the sale as from the beginning. *Held also*, that had a stranger purchased, instead of the creditor, the sale would have been good, under Sec. 111, p. 572, Comp. St., Minnesota. *Pettingill v. Moss*, 3 Minn. 223.

**3. Sale by attorney after death of principal—setting aside.** Where a sale of property had been made on decree in an action after the plaintiff (a non-resident) had died, the sale was set aside on those facts being made to appear—the plaintiff having bid in, through his attorney, most of the property. *Held*, correct, inasmuch as plaintiff did not exist to make the purchase, and the fact that a portion of the property was bid in by others would not alter the case—no prejudice to defendants being shown. *Landis v. Old et al.*, 9 Minn. 90.

**4. Report of sale—signing.** The sheriff's report of sale under decree of court may be signed in his name by his deputy, although the decree directs the sale to be made by the sheriff, and that "the said sheriff make report." etc. Sec. 57, Chap. 7, Comp. St. *Hotchkiss v. Cutting*, 14 Minn. 537.

**5. The purchaser.** No omission of the duty of an officer in the sale of personal property, nor any mistake of his in the manner of discharging his duty, will vitiate the title to the property in hands of bona fide purchaser. *Tillman et al. v. Jackson*, 1 Minn. 188.

**6.**—Where a purchaser has satisfied himself that the officer is duly qualified to act, and has legal process in his hands authorizing him to sell, our laws should be



so construed as to relieve him of all doubt as to the title he is to obtain, and justify him as a prudent man in paying a fair consideration—except only in case of fraud. *Tillman et al. v. Jackson*, 1 Minn. 187.

7.—Purchasers at judicial sales are not supposed to have knowledge of, and ought not to be prejudiced by the misconduct or omissions of the officer—the law requires them only to ascertain that the officer sells on a valid writ, and on a valid and subsisting judgment. *Tullis v. Brawley*, 3 Minn. 277.

8.—The purchase of real estate on execution sale, *pendent lite*, is voluntary, and the purchaser takes it subject to the *lis pendens*—affirming *Steele v. Taylor et al.*, 1 Minn. 274. *Hart & Caldwell v. Marshall*, 4 Minn. 294.

## JUDGMENT.

(See PRACTICE, II., 12.)

## JURISDICTION.

(See COURTS, IV.)

1. Though the consent of parties may waive error, it cannot confer jurisdiction of subject matter. *Ames v. Boland*, 1 Minn. 369.

2. Waiver, or consent of parties will not confer jurisdiction of the District or Supreme Court in cases where a Justice of the Peace has exclusive jurisdiction, as in suits not over \$15.00. *Dodd v. Cady*, 1 Minn. 289.

3. Where the legislature has omitted to furnish the means for this court to enforce its judgment, on reversal of the judgment below; this fact alone is almost conclusive to prove that the legislature never intended to give this court jurisdiction. *State v. McGrorty*, 2 Minn. 222.

4. Nothing is intended to be out of the jurisdiction of a superior court, but that which specially appears so. *Holmes et al. v. Campbell*, 12 Minn. 221.

## JURY.

(See NEW TRIAL, II., f.)

1. Where the jurors summoned on the original venire had all been discharged. *Held*, that the jurors summoned as a *special venire* under Sec. 32, p. 289, R. S., were competent to try a cause. *State v. Maloney*, 1 Minn. 350.

2. The word “jury,” in Sec. 1, Art. 1, Constitution of State, imports a body of twelve men. *State v. Emmet*, 14 Minn. 439.

## JURORS.

(See PRACTICE, II., 11, B., a. b.)

(See CRIMINAL LAW.)

# JUSTICE OF THE PEACE AND HIS COURT.

I. POWERS AND LIABILITIES OF THE JUSTICE.

II. JURISDICTION.

III. COMMENCEMENT OF ACTIONS.

a. *The Justices' Docket.*

b. *Transfer of Actions to another Justice.*

IV. PLEADINGS AND TRIAL.

a. *Pleadings.*

b. *Defenses.*

c. *Adjournment.*

d. *Certifying Case up when real estate is in issue.*

e. *Costs.*

V. REPLEVIN.

VI. ATTACHMENT.

VII. APPEAL.

- a. *When it lies.*
- b. *When it does not lie.*
- c. *Appeal papers.*
  - 1. *Generally.*
  - 2. *Notice of Appeal.*
  - 3. *Affidavit on Appeal.*
  - 4. *The Return.*

## VIII. CERTIORARI.

## IX. CRIMINAL PROCEEDINGS.

(See PRACTICE, II., 16, A.)

## I. POWERS AND LIABILITIES OF THE JUSTICE.

**1. Liability for not posting table of fees.** Sec. 33, p. 592, Comp. Stat., requiring Justice of Peace to post up a table of fees, "within six months after the passage thereof," under a penalty of not to exceed two dollars for each day the duty is neglected, is a penal statute, is limited in its operation to officers in office, and to come into office within six months after its passage *Kennedy v. Raught*, 6 Minn. 235.

**2. Not liable for money collected on judgment until demand.** There can be no liability, either civil or criminal, attach to a Justice of the Peace for neglecting to pay over money collected on a judgment, until a demand, nor for neglecting to inform the party of any fact concerning the judgment until requested. *State v. Coon*, 14 Minn. 455.

## II. JURISDICTION.

**3. Amount involved is less than \$15.** A Justice of the Peace has exclusive jurisdiction in all cases where the amount does not exceed \$15.00 (fifteen dollars.) *Dodd v. Cady*, 1 Minn. 289.

**4. Exclusive jurisdiction where amount is \$100.00 or less.** The statutes of Minnesota give to Justices of the Peace original jurisdiction of all matters involving one hundred dollars or less (with the exceptions in the statutes contained) and this is exclusive of the District Courts. *Castner et al. v. Chandler et al.*, 2 Minn. 88.

**5. Where amount claimed exceeds \$100.00.** In an action for injuries to

real estate where the plaintiff claimed damages in a sum exceeding one hundred dollars, under Sub. 2, Sec. 5, Comp. Stat., 498, a Justice of the Peace has no jurisdiction. *Turner et al. v. Halleran*, 8 Minn. 451.

## III. COMMENCEMENT OF ACTIONS.

a. *The Justices' Docket.*

**6. Docket must show jurisdiction.** A justices' court, being a court of special and limited jurisdiction, in an action before such court the record must show facts which confer jurisdiction, both of the person and cause of action. *Barnes v. Holton et al.*, 14 Minn. 357.

**7. What an insufficient statement of the nature of plaintiff's demands.** A parties return showed that the "plaintiff appeared in court ready for trial; defendants failed to appear; plaintiff made his complaint orally and verified the same under oath, and B. was sworn as witness and gave evidence in the case, and after hearing the proofs and allegations in the case, the court gave judgment in favor of the plaintiff and against defendants for the sum of thirty-one dollars, balance due on lot sold by plaintiff to defendants in Sept. 1867, and the costs of this action, taxed, etc." *Held*, not such a brief statement of the nature of plaintiff's demand and the amount claimed, \* \* as required by Sec. 7, Chap. 65, G. S. Neither the action nor the justice's jurisdiction can be shown by the judgment rendered thereon, and for all that appears elsewhere, it may have been an action of ejectment or a money demand of one or ten thousand dollars. *Ib.*

**8. If pleadings in writing, an omission to state plaintiff's demand, immaterial.** The omission of a Justice to make a statement of the plaintiff's demand, etc., as required by Sub. 4, Sec. 7, Comp. St., p. 499, could not effect the validity of the judgment, especially where the pleadings were in writing and filed. *Payson v. Everett*, 12 Minn. 216.

**9. What sufficient statement of costs.**

It sufficiently appears that the entry of "30.65," by the Justice in his docket as amount of costs was intended for \$30.65—the items composing it being entered, nobody could be misled. *Ib.*

**10. What sufficient showing of service of summons.** Justice's transcript showed the following entry: "Nov. 19, 1852. Summons returned, served by copy, by officer Brott." *Held*, it sufficiently appeared that "service" was affected under the statute authorizing summons to be served by leaving copy in certain cases, and that the justice acquired jurisdiction—for it is to be presumed the service was made as required by law. *Bidwell v. Coleman*, 11 Minn. 78.

**11. What sufficient showing of nature of process issued.** A Justices' transcript which showed that a "summons" issued on a given date, is a substantial compliance with the requirements of the statute in reference to the entry which must be made on his docket concerning the nature of the process issued by him—whether in a civil action for money, in replevin, or otherwise. Comp. Stat., Sec. 82, p. 686. *Ib.*

**12. Presumptions in favor of proceedings—estoppel—jury list—number of jurors—oath of jurors.** The Justices' return set forth that "defendant asked for a venire; issued venire to L. H. Raymond; venire returned with the following names as jurymen personally summoned (giving six names). The following persons appeared and were sworn as a jury to try the cause by the agreement of the parties, viz: (giving five names). *Held*, defendant, by his consent, given, as appears from the record, is estopped from denying that the jury were selected, empaneled or summoned as provided by law, or that they had authority to render a verdict, or that the list of names was made as required by law, or that the parties consented in any manner, that a jury of six might be made, or that they took the oath required by law. *Held*, further, that, it appearing that one item of the constable's costs taxed, is for making a list, the presumption is that the

venire was issued for jurors selected as required by law, and for twelve, no record agreement for a jury of six appearing and notwithstanding only six were returned personally summoned; further, it appearing that the jury were sworn to try the cause, it is necessarily to be presumed that they took the proper oath. *Clague v. Hodgson*, 15 Minn. 329.

**13.—verdict.** The justice's return stated that the case being closed, "the jury retired under the charge of constable L. H. Raymond, sworn for that purpose; jury returned into court, and say they find for the plaintiff, and assess his damages at eight dollars." *Held*, it is presumed that the jury were kept together, as required by law, till they agreed, that they agreed and delivered a verdict to the justice, and that a legal verdict was rendered. *Clague v. Hodgson*, 16 Minn. 329.

**14.—generally.** Where the justice's court has jurisdiction, the same presumption exists in favor of the formality and regularity of its proceedings as in courts of record. *Ib.*

*b. Transfer of action to another justice.*

**15. Under R. S. transfer must be made before issue joined, and not for prejudice or partiality.** The law of 1849 authorizes a transfer of a suit from one justice to another only where the defendant makes an affidavit before issue joined, that the justice is a material witness for him, without whose testimony he cannot safely proceed to trial, or where it is proved that he is of near kin to the plaintiff. For errors committed through *partiality* or *prejudice*, the remedy is by appeal or *certiorari*. *Cooper v. Brewster*, 1 Minn. 95.

**16. What is not such a "commencement of an action" as to prevent a transfer.** The filing and subsequent amendment of pleadings, nor the filing of an affidavit for a writ of attachment, and arguing of a motion to dissolve the attachment, does not constitute such a "commencement of a cause or proceeding" in a justice's court, under Sec. 65, p. 509, Comp.

St., 1859, as precludes a party from asking—on the proper affidavit—for a transfer of the suit to another justice. Such trial is a trial “on the merits.” *Curtis v. Moore*, 3 Minn. 29.

**17. What essential to a transfer—justice’s docket.** Where a cause is transferred from Justice A. to Justice B., the docket of A. must show that he transferred it, and to whom, and where A.’s docket simply showed that “upon affidavit of S. for a change of venue, a change was granted,” without any further entry, it did not give jurisdiction to B., though B.’s docket recited the fact that the cause was transferred to him from A.; neither did the appearance of the parties before B., nor an appeal from his judgment on questions of both law and fact, give him jurisdiction, but the action of A. operated as a discontinuance of the action. *Rahilly v. Lane et al.*, 15 Minn. 447.

#### IV. PLEADINGS AND TRIAL.

##### a. Pleadings.

**18. Cannot depart from the issue made by the pleadings.** Under the 7th Sec, 4th Art., of the act of this Territory, “concerning justices,” where “pleadings” have been filed at instance of the opposite party or the justice, the issue so made up cannot be departed from or abandoned at pleasure. *Desnoyer v. Hereux*, 1 Minn. 17.

**19. Verification necessary.** The statute requires all pleadings before a justice to be verified; and it seems without it he obtains no jurisdiction, unless by his own consent, or waiver of parties; and if not verified, may dismiss on his own motion. *Taylor v. Bissell*, 1 Minn. 225.

**20. Counter claim admitted by failure to reply.** Nothing is admitted in an answer in a justice’s court by failure to reply, save a counter claim. Comp. St., p. 501-2, Sec. 25, 29, 33—following *Taylor v. Bissell*, 1 Minn. 225. *Walker v. McDonald*, 5 Minn. 455.

**21. When pleadings must be made—within one week after appearance. Un-**

der Sec. 24, Comp. St., p. 501, the pleadings in a justice’s court must take place at time mentioned for the appearance of the parties, unless by consent of parties, in which case they may be filed within a week from that time. But where a justice adjourned for more than a week, and pleadings were put in on the day to which it was adjourned. *Held*, although the adjournment was with consent of parties, it did not carry their consent to file pleadings after a week from return day of summons. Whether they could so file by consent, is not determined. *Holgate v. Broome*, 8 Minn. 243.

**22.**—A Justice of the Peace has no power to receive the pleadings at any other time than that appointed for the appearance of the parties, (Sec. 21, Chap. 65, G. S.), except by their consent; and a consent to an adjournment does not carry with it consent for a party to plead after the expiration of a week from the return day of summons—following *Holgate v. Broome*, 8 Minn. 246. *Mattice v. Litcherding*, 14 Minn. 142.

##### b. Defenses.

**23. Equitable defenses.** A Justice of the Peace has nothing to do with actions or defenses of a purely equitable nature. A party in a suit before a justice, who has an equitable defense, may appeal to the District Court, and there set up his equities by way of answer, as though the action had originally commenced in that court. *Fowler et al. v. Atkinson*, 6 Minn. 503.

##### c. Adjournment.

**24. Requisites of an affidavit for adjournment.** In an affidavit in justice’s court, made to procure an adjournment, (subsequent to the first,) to obtain material testimony, it is not enough to aver that “due diligence” has been used—the facts constituting that due diligence must be set out so the justice can form his own conclusion. *Board of Commissioners of Washington Co. v. McCoy*, 1 Minn. 100.

**25. Justice cannot change the adjourned day.** A Justice of the Peace having adjourned a cause to a certain day, and entered the same on his docket, afterwards took the responsibility (that day being Sunday) to change the day of trial to the next Monday, and on that day proceeded to hear the cause, in the presence of one of the parties only. *Held*, erroneous. *Wardlow v. Bissler*, 3 Minn. 317.

**26. Justice cannot adjourn on his own motion—requisites of affidavit.** Under Sec. 37, Comp. St., p. 502, which provides that "when the pleadings of the parties shall have taken place, the justice shall, upon the application of either party, if sufficient cause be shown upon oath, adjourn the cause for any time not exceeding thirty days," etc., a justice cannot adjourn on his own motion—every adjournment must be by consent of parties, or for sufficient cause shown; and an affidavit which merely states that counsel "had a subpoena for, but was unable to procure the attendance of a material witness," does not show "sufficient cause,"—showing no diligence, nor in what the materiality consists, nor name of the witness, etc. *School District v. Thompson*, 5 Minn. 280.

**27. Unauthorized adjournment is a discontinuance.** Where a justice grants an unauthorized adjournment, it amounts to a discontinuance. *Ib.*

*d. Certifying case up, when real estate is in issue.*

**28. Justice loses jurisdiction, not until the evidence puts title in issue.** Until Art. 6, Sec. 8, Constitution, and Sec. 38, p. 502, Comp. St., a Justice of the Peace is not ousted of jurisdiction simply because the title to real estate is put in issue by the pleadings; it is only in the event of title coming in question on the evidence. For the defense which raises that issue may not be relied on in evidence. *Goenen v. Schroeder*, 8 Minn. 387.

**29.—but he may certify case up when the pleadings raise the issue as to title.** In an action in a justice's court, the title to

land was put in issue by the pleadings, whereupon the justice certified the case to the District Court, without any trial. The plaintiff, disregarding the action of the justice, commenced another action for the same cause, to which defendant made same answer, adding the defense of "another action pending." *Held*, the plea of another action pending was good, inasmuch as the justice had power to entertain the subject matter of the suit, notwithstanding the presence of a plea to the jurisdiction, so long as that question is undecided, and the certifying to District Court before hearing any evidence, was not such an irregularity as operated to put an end to case. (See *Goenen v. Schroeder*, 8 Minn. 387.) **FLANDRAU, J., dissenting**, thinks the act of the justice in certifying the case up before receiving any evidence, had the effect, according to the rule laid down in *Goenen v. Schroeder*, 8 Minn. 387, to discontinue the former suit. See Sec. 38, Comp. St., p. 502. *Merriam v. Fridley*, 9 Minn. 34.

*e. Costs.*

**30. Fees of defendant's witnesses cannot be included in judgment.** In justice court, where the plaintiff recovers judgment, the justice cannot enter the fees of the defendant's own witnesses with the other costs in the judgment. *Griggs v. Larson*, 10 Minn. 220; *Payson v. Everett*, 12 Minn. 216.

**31. Taxing for jury list and attendance of an officer.** It is to be presumed, that where a jury list is taxed in the justice's court, such jury list was actually made; so as to the authority of a constable to summon a jury, and that he attended the jury and court where each of those services are taxed. *Clague v. Hodgson*, 16 Minn. 329.

**32. Witnesses' mileage—presumption.** Where travel of witnesses is taxed in a justice's court, it is presumed that proper proof was made as to such travel having been performed. *Ib.*

**33. Witnesses not subpoenaed.** Costs of witnesses in a justice's court may be

taxed, though they were not subpoenaed. *Ib.*

### V. REPLEVIN.

**34. Property replevied essential to jurisdiction.** In replevin before justice, the proceeding is *in rem*, and the thing replevied alone gives the justice jurisdiction. Art. 10, act of Territory, treats it as proceeding *in rem*. *St. Martin v. Desnoyer*, 1 Minn. 41.

**35. Judgment in replevin.** In replevin in justices' courts, where property has been delivered to the plaintiff, the defendant, in taking judgment, under Sec. 88, p. 433, G. S., should take it in the alternative for the return of the property or its value. *Kates v. Thomas, impl., etc.*, 14 Minn. 460.

**36. The affidavit.** In replevin in justice's court, the affidavit provided for in Sec. 81 and 82, Chap. 65 G. S., must state the value of the property according to the best knowledge and belief of affiant—a specific value—not that “it does not exceed \$100,” although the statute requires that “it should appear affirmatively that it does not exceed \$100.” *Hacklin v. Ess*, 16 Minn. 51.

**37. Value of property may be put in issue.** It seems that in replevin, in a justice's court, the defendant may plead in bar to the jurisdiction, and prove, if it is so, the fact that the property is worth over \$100. *Ib.*

**38. Jurisdiction.** Where a replevin suit is taken by appeal to the District Court from a justice's court, and it there appears that the value of the property in controversy exceeds \$100, but the pleadings admit the value to be \$100, the jurisdiction of the justice is not thereby taken away. *Ib.*

### VI. ATTACHMENT.

**39. Affidavit sufficient where drawn in words of the statute.** An affidavit in a justice's court for the purpose of obtaining a writ of attachment, under Sec. 94, Comp. Stat., p. 513, is sufficient if drawn in the

words of the statute, without stating the facts and circumstances on which the statement is based. *Curtis v. Moore*, 3 Minn. 29.

**40. When writ returnable.** When an affidavit for an attachment specifies two grounds therefor, one of which makes the writ returnable in three days, the other in six days, the Justice has jurisdiction to determine on which of said days to make the writ returnable. *Ib.*

### VII. APPEAL.

#### a. When it lies.

**41. Where amount claimed exceeds thirty dollars, though judgment is less than ten dollars.** An appeal lies from a Justice's judgment under Sec. 136, Comp. St., p. 517, where the “amount claimed in the complaint shall exceed thirty dollars,” though the judgment does not exceed ten dollars—save in such actions excepted in subsequent parts of that section. *Shunk v. Hellmiller*, 11 Minn. 164.

**42. Forceible entry and detainer.** In an action under Chap. 84, G. S., before a Justice of the Peace, by a landlord against his tenant, the same right of appeal to the District, and thence to the Supreme Court, exists as in other cases. *Barker v. Walbridge*, 14 Minn. 469.

#### b. When it does not lie.

**43. Amount is less than fifteen dollars.** No appeal lies from a Justice's judgment, unless it exceeds fifteen dollars *exclusive* of costs. *Dodd v. Cady*, 1 Minn. 289.

**44. When Justice is acquitted on charge of not posting fee table.** Sec. 33, p. 592, Comp. St., requiring Justice of the Peace to put up a table of fee, under a penalty of not to exceed two dollars for each day they neglect the same, is a penal offense, and an acquittal on fair hearing precludes an appeal against the officer, under Sec. 7, Art. 1, Const. of Minn. *Kennedy v. Raught*, 6 Minn. 235.

*c. Appeal papers.*

*1. Generally.*

**45. Defendant need not first pay his witnesses.** In a civil action the fees of witnesses, for a party against whom a judgment is rendered in a Justice's Court are not taxable as costs under the judgment, hence such party may appeal without paying his own witnesses. *Trigg v. Larson*, 10 Minn. 220.

**46. Appeal papers not fatally defective, though not attached to the transcript.** An appeal from a Justice's judgment is not defective by reason of the appeal papers not being attached to the transcript of the Justice, they being on file, for such defect is in the return and amendable. *Rahilly v. Lane et al.*, 15 Minn. 447.

**47. Papers need not be stamped.** An appeal from a Justice's Court is not void by reason of none of the appeal papers being stamped. *Dorman v. Bayley*, 10 Minn. 383.

*2. Notice of appeal.*

**48. Admission of service does not waive signature to notice of appeal.** On appeal from Justice's Court, under Sub. 3, Sec. 104, G. S., p. 435, the service of notice of appeal is jurisdictional, and the notice must be signed by the appellant, his agent, or attorney. No admission of service by the other side will estop him from questioning the sufficiency of the notice for want of signature, for consent cannot confer jurisdiction. *Larrabee et al. v. Morrison*, 15 Minn. 196.

**49. Admission of service sufficient.** Notice of appeal from Justice's Court was endorsed as follows: "Personal service of the within is hereby admitted this 23d day of December, A. D. 1867. B. & S. attorneys for plaintiff." *Held*, sufficient proof of service—the presumption being that the endorsement was there when the notice was filed, at most an amended return would have removed any uncertainty. *Rahilly v. Lane et al.*, 15 Minn. 447.

*3. Affidavit for appeal.*

**50. Mistake in date of judgment appealed from, not fatal.** An affidavit for, nor notice of an appeal from Justice's Court is not fatally defective, because it refers to the judgment rendered on a date different from the true date. It refers to the judgment rendered in the action—the details including the date are needless. *Ib.*

**51. Need not state reasons showing good faith, etc.** An affidavit for appeal from Justice's judgment in the words of the statute, that the appeal is made in good faith, and not for the purposes of delay, is sufficient, without stating reasons tending to show that fact. *Ib.*

**52. Venue to the affidavit.** Where an affidavit for an appeal was said to have no venue. *Held*, as it was entitled in the State of Minnesota, and proper county, it must refer, not to the affidavit, but to the jurat, which however being part of the affidavit, does not require a separate venue. *Ib.*

**53. Need not be sworn to before the Justice.** The affidavit for an appeal from a Justice's Court, under G. S., Chap. 65, Sec. 104, need not be sworn to before the Justice who tried the case. *Ib.*

*4. The return.*

**54. What sufficient showing of costs paid, etc.** The return of a justice on appeal certified that "costs paid and appeal allowed, Dec. 24, 1867." *Held*, his fee for the return being included among the costs, it appeared that they were paid so as to give the Justice power under G. S., Chap. 65, Sec. 117, to allow the appeal, distinguishing from *Griggs v. Larson*, 10 Minn. 220. *Ib.*

VIII. CERTIORARI.

**55. What Justice's return should contain.** A Justice of the Peace in his return to a writ of *certiorari* should not confine himself to the complaints and errors set forth in the affidavit of the party aggrieved, but should make a full return of all the proceedings, and his rulings at the trial,

and the District Court should be guided by what appears on the return, and this though the affidavit dispute it. *Gervais v. Powers et al.*, 1 Minn. 45.

**56.**—A Justice of the Peace in answer to a *certiorari* under a statute requiring him to return "all the testimony and proceedings in the case," (Sec. 127 and 13, Chap. 59, Comp. St.,) did not certify that his return *did contain* all the testimony, but stated at the bottom, "The above is all the testimony." *Held*, the presumption was in favor of his having done his duty in the absence of any certificate. If it was necessary, the language used was sufficient. *Payson v. Everett*, 12 Minn. 216.

## IX. CRIMINAL PROCEEDINGS.

**57. Trial by jury of six men against defendant's request, unconstitutional.** A trial of a defendant in a criminal prosecution in a Justice's Court, by a jury of *six* men, when he requests *twelve* men, is not such a trial by jury as is guaranteed by the constitution; and this is so although he had the right of appeal to the District Court, and to be there tried by a jury of twelve men, for under Chap. 81, Laws of 1867, such an appeal is allowed only when he enters into a recognizance therein specified, with one or more sufficient sureties. This statute does not *secure* to him such a trial absolutely as required by the constitution. *State v. Everett*, 14 Minn. 439.

**58. Justice has no power to take money as security for the appearance of prisoner.** Under Sec. 9 and 18, p. 746, Comp. St., a Justice has no authority on an *adjournment* to accept a sum of money as security for the appearance of a prisoner—hence when he so receives money and refuses to return the same on the re-appearance of the prisoner and execution of the ordinary recognizance, it is not a breach of his official bond—although he is personally liable. *Cressey v. Gierman et al.*, 7 Minn. 398.

**59. Depositions not part of record.** Depositions of witnesses taken by a Jus-

tice in a criminal examination are not portion of the record of his proceedings. *Chapman v. Dodd*, 10 Minn. 350.

**60. Criminal Docket competent evidence.** Whether the statute requires a criminal docket to be kept by Justices of the Peace is immaterial, for where one is kept, it is competent evidence, whether signed or not, if identified by the Justice, or other competent proof. *Ib.*

**61. Complaint charging two offenses.** Under an ordinance making it unlawful for any person "to sell or expose for sale," a complaint charging that defendant "unlawfully did sell, offer for sale, or expose for sale," charges two distinct offenses in the alternative, and is fatally defective for uncertainty. *City of St. Paul v. Marvin*, 16 Minn. 102.

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## JUSTIFICATION.

(See CRIMINAL LAW, 41.)

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## LACHES.

**1. Plaintiff claimed equitable relief against certain proceedings in execution, on the ground that he was ignorant of the return of the sheriff on the original summons. Held**, that as he had neglected for more than a year after notice of judgment against him to examine the sheriff's return, his ignorance, arising from such neglect, could not entitle him to relief—against the judgment. *Myrick v. Edmundson*, 2 Minn. 259.

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## LARCENY.

(See CRIMINAL LAW, 32, 162.)

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LANDLORD AND TENANT.

(See LEASE.)

**1. Suits between—second trial.** Sec. 5, Chap. 75, G. S., as amended by Sec. 2, Chap. 72, Laws 1867, p. 117, does not refer to suits between landlord and tenant for possession by the former on breach of covenants in a lease—Sec. 15, Chap. 75, G. S., is a particular provision for such cases. *Whitaker v. McClung et al.*, 14 Minn. 170.

**2. Who is a tenant—letting land on shares.** One who rents a piece of land on shares, and who is by the terms of the agreement to have the exclusive use of certain rooms in a house on a different portion of the same place, holds the rooms as tenant for years, whether he holds the land as a tenant in common with the owner or not—the right to an exclusive use being inconsistent with a tenancy in common. *Gould v. Sub. Dist. No. 3, of Eagle Creek School District*, 8 Minn. 427.

**3. Tenant's right to assign.** Tenant, for years, may assign, or grant, over his whole interest, unless restrained by covenant not to assign without leave of the lessor. *Id.*

**4. Disputing landlord's title.** A tenant will not be allowed to dispute the title of his landlord—where there has been no eviction. Nor can he by attorning to a stranger, or other claimant, throw on his landlord the burden of proving title. *Allen et al. v. Chatfield*, 8 Minn. 435.

**5.**—A tenant may deny his landlord's title as against a stranger. *Cole v. Maxfield*, 13 Minn. 235.

**6. Covenant by lessee to pay taxes—forfeiture on default—no demand necessary.** Where a right of re-entry is given to the landlord for non-payment of taxes by the lessee, no demand for the payment of the same is necessary to enable the landlord to declare a forfeiture—but it seems that the tenant has until the last day of the time provided by law for their payment in which to pay them to the government where a day certain is fixed. *Byrane v. Rogers*, 8 Minn. 281.

**7. Defense to action by landlord.** A lessee of a mill situated in the midst of the east portion of the Mississippi River as it passes over the Falls of St. Anthony, can not defend against an action on behalf of his landlord for rent and recovery of possession, on the ground that the restoration of possession would be a violation of the public right of free and unobstructed navigation of said river—for if the facts were so, he cannot deny his landlord's title or right of possession. *The St. Anthony Falls Water Power Co. v. Morrison impl. etc.*, 12 Minn. 249.

**8. A surrender of a lease need not be in writing,** it may arise from any condition of facts incompatible with the relation of landlord and tenant, as by the landlord accepting a third party as his tenant. But the mere act of receiving rent from the assignee of a lease in possession will not operate as a surrender of the original lease, because the presumption is that the assignee is the lessee's agent, but this presumption may be rebutted by parol. *Levering et al. v. Langley et al.*, 8 Minn. 107.

**9. Re-entry by landlord on default in rent.** A lease stipulated that "if it shall happen that any installment of the rent, etc., shall not be paid (to the lessor, etc.), within 30 days after the same shall have become due, etc., or at any time thereafter, if demanded, or if default shall be made in any of the covenants, etc., then the lessor may re-enter, etc." Held, the stipulation waived the demand, on the day the rent became due, which was necessary at common law to declare a forfeiture, and the landlord, in case the tenant failed to pay the rent within thirty days after it becomes due, may re-enter at once without demand and claim his forfeiture, but he must claim this forfeiture at the time it accrues by re-entry or suit, or he will lose it. To declare a forfeiture *after the thirty days*, a demand (probably as at common law) would then have to be made. *Byrane v. Rogers*, 8 Minn. 281.

**10. Forfeiture at common law.** At common law, a landlord to claim a forfeit-

ure of the lease for non-payment of rent, must in person, or by agent duly authorized, first make a demand upon the land of the precise sum due, on the day it is due, at a convenient time before sunset, at the front door of the dwelling house upon the land, if there is one, unless a place of payment is specified, when it must be there, and this, though there be no one upon the land ready to pay it. *Ib.*

## LEASE.

(See LANDLORD AND TENANT.)

1. A lease for three years or under, does not require the signature of witnesses to make it valid under Sec. 30, Chap. 35, Comp. Stat. *Chandler v. Kent*, 8 Minn. 524.

2. In the absence of any evidence to the contrary, where a written lease is to take effect *in presenti*, the *prima facie* presumption is that both the instrument and possession of the premises were delivered on the day of the date of the lease. *Rhone v. Gale et al.*, 12 Minn. 54.

3. **Insurance clause.** A stipulation in a lease that, as one of the conditions thereof, and as part rent, the lessee agreed to procure for the benefit of the plaintiff, an insurance of seven hundred dollars on the buildings (rented) and to keep the same so insured during the term of said lease—said insurance to be effected as soon as the 18th day of April, 1865, in a good and responsible company, bound the lessee to insure against loss by fire, and a neglect to insure on the 18th did not relieve him from the duty of insuring after that time, up to expiration of lease. *Ib.*

4. **Covenant to convey, etc.** An ordinary lease containing a provision allowing the lessee to purchase the premises at any time during the tenancy, by paying a given price, is not an instrument in the nature of a mortgage, and after the expiration of the term and demand of possession and refusal, the tenant has no defense on that

ground in an action for "forcible entry and detainer." The lease being in writing, and the only writing between the two parties, and no fraud, mistake, or surprise in its execution, it is not to be varied by parol contemporaneous or prior understandings between the parties. *Stewart v. Murray*, 13 Minn. 426.

## LEVY.

(See PLEADINGS, 41, 42.)

(See PRACTICE, II. 13, *e.*)

## LIBEL.

(See CRIMINAL LAW, 161.)

(See SLANDER AND LIBEL.)

## LIEN.

(See MECHANICS' LIEN.)

## LICENSE.

(See MUNICIPAL CORPORATION, II.)

(See INTOXICATING LIQUORS.)

## LIMITATION OF ACTIONS.

### I. GENERALLY.

### II. RETROSPECTIVE ACTION OF LIMITATION STATUTES.

### III. WHEN THE STATUTE BEGINS TO RUN.

*a. Generally.*

*b. In particular cases.*

### IV. ACKNOWLEDGEMENTS, NEW PROMISE AND PART PAYMENT.

(See CONSTITUTIONAL LAW, V., 12.)

(See PARTNERSHIP, 17, 25.)

## I. GENERALLY.

**1. Limitation governed by the *lex fori*.** The limitation of actions will always be governed by the *lex fori*, unless there is some provision therein referring such limitation to other laws. *Fletcher v. Spaulding*, 9 Minn. 64.

**2. Law in force at time of bringing action, governs.** A statute of limitations affects only the remedy, and therefore every case must be governed by the law in force when suit is brought. *Cook et al. v. Kendall et al.*, 13 Minn. 324.

**3. Statute may run against one joint debtor only.** Judgment is recoverable against one or more on a joint contract, although the statute of limitations has barred the action against the others. *Town v. Washburn et al.*, 14 Minn. 268.

## II. RETROSPECTIVE ACTION OF LIMITATION STATUTES.

**4. Limitation Statutes may operate retrospectively.** Statutes of limitations concern the *remedy*, and are clearly within the power of the Legislature, and may apply to existing actions, if a reasonable time is allowed to bring an action. *Holcombe v. Tracy*, 2 Minn. 246.

**5.—and will unless it cuts off a party entirely.** Where the plaintiff's claim had run several years, and an act was passed amending the statute of limitations. *Held*, that the *new* limitation thus established was not in *addition* to the time already elapsed, but as including such period—unless such a construction would cut off a party entirely, in which case he was to have a *reasonable* time to bring his action. *Ib.*

## III. WHEN THE STATUTE BEGINS TO RUN.

## a. Generally.

**6. In case of a cause of action which arose abroad, our own Statute alone governs until it is shown that a foreign Stat-**

**ute exists.** At common law there was no stated or fixed time as to the bringing of actions, and if a State in which a contract is made, had no statute of limitations, then by the *lex loci* the action might there be commenced at any time. Hence if it does not appear, from a complaint on a cause of action that occurred in another State, that a statute of limitations embracing the particular case, exists in that State, then the same is actionable here, unless barred by our own statute, and the complaint not demurrable. *Hoyt et al. v. McNeil*, 13 Minn. 390.

**7. For injuries to land held by pre-emptor before patent issues.** Action for damages occasioned by the erection of defendant's mill-dam, where the land injured was at the time of the commencement of the injury held by plaintiff as pre-emptor, can under the statute, Sec. 17, Chap. 31, G. S., be brought within two years after the patent issues. *Dorman v. Ames & George*, 12 Minn. 451.

**8. Where party was non-resident when action accrued.** The statute of limitations does not begin to run in favor of the party charged until he comes within the jurisdiction. *Hoyt et al. v. McNeil*, 13 Minn. 390.

**9. When cause of action depends on a contingency.** *It seems* that where a promise depends on a contingency, a cause of action does not accrue within statute of limitations until the happening of the controlling event. *Johnson et al. v. Gilfillan*, 8 Minn. 395.

**10. Against married women.** A married woman is within the express words of Sec. 17, Chap. 66, G. S., as to limitation of actions, and entitled to avail herself of it. *Burke et al. v. Beveridge*, 15 Minn. 205.

**11. Where action accrued in another State.** When the cause of action accrued, both plaintiff and defendant were residents of Massachusetts, after which defendant removed to Minnesota, more than six years prior to the commencement of action, plaintiff still being a resident of the former State. *Held*, action barred by statute of

limitations, Sec. 6, p. 532, Comp. St.; Sec. 39, Chap. 72, p. 629, Comp. St., not removing the effect of the statute. *Fletcher v. Spaulding*, 9 Minn. 64.

**12. Surety bond by payment of interest on part of debtor within six years from maturity of bond, and within six years from bringing suit, though without sureties knowledge.** A bond for the payment of money had been due more than six years prior to the commencement of the action. The "principal debtor" had paid interest on the same before the bond was barred by the statute of limitations, and within six years prior to the commencement of the action; this payment of interest being made without the procurement, knowledge, or consent of the sureties. *Held*, Under Sec. 6 and 24, Chap. 60, Comp. St., a right of action against the sureties survived for six years from the last payment of interest made prior to the expiration of six years from the due date of the bond. Distinguishing this from the effect of a payment by one joint obligor after the debt has become barred, as to which no opinion is given. *Whitacre v. Rice & Becker*, 9 Minn. 13.

**13. Absence from State.** In 1856, A. sold land to B., taking in part payment an assignment of certain land warrants from B. A. discovered in 1861 that the prior assignments on said warrants were forged, and in 1863 that his title to the other warrants was defective on like grounds. In November, 1858, B. departed from the State to Europe, his wife, to whom the land had been conveyed in the mean time, left in August, 1862. That neither B., nor his wife, returned to the State until October, 1868, and during the interval, both were non-residents. *Held*, this action to enforce an equitable lien for the purchase money for which the warrants were taken, was not barred by the statute of limitations, in October, 1868. *Duke v. Balme et al.*, 16 Minn. 306.

**14. Effect of general statutes.** Judgment was recovered in Dec., 1857. Payment made in Aug., 1865. Action commenced

Dec., 1860, on said judgment. *Held*, Chap. 60, Sec. 24, Comp. St., which provides that a payment of principal or interest upon an existing contract \* \* \* if "made after the same becomes due, the limitation shall commence from the time the last payment was made," which, in the G. S. of 1866, was supplanted by the provision requiring a writing signed by the party to be charged to take a cause of action out of the statute, providing "this section shall not alter the effect of any payment of principal or interest." Sec. 21, Chap. 66, G. S., does not apply to this action; for the saving clause in Sec. 4, Chap. 121, G. S., which provides that the repeal of said statute "shall not affect any right accruing, accrued or established when the said General Statutes took effect," does not prevent the legislature from changing the limitation law. *Brisbin v. Farmer*, 16 Minn. 215.

*b. In particular cases.*

**15. On a guaranty.** Defendants sold to plaintiff's assignor certain land warrants, guaranteeing them to be "in all respects genuine and receivable at the General Land Office." The warrants and guarantee were assigned to plaintiff. The warrants were not presented to the Commissioner for inspection in the regular course of entry, until sufficient time had elapsed from the assignment to set the statute of limitations in motion. The question being, when did the cause of action on the guarantee accrue? *Held*, it accrued when the warrants were rejected by the Commissioner, and not when assigned, although the defect existed then. *Johnson et al. v. Gilfillan*, 8 Minn. 395.

**16. Dam, action for damages occasioned by.** The limitation prescribed by Sec. 17, Chap. 127, Comp. St., in which actions for damages occasioned by the erection of a mill-dam may be brought, does not commence to run until damage has been sustained—when the dam obstructs the flow and raises the level of the water, and not before it becomes a dam within the mean-

ing of the act. *Thornton v. Turner*, 11 Minn. 336.

**17.—action to remove and enjoin another erection.** An equitable action to obtain the removal of a dam, and an injunction against its ever being erected or maintained, comes within Sec. 12, Chap. 60, Comp. St., which prescribes a limitation of ten years for bringing action for relief not before specifically enumerated. *Eastman v. The St. Anthony Falls Water Power Co.*, 12 Minn. 137.

**18.—action for damages, etc.** Sec. 17, Chap. 31 G. S., which limits the time for bringing an action for damages occasioned by the erection of a mill-dam, relates only to an *action for damages*, and cannot be extended to an action to abate or enjoin a nuisance. *Cook et al. v. Kendall et al.*, 13 Minn. 324.

**19.—action to remove, as a nuisance.** The limitation of time for bringing an action for damages, occasioned by the erection of a dam, prescribed by Sec. 17, G. S., p. 241, does not apply to an action to remove the same as a nuisance, the latter is governed by Sec. 12, Chap. 60, G. S.,—following, *Eastman v. St. Anthony Falls W. P. Co.*, 12 Minn. 137. *Thornton v. Webb et al.*, 13 Minn. 498.

**20. Executor, etc., when statute runs against.** Under Sec. 2 and 5, Chap. 55, G. S., a right of action upon the bond of an executor or administrator is given a creditor when the amount due him has been ascertained and ordered by the decree of distribution to be paid, when the same has been demanded by the creditor and refused by the executor or administrator, and permission to sue has been granted the creditor by the Probate Judge; until all these circumstances transpire, the creditor has no right of action upon the bond, and until the right of action exists, the statute of limitations does not begin to run. *Wood v. Myrick*, 16 Minn. 494.

**21. Foreign judgments.** The time for bringing actions on judgments of another State was, by Chap. 20, p. 57, Laws of 1865, reduced from ten years to six years, the act

was approved Feb. 16, 1865, and was to take effect and be in force on and after July 1 1865. *Held*, the amendment operates retrospectively and cuts off all right of action on judgments of another State, recovered more than six years prior to July 1, 1865, and is constitutional. *Stine et al. v. Bennell*, 13 Minn. 153.

**22. Surplus money received on mortgage sale by mortgagee—action to recover by junior incumbrancer.** Defendant as assignee of the mortgagor, demanded of and received from the Sheriff the surplus proceeds arising from the sale of the premises on the first mortgage; the plaintiff, second mortgagee, brings this action to recover the amount and enforce his lien. *Held*, assuming that the money belonged to plaintiff, the same having been taken by defendant nearly eight years prior to the bringing this action, plaintiff's action is barred, it being in the nature of an action for money had and received, on the principle that equity follows the analogy of the law in regard to limitations of actions, and in the absence of legal analogies, refuses to enforce State demands. *McMILLAN, J., dissenting* thinks the proceeding is in the nature of an action for foreclosing the plaintiff's mortgage, and not barred short of 20 years under the statute. *Ayer v. Stewart et al.*, 14 Minn. 97.

**23. Mortgage, action to foreclose.** An action to foreclose a mortgage is not "an action upon a contract or other obligation, expressed or implied," within the meaning of Sub. 1, Sec. 6, Comp. St., 533, which limits the time for bringing such actions to six years. *BERRY, J.*, thinks it is an action upon a contract, and also an *action for relief* within Sec. 12, same chapter, and that in such cases the latter controls and allows ten years limitation. *Ozmun v. Reynolds et al.*, 11 Minn. 459.

**24. Deed absolute on the face, action to foreclose as a mortgage.** Where a deed absolute on its face was given to secure the payment of money thus constituting a mortgage in equity, the right of the grantee to foreclose, and the grantor to redeem, is

not cut off for 20 years from the time the cause of action accrues—under Sec. 11, Chap. 66, G. S. *Holton v. Meighen*, 15 Minn. 69.

**25. Promissory note.** No day of payment being fixed on a promissory note, the statute of limitations runs from its date. *Kennedy v. Williams*, 11 Minn. 314.

**26. Personal representatives, action against.** Sec. 18, Chap. 60, Comp. St., relates to causes of action matured and existing against decedent at time of death, as to which the statute has commenced to run before his death, and as to which the statute might operate as a bar before an action could be brought, unless provisions were made for extending the time within which an action could be brought until the appointment of an administrator. *Wilkinson, Statson, & Co. v. Estate of Winne*, 15 Minn. 159.

**27.**—Where plaintiff's cause of action did not accrue until the administratrix of his debtor's estate had departed from the State, (accrued Dec. 24, 1856) and the administratrix returned in 1864, and no second administrator was appointed until Nov. 1863, and plaintiff presented his claim to the Commissioners (who were not appointed until Nov. 23, 1863,) in 1865. *Held*, Under Sec. 16, Chap. 60, Comp. St., the statute of limitations did not run prior to appointment of the second administrator, Nov., 1863. Nor was claimant's action barred by a failure to present it to the Commissioners within six years, or within any less time after maturity of note, or the granting of letters of administration, for no Commissioners were appointed until after six years after both these events. *Ib.*

**28. Tax proceedings, action to test their validity.** The tax law of 1862, Sec. 6 and 7, which provided that any one claiming an interest should bring an action to test the validity of an *assessment* before sale, and any one claiming an interest adverse to the purchaser at the sale, should bring an action to test the validity of the tax deed, within one year after its record, or be "forever barred," is limited in its ap-

plication to owners or claimants in possession, limiting their time to *bring an action*, but Sec. 7 does not apply to actions brought against the original owner—nor is an action of ejectment an "action to test the validity of an assessment or sale." *Baker v. Kelley* 11 Minn. 480.

#### IV. ACKNOWLEDGMENT, NEW PROMISE, AND PART PAYMENT.

**29. What will take a cause of action out of the statute.** To take a cause of action out of the statute of limitations, there must be either an express promise, or an acknowledgment expressed in such words, and attended by such circumstances as to give it the meaning, and therefore the force and effect of a new promise, and in case of an acknowledgment or an implied promise, there should be a direct recognition of the indebtedness sued on, from which a willingness to pay the same may be reasonably implied. *Whitney et al. v. Reese et al.*, 11 Minn. 138.

**30.**—To take a cause of action out of the statute of limitations, there must be either an express promise to pay, or an unqualified acknowledgment of a preëxisting indebtedness, from which such promise may be inferred, and the promise being the ground of the action, must be clearly proved. If the acknowledgment or promise is conditional, it does not constitute a cause of action, unless that is done on which the promise—express or implied—is made to depend. *McNab et al., Exrs., etc., v. Stewart*, 12 Minn. 407.

**31. Effect of the statute and an acknowledgment.** The statute of limitations only denies a remedy after the prescribed time, without extinguishing the debt, and the existence of the debt after the remedy is barred by statute, is a good consideration for a new promise to pay, and such promise may be implied from an unqualified acknowledgment of a present existing indebtedness. The acknowledgment does not revive the old debt, but is

evidence of a new promise, of which the former debt is a consideration; hence if anything is said at the time to repel the inference of a promise, the acknowledgment will not take the case out of the statute—it must be consistent with an intention and promise to pay—Sec. 6, Chap. 66, G. S. *Smith v. Moulton et al.*, 12 Minn. 352.

**32. General acknowledgment—when insufficient.** When the acknowledgment of indebtedness was made, the creditor held three notes of the debtor, and as the acknowledgment of indebtedness was general, it could not be known to which one it referred, or whether to more than one of the notes, hence it could not be held as evidence of a promise to pay either, hence does not take either out of the statute of limitations. *Ib.*

**33. What a sufficient acknowledgment and memorandum in writing to bind a school district.** A school district voted that S. be requested to make a proposition upon what terms he would settle his claim, (which was outlawed.) At a subsequent meeting S. submitted a written proposition to take \$1,250, "in full satisfaction and discharge," and the district accepted it by a majority vote, and at a subsequent meeting voted that the directors of said district be directed to draw the money in the treasury and pay it to S. on the present indebtedness. *Held*, a sufficient acknowledgment to take the case out of the statute of limitations, and their action being of record, is a memorandum in writing within the meaning of Sec. 73, Chap. 60, Comp. St. *Sanborn v. School District No. 10, Rice Co.*, 12 Minn. 17.

**34. What an insufficient acknowledgment, in case of two separate notes.** Plaintiffs holding two separate notes of defendants, received from the latter the following writing: "GENTLEMEN,—You are hereby authorized to compromise with Charles Hoyt, Esq., for his acceptance dated May 11, 1864, for \$394.94, which you now hold as collateral on our debt." Signed. *Held*, "our debt" too vague to lead to any conclusion as to which

note reference was made, and insufficient to take either out of the statute. *Whitney et al. v. Reese et al.*, 11 Minn. 138.

**35. New promise cannot be rescinded.** Where a promise or acknowledgment which takes a debt out of the statute of limitations has once been made, it cannot be rescinded. *Sanborn v. School District No. 10, Rice Co.*, 12 Minn. 17.

**36. Part payment—inference of promise to pay balance.** An action on a cause of action once barred by the statute of limitations, founded on a subsequent part payment, cannot be maintained unless the plaintiff prove a payment made on the cause of action, under such circumstances as would warrant the jury in inferring a promise by defendant to pay the balance. *Brisbin v. Farmer*, 16 Minn. 215.

**37.**—A payment, to revive a cause of action barred by the statute of limitations, must be a part payment unaccompanied by any circumstances which repel the idea of an intention to pay the balance. *Ib.*

**38. Part payment simply no evidence of promise to pay balance.** It seems, that part payment of a debt barred by the statutes of limitations, without words or acts to indicate its character, would not be construed as carrying with it an acknowledgment that more was due and would be paid—*i. e.*, it would not be evidence from which a jury would be warranted in inferring a new promise. *Ib.*

**39. Part payment in full.** If a payment on a debt barred by the statute of limitations was paid in full of the judgment by respondent, and not merely as a part payment thereof, there is nothing to prevent the operation of the statute. *Ib.*

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## LOGS.

**I. Evidence of ownership.** The following portion of Sec. 23, Chap. 32, G. S., does not apply to logs on land in the actual possession of the owner; it is designed to furnish evidence of ownership of logs

where they are being floated on the streams: "Any logs or timber cut in this State, or coming into this State, in the first district, at any point on the St. Croix above \* \* Stillwater, the marks of which are not recorded in the district in which they were cut, or into which they may come, and all logs, etc., not bearing any distinctive mark, shall not, in favor of the person who has cut the same, or claims to be the owner thereof, be recognized, deemed or held in any of the courts of this State to be the property of any such person, for any purpose whatever, in any action or proceeding. *Plummer et al. v. Mold*, 14 Minn. 532.

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### MALICE.

**1. Definition.** From the wilful doing of an injurious act, without lawful excuse, the law implies malice, and this though defendant supposed he was acting in conformity to law. *Judson v. Reardon*, 16 Minn. 431.

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### MALPRACTICE.

(See DAMAGES, 37, 38.)

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### MALICIOUS PROSECUTION.

(See EVIDENCE, 189 *et seq.*)

(See DAMAGES, 39.)

**1.** That malice may be inferred from want of probable cause is too well settled to admit of argument. *Chapman v. Dodd*, 10 Minn. 350.

**2.** In malicious prosecution, it is sufficient if defendant's complaint in the suit on which the action is based, charged a crime, was instituted before a tribunal hav-

ing jurisdiction, and a warrant regular upon its face was issued, and plaintiff arrested, though defendant did not sign the complaint. *Ib.*

**3.** In an action for malicious prosecution, it is necessary to show a termination of the prosecution upon which it is based, and it must be shown substantially as alleged. In the absence of a substantial difference between the allegation and proof it will not be regarded as a variance—*e. g.*, where it is pleaded according to its legal effect. *Ib.*

**4.** In case of a discharge after an examination before a magistrate who has power only to commit or discharge, if it appear that there is *probable cause to believe* that an offense has been committed, and that the person charged is guilty, the inference is that there is not probable cause to believe either the commission of the offense or the guilt of the party charged. *Ib.*

**5.** In an action for malicious prosecution, where a justice's docket, showing an acquittal, is offered by plaintiff, defendant cannot inquire of the justice as to his reasons for deciding as he did—his judgment, as proof of want of probable cause, must be impeached in some other way. *Ib.*

**6. Consulting counsel.** In malicious prosecution, where a party consults counsel before instituting proceedings, if he does not state all the facts within his knowledge to his counsel, or if he misrepresents the case, or does not act *bona fide* under the advice received, or does not himself believe the accused is guilty of the crime charged, he is not protected by the advice given, and the *bona fides* of his conduct is a question of fact for the jury. *Cole v. Curtis et al.*, 16 Minn. 182.

**7.—good faith.** If the defendants, in malicious prosecution, "after a full and correct statement of the case, as they honestly and reasonably believed, to their counsel," instituted the alleged malicious suit "in good faith, then they had probable cause for procuring the warrant." Good faith, in acting under the advice of coun-



sel, is necessary in order to protect the party, for otherwise, after receiving the advice of counsel, he may receive information of other facts which satisfy him that the accused is not guilty. *Id.*

**8. Acts of one of two defendants.** In malicious prosecution against two defendants, it is error to charge that if the jury believe the defendants caused the plaintiff to be arrested, held to bail, and examined on a charge of larceny preferred by them, *or one of them with the knowledge or consent of the other*, and in so doing acted maliciously, and without probable cause, they are liable. *Id.*

**9. Definition of probable cause.** Probable cause is a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense with which he is charged. *Id.*

**10.**—Probable cause is not “such a state of facts, known to and influencing the prosecutor, as would lead a man of ordinary caution and prudence, acting impartially, reasonably and without prejudice, to believe that the person accused is guilty,” for it conveys the impression that a person commencing a prosecution for crime committed against his person, or property, must act with the same impartiality and absence of prejudice in drawing his conclusions as to the guilt of the accused, that a person entirely disinterested would deliberately do. Such conditions would deter the prosecution of crimes by compelling honest prosecutors to incur the hazard of being mulcted in damages for a malicious prosecution, whereas the law favors prosecutions for crimes, and will afford such protection to the citizen prosecuting as is essential to public justice. *Id.*

## MANDATUM.

(See BAILMENT, IV.)

## MANSLAUGHTER IN SECOND DEGREE.

(See CRIMINAL LAW, 147.)

## MANDAMUS.

- I. THE ALTERNATIVE WRIT.
- II. THE PEREMPTORY WRIT.
- III. WHEN MANDAMUS WILL ISSUE.
- IV. WHEN MANDAMUS WILL NOT ISSUE.
- V. THE PRACTICE.

- a. Questions that may and may not be raised.
- b. Trial of issues of fact.
- c. Moving papers.
- d. Notice of application for the writ.

### I. THE ALTERNATIVE WRIT.

**1.** The Supreme Court has no power to issue an alternative writ of mandamus. *Harkins v. Board of Supervisors, Scott Co.*, 2 Minn. 343.

### II. THE PEREMPTORY WRIT.

#### **2. Should rarely issue in first instance.**

A peremptory writ of mandamus should very rarely issue in the first instance, except upon notice of motion for the writ, or upon an order to show cause, or the party against whom the writ is sought voluntarily appears upon the application and hearing; under such circumstances, where the material facts are agreed upon, or admitted, it is easy to conceive how “the right to require the performance of the act may be clear,” and how it may be “apparent that no valid excuse can be given for not performing it,” within Title 1, Chap. 80, Gen. St., p. 554-5, and this even where the right depends upon facts, the existence of which might have been disputed, so that the party would have been entitled to controvert them in an answer to an alterna-

tive writ. *The Home Ins. Co. v. Scheffer*, 12 Minn. 382.

### III. WHEN MANDAMUS WILL ISSUE.

**3. Will issue to compel an incumbent to surrender insignia of office.** While *mandamus* will not lie to admit one to an office which is full of one holding under color of right—*quo warranto* being the proper remedy—on the ground that *mandamus* to admit runs to others than the incumbent, and they are required to oust him, and thus pass on his rights in a proceeding to which he is not a party, the rule does not apply where it runs to the incumbent himself, to compel him to surrender the insignia of office. *Atherton v. Sherwood*, 15 Minn. 221.

**4.**—Where it appears that the relator holds a certificate from the proper officer of his election at the last election, to the office of clerk of court; that he has duly qualified; that the respondent who was his predecessor in said office, and whose term of office has expired, is in possession of the books, etc., demanded, and refuses, though requested, to deliver them to relator, *mandamus* will issue to compel him to surrender them. *Id.*

**5.**—Peremptory *mandamus* will issue to an individual whose term of office has expired, to compel him to deliver the books and papers of the office to the person holding the certificate of election, he having qualified as required by law, and made a demand for the same, and this though the validity of the latter's election is being contested—the certificate making him *prima facie* the officer. *Crowell v. Lambert*, 10 Minn. 369.

### IV. WHEN MANDAMUS WILL NOT ISSUE.

**6. To compel an unlawful act.** A writ of *mandamus* will not lie to compel an officer to do an act, which, without its commands, it would not be lawful for him to do. *Clark v. Buchanan et al.*, 2 Minn. 347.

**7. Register of deeds.** *Mandamus* lies

against Register of Deeds, to compel him to deliver "all the books, records, and accounts of the board of supervisors," to said board, when they need them in the performance of their duties. *Board of Supervisors, Ramsey Co., v. Heenan*, 2 Minn. 341.

**8. The Governor of the State—railroad bonds.** This court will not compel the Governor of the State, by peremptory *mandamus*, to deliver to the railroad companies the Minnesota State R. R. Bonds contemplated by the 10th Amendment to Art. IX., State Constitution. It is a duty devolving upon him as Chief Executive, and properly pertaining to his office, in the exercise of which he is independent of the judiciary. But where some official act, not necessarily pertaining to the duties of the Chief Executive of the State, which might be performed as well by one officer as another, is refused to be done, and directed by law to be done, and a person shows himself entitled to performance, and no other remedy, *mandamus* will issue to the Governor as well as any other person. *Chamberlain v. Sibley*, 4 Minn. 309.

**9. Opening a road by county commissioners.** On direct application to the Supreme Court to compel the county commissioners of Hennepin County to open a road established by the Legislature, it appearing that from the terms of the act the establishment of the road was not complete until the filing of the plat and field notes of the survey, and such filing being contested by the defendants' counter affidavits, the writ of *mandamus* was refused—because it did not appear, so long as that issue was undetermined, that the defendants could give no valid excuse for not performing. *Warner v. Commissioners of Hennepin Co.*, 9 Minn. 139.

**10. Right to office.** It seems that *mandamus* does not lie to try and finally determine the title to an office, except perhaps where the law has furnished no other means of doing so. *Atherton v. Sherwood*, 15 Minn. 221.

**11. Adequate remedy at law.** *Man-*

damus will not lie if the party has an adequate remedy at law. *Baker v. Marshall et al.*, 15 Minn. 177.

**12. Bridge stock.** Mandamus will not lie to compel the issue of bridge stock; the law regards them as a subject of pecuniary value, and capable of being fully compensated for in damages at law. *Ib.*

**13.**—Where two persons claimed to own certain bridge stock, which the company had issued to one, in good faith, under color of title, the other could not compel the company by mandamus to issue stock to him, for he has a remedy at law, and the question of ownership between the adverse claimants cannot thus be determined. *Ib.*

## V. THE PRACTICE.

### a. Questions that may and may not be raised.

**14. Eligibility to office will not be inquired into.** Where the relator shows himself to hold the certificate of election, and that he has duly qualified, he is entitled thereupon to the office, and the court will not go behind the certificate and inquire whether he was eligible to the office before issuing a writ of mandamus. *Atherton v. Sherwood*, 15 Minn. 221.

**15.**—To go behind the certificate of election and determine the correctness of the canvass by the board of canvassers, involves the right of the claimant to the office, which cannot be done on mandamus—following *Atherton v. Sherwood*, 15 Minn. 221. *State ex rel. Biggs v. Churchill*, 15 Minn. 455.

### b. Trial of issues of fact.

**16. Issue of fact cannot be tried by court or jury.** The Supreme Court has authority to issue the writ of mandamus under Sec. 2, Art. 6, Constitution, and Sec. 4, Comp. St., p. 475, although the right to try an issue of fact, or to order the trial of such issue by a jury in such proceedings, is taken away by Chap. 18, p. 71, Laws of

1862, in accordance with the provision of the Constitution aforesaid, as expounded in *Harkins v. Board of Supervisors of Scott Co.*, 2 Minn. 342. *Crowell v. Lambert*, 10 Minn. 369.\*

**17.**—**tried by referee.** Proceedings on mandamus are not within the provisions of the Constitution relative to trial by jury, and where no issue of fact was raised, the court appointed a referee to try it. *Atherton v. Sherwood*, 15 Minn. 221.

### c. Moving papers.

**18. A peremptory writ of mandamus only issues in the first instance, where the moving papers preclude the possibility of any valid excuse being consistent with the facts therein contained.** *Harkins v. Supervisors of Scott Co.*, 2 Minn. 343; *Harkins v. Sencerbox*, 2 Minn. 345.

**19. Existence of defendant, corporation, etc., must appear.** In an application for a peremptory writ of mandamus, it is essential to show, if an inferior tribunal, corporation or board, that such board exists, and that it is in their power and their duty to do the act required. *Clark v. Buchanan et al.*, 2 Minn. 347.

**20. Requisite of affidavit.** The affidavit on which plaintiff moved for a peremptory writ of mandamus stated that plaintiff was elected at such a time to fill a vacancy in office of Register of Deeds, that he gave an official bond, with good and sufficient sureties, and presented it to supervisors for their action, and that they refused to receive or consider its sufficiency. Held, insufficient, in not stating the board knew, or had means of knowing or ascertaining, the sureties or principal to the bond, or the genuineness of the signatures to, and pecuniary qualification of sureties. *Harkins v. Board of Supervisors, Scott Co.*, 2 Minn. 343.

### d. Notice of application for the writ.

**21. Peremptory writ, requires notice.** By a rule of the Supreme Court, in all cases of an application for a peremptory

writ of mandamus, either to the court *in banc*, or either of the Justices at chambers, notice of application must be served on defendant a reasonable time before the hearing. *Harkins v. Board of Supervisors, Scott Co.*, 2 Minn. 342.

**22. Order to show cause, proper proceeding.** As a general rule, subject to very few exceptions, if the peremptory writ of mandamus is to be applied for in the first instance, it should be upon notice, and if the circumstances call for great dispatch, there will be few cases in which this cannot be attained under an order to show cause. *The Home Ins. Co. v. Scheffer*, 12 Minn. 382.

## MARRIED WOMAN.

(See EQUITY.)

(See SPECIFIC PERFORMANCE, 17.)

(See HUSBAND AND WIFE.)

(See LIMITATION OF ACTIONS, 10.)

(See PLEADINGS, 45, 46, 47.)

## MASTER AND SERVANT.

### I. MASTER'S LIABILITY.

- a. *For injuries to servant, caused by master's negligence.*
- b. *Injuries caused by negligence of servants.*
- c. *Injuries sustained by servant, from fellow servant.*

### II. WHO ARE SERVANTS.

#### L. MASTER'S LIABILITY.

- a. *Injuries to servant, caused by master's negligence.*

**1. No matter if co-servants contribute to the injury.** Where a servant (plaintiff) is injured by the explosion of the boiler of his master's vessel, it is not material how many others (servants) may have been in

fault, if the master's acts or negligence were such efficient cause, without any fault on the part of the plaintiff, the master is liable. *McMahon v. Davidson, impl., etc.*, 2 Minn. 357.

#### b. *Injuries caused by negligence, etc., of servants.*

**2. D. and R. jointly interested as masters, both liable.** If D. and R. jointly owned and jointly navigated a boat when she was blown up by the unlawful or negligent act of the engineer, acting in the course of his employment, they are jointly and severally liable, in an action of tort, for injuries resulting to plaintiff. *Fay v. Davidson*, 13 Minn. 523.

**3.**—In an action for injuries occasioned by the bursting of a boiler from the alleged unskillfulness of the engineer, servant of defendant. *Held*, if the injury was occasioned by the wrongful acts or negligence of any person acting for defendant, such acts and negligence are in law the acts and negligence of defendant. If occasioned by the wrongful acts or negligence of any one who was acting for some other person associated with defendant as partner or otherwise, in an action of tort, such acts and negligence are in law the acts and negligence of defendant and that person, jointly and severally liable. *Id.*

**4.**—For the wrongful act or negligence of an engineer, whereby plaintiff was injured, it is not necessary that defendant should be the owner in whole or in part, or that the boat be registered in his name, in accordance with the facts. If the boat was navigated by him or for him, the wrongful acts or negligence of her employes, acting in the course of their employment, would in contemplation of law be his acts or negligence, for which he would be responsible. The arrangement between defendant and another might be such that the other had sole authority to hire, control and discharge such employes, and to manage the boat, still if this was done for defendant, he would be liable. *Id.*

**5. Not liable for wilful wrong of servant.** A master is not liable for a wrong wilfully committed by his servants, and not sanctioned or authorized by him; but this rule does not exempt the master from liability for mischief arising from the negligence and unskillfulness of his servant, who had no purpose but the execution of his master's orders. *McMahon v. Davidson, impl., etc.*, 12 Minn. 357.

**6. Temporary business connection does not make servants of the servants of another corporation.** Two corporations had an arrangement by which each took up the mails and passengers at a common terminus, and transported them through to the end of their routes respectively, thus making their two lines, for purposes of business, one route; each selling tickets for the whole distance over the routes of both, and dividing the receipts between them proportionably. *Held*, as to their employes, they did not constitute one master, so as to relieve from liability one of said corporations for injuries committed by its servants, on the servant of the other. *Carroll v. The Miss. Valley R. R. Co.*, 13 Minn. 30.

*c. Injuries sustained by servant from a fellow servant.*

**7. When master is free from fault.** A master guilty of no personal negligence or misconduct, is not responsible to his servant for injuries resulting to the latter from the negligence, carelessness or misconduct of a fellow servant engaged in the same general business. *Foster v. The Minnesota Central Railway Co.*, 14 Minn. 360.

**8. Who are "fellow servants."** When the servant injured and the servant causing the injury are employed in separate and distinct departments of a general business, they are "fellow servants," within the rule which holds the master not liable. *Ib.*

**9.—in same general business.** Plaintiff, while engaged in the defendant's employment as "section man," in repairing the road, was injured, by the negligence and carelessness of another of defendant's

servants, in piling wood upon the "tender" of a train he was engaged in running, whereby the wood thrown from the "tender" struck plaintiff. *Held*, plaintiff and defendant's other servant were in the employment of the same master, under same general control, promoting same general object, and thereby in the same general business, within the rule which exempts the defendant from liability. *Ib.*

**10. Fault in selecting or retaining servant causing injury, etc.** A servant who is injured by the negligence or misconduct of a fellow servant, while both are aiding in the common business of the same master, cannot maintain an action for such injury against a master not chargeable with any personal negligence or wrong—as a general rule; but if there is any fault in the selection, or retaining of other servants, or in employing unsafe machinery, the master will be answerable for all injury to his servants in consequence. And it would seem that the master is liable where the injury is caused in part by his negligence, and without the fault of the party injured. *McMahon v. Davidson, impl., etc.*, 12 Minn. 357.

**11.—**Where an owner of a vessel employed as engineer of the same, one D., who was not a licensed engineer, and was unskilled, and unqualified to discharge the duties of engineer, and through negligence and unskillfulness of said engineer the boiler of the boat exploded, injuring another servant, the master was held liable for the injury. *Ib.*

## II. WHO ARE SERVANTS.

**12. Ferry on line of stage route is servant of the stage company.** Where defendants were a stage company, and common carriers of passengers from L. to S., and plaintiff's intestate was a passenger, having paid the usual fare between said points, and in crossing a ferry which was on and constituted part of the route taken by defendants in this instance, between these termini, said intestate was

drowned by the uncoupling of the coach, the defendants not owning the ferry, but paying their ferrriage, and the coach in fact passed over the ferry. The contract between defendant and passenger is for the entire route from L. to S., no notice to passenger of the intervention of any other carrier than defendant, the contract clearly embracing the entire distance between the termini, another route existing which might have been taken by defendants, and the ferry thus avoided. *Held*, under these facts as to passenger, the ferry company are the employes and agents of the defendants, and the latter are responsible for the acts of their employes or agents. *McLean v. Burbank*, 11 Minn. 277.

**13. Where D. and R. were interested in running a boat.** It appearing from the evidence, that the defendant was interested with R. in running the boat, and that they together received the earnings, it will be presumed—there being no evidence to the contrary—that those employed in managing the boat, were the servants of both, and that R., in employing them, acted by the authority, express or implied, of defendant. *McMahon v. Davidson, impl., etc.*, 12 Minn. 357.

**14. Deck hands on boats, not engaged in "same general business," are not fellow servants, though the boats are owned by same persons.** Where plaintiff, a deck hand on the steamboat "Albany," had been injured by the explosion of the boiler of the steamboat "John Rumsey," even supposing that the owner of the "Albany" was a joint owner of the "John Rumsey," and pooled the profits of the "Albany" with the profits of the "John Rumsey," in such way as to make him a partner in the aggregate profits with the other joint owner of the "Rumsey," still the rule that the master is not liable to one of his servants for injuries sustained by him through the negligence, etc., of a fellow servant engaged in the same general business, does not apply, for the boats were not engaged in the "same general business," but each boat did a separate business in every re-

spect—though for the joint profit of their owners. *Connolly v. Davidson et al.*, 15 Minn. 519.

**15.** Where the relation between the servant injured, and the servant causing the injury, is that of superior and subordinate. *Query*, is the master liable? *Foster v. The Minnesota Central Railway Co.*, 14 Minn. 360.

## MECHANIC'S LIEN.

- I. GENERALLY.
- II. WHO MAY ACQUIRE A LIEN.
- III. PERSONS AND PROPERTY BOUND BY A LIEN.
- IV. WHEN THE LIEN ATTACHES.
- V. FILING THE NOTICE OF LIEN.
- VI. THE NOTICE OF LIEN.
- VII. ASSIGNMENT OF THE LIEN.
- VIII. FORFEITURE OF THE LIEN.
- IX. GIVING PROMISSORY NOTE, EFFECT OF.
- X. SUB-CONTRACTOR'S RIGHTS.
- XI. REPEAL OF LIEN STATUTES, EFFECT OF.

(See HUSBAND AND WIFE, 12.)

### I. GENERALLY.

**1.** Where a lien attached to land held under a school land certificate, it cannot be divested by the land subsequently becoming a homestead. *Tuttle v. Howe et al.*, 14 Minn. 145.

### II. WHO MAY ACQUIRE A LIEN.

**2. Sub-contractor cannot have lien.** Under the law of Aug. 12, 1858, (Comp. St. p. 696,) which gives a lien to the person performing the labor or furnishing the materials "by virtue of a contract with the owner or agent thereof," a party furnishing the material to the contractor has no lien on the premises. *The Toledo Novelty Works v. Bernheimer*, 8 Minn. 118.

**3. An architect has a lien on a building for his services in drawing the "plans,**

specifications, and superintending the building thereof," under Sec. 1, Chap. 96, G. S.,—*WILSON, C. J., dissenting. Knight v. Norris et al.*, 13 Minn. 473.

### III. PERSONS AND PROPERTY BOUND BY A LIEN.

**4. Purchaser in good faith without notice bound.** A material man's lien attaches as against a person who, in good faith and without notice, purchases the premises subsequently to the erection of the building in which the materials are used, and prior to the filing and recording of the account. Ch. 90, G. S. *Cogel et al. v. Mickow et al.*, 11 Minn. 475.

**5. Building bound for work on appurtenances.** Under Sec. 1, Comp. St. p. 696, (act of Aug. 12, 1858,) the lien attaches to a building, though the land on which it stands is not owned by the debtor, and where the work is performed on an appurtenance, the principal building and appurtenance are both subject to the lien—though the labor be wholly on the appurtenance—so that work performed on a building on one side of a street, which is used as appurtenant to a hotel on the opposite side the street will authorize the filing a lien on the hotel, and where work was done on each, it is unnecessary to specify the work or value thereof done on each separately, but the value may be stated in the aggregate, and a lien be enforced for the amount. *Carpenter and wife v. Leonard*, 5 Minn. 155; *Carpenter and wife v. Wilverschied*, 5 Minn. 170.

**6. Separate estate of feme covert bound.** Where the law gives a lien for improvements made upon the real estate of an unmarried woman, it gives it equally against the separate estate of a *feme covert*—the consent of the husband to the wife's improvements in this case being shown. *Tuttle v. Howe et al.*, 14 Minn. 145.

### IV. WHEN THE LIEN ATTACHES.

**7. Work, labor, or material must first be on the premises.** Work and labor ex-

pendent upon, or materials furnished for a building, cannot operate as a lien, unless such building or such materials are upon the premises upon which it is sought to make the lien attach. *Farmer's Bank v. Winslow*, 3 Minn. 86.

**8.**—Under the lien law of 1855, (p. 58, Sec. 9,) which gives mechanics, etc., a lien which takes precedence of any other lien "which originated subsequent to the laying of the stock, or to the commencement of such building," the lien of one who performs "work, labor, and services, from Aug 1, 1857, up to and until the last of September, 1857, in the erection and construction of a building," does not take precedence of a mortgage lien, recorded on the 4th of Sept., 1857. To give it such precedence it must appear that the material, in whole or in part, or the labor was commenced *upon the mortgaged premises* before the record of the mortgage. *Ib.*

**9.**—Under the lien law of 1855, (S. L. 1855, p. 58, Sec. 9,) no lien can in any case attach until the "laying of the stock," which means the beginning of the work by placing the material for the structure on or adjacent to the land upon which it is to be erected. *Knox et al. v. Starks et al.*, 4 Minn. 20.

**10.**—**from commencement of such furnishing.** Where plaintiff furnished materials for a building, and after the commencement of, but before the completion of the delivery thereof, defendants took a mortgage on the building. *Held*, the fact that some portion of the materials were furnished and used in the building after the execution of the mortgage, is unimportant, since by Sec. 7, Chap. 90, G. S., the same becomes a lien from the commencement of such furnishing, on the filing of the required account. *Milner et al. v. Norris et al.*, 13 Minn. 455.

### V. FILING THE NOTICE OF LIEN.

**11. In what office.** W. had performed certain work on property, which gave him a lien, under the law then in force, prior to a mortgage on the same property held by

B. W. failed to comply with the lien law, and it was repealed. Afterwards a new lien law was passed, giving lien for labor, etc., performed prior to its passage, provided a sworn account of the work, etc., was filed in the office of *Register of Deeds*, and all liens, the *right to which accrued under this act*, should be prosecuted according to its provision, (act Aug. 12, 1858, Comp. St., p. 696.) W. filed the statement under the last act with the *Clerk of District Court*. *Held*, filed in the wrong office, as the right to a lien accrued under the act requiring statement to be filed with the Register of Deeds, and B.'s mortgage was not affected by it. *Willim v. Bernheimer*, 5 Minn. 288.

**12. Time of filing the notice.** Where the building was nearly completed, plaintiff's plans and specifications wholly completed, the progress of the work was stopped for several months without plaintiff's fault, and during that suspension he filed his lien on the building. *Held*, the amount of his claim being computed with reference to the cost of the building, exclusive of what remained to be done upon it at the time when the lien claim was filed, and no particular price being agreed upon, the plaintiff was justified in filing his lien when he did, and claiming the value of the services rendered by him up to that time, following the contract as far as he was able. The postponement of the work without his fault cannot effect him. *Knight v. Norris et al.*, 13 Minn. 473.

## VI. THE NOTICE OF LIEN.

**13. Description must show the quantity of the land.** The description of the land, in proceedings to enforce a lien, as "Block No. 11, in town of Cannon City, according to the recorded plat thereof," without stating that it did not exceed forty acres, or that it was a village lot not exceeding one acre, is insufficient. *Knox et al. v. Stark et al.*, 4 Minn. 20.

**14. Particularity of description.** A lien claim described the labor performed as "plans, specifications, and superintending

of the building," describing and locating the building, and time of the performance of the labor, and price designated. *Held*, sufficiently specific as to the items of labor. *Knight v. Norris et al.*, 13 Minn. 473.

**15. May describe the property by metes and bounds, without consulting owner.** Where a lien was given by statute "upon the building, and upon the right, title, and interest of the owner of the building, in and to the land upon which the same is situated, not exceeding in extent an acre;" on filing the lien the lienor may designate by metes and bounds the acre upon which he claims a lien, without consulting the owner, and he must designate the particular acre of land. *Tuttle v. Howe et al.*, 14 Minn. 145.

## VII. ASSIGNMENT OF THE LIEN.

**16. Lien may be assigned.** A lien may be assigned, though in strict subordination to the right of the original holder—a sale of the *property* instead of the *lien* is tortious, and forfeits the lien—except according to the statutes. *Coit v. Waples & Zerkle*, 1 Minn 134.

**17.**—The lien provided by statute is assignable together with the claim, and the assignee may enforce the same in his own name. *Tuttle v. Howe et al.*, 14 Minn. 145.

## VIII. FORFEITURE OF THE LIEN.

**18. Sale of property, forfeiture.** A lien is a personal privilege of the holder, and where he sells the property otherwise than according to the statute, he forfeits his right, and it is wholly gone, and such lien can not longer be set up against the owner of the general title. *Coit v. Waples et al.*, 1 Minn. 134.

## IX. GIVING PROMISSORY NOTE, EFFECT OF ON LIEN.

**19.** The delivery of a note for materials furnished for a building, does not destroy the lien which the person furnishing the



materials would have had, had the note not been given, provided the note is held by the person furnishing the materials. *Milwain v. Sanford*, 3 Minn. 147.

### X. SUB-CONTRACTOR'S RIGHTS.

**20. No remedy against owner in first place.** Under Sec. 15, of the lien law of 1855, p. 59, the remedy of a party who furnishes material to a contractor to build a house is by action against such contractor, and then by *scire facias* against the owner, and not against the owner in the first instance. *Emmet et al. v. Rotary Mill Co.*, 2 Minn. 290.

**21.**—Under the lien law of 1855, p. 59, Sec. 10, a sub-contractor to reach the building, must first get judgment against his employer (contractor), and then sue out a *scire facias* against the owner. *Lewis et al. v. Williams et al.*, 3 Minn. 151.

**22.**—except in certain cases. Under the lien law of Aug. 12, 1858, (Comp. St., p. 696,) no personal action lies against the owner of property in favor of a sub-contractor, unless it is shown that the owner owes the contractor at the time plaintiff served notice upon him, or that an amount subsequently became due. *The Toledo Novelty Works v. Bernheimer*, 8 Minn. 118.

### XI. REPEAL OF LIEN STATUTES, EFFECT OF.

**23. Destroys all liens not perfected.** The repeal of the lien law of 1855 destroyed, without reservation, all liens which had not been fully perfected, it being a purely statutory right which does not enter into the contract, and can be taken away any time before it is perfected. *Bailey & Gilman v. Mason & Craig*, 4 Minn. 546.

**24. Repealing act, without a saving clause, takes away all liens.** T. commenced labor on the premises, under a law allowing a lien from time of commencing labor on the premises. The owners next gave B. a mortgage on the same property. An act was then passed repealing the form-

er lien law, and providing that liens existing at date of its passage "shall be a lien, etc., and take precedence of any other incumbrance originating subsequent to commencement of such services, or furnishing of materials," without any saving clause, after passage of this act, another lien law was passed, saving all liens existing under former acts. After all these changes T. filed his lien. *Held*, the second act containing no saving clause, did away with all liens on the premises except the mortgage; that the clause above quoted from the second lien act gave existing liens precedence over incumbrances originating subsequent to its passage, and did not reinstate T.'s right to take precedence of B.'s mortgage, and the saving clause in the last act only reached liens filed under the second act.—See Comp. St., p. 694-6 and 400. *Dunwell et al. v. Bidwell*, 8 Minn. 34.

### MEEKER COUNTY.

**1. The amount of tax it can levy.** The Commissioners of Meeker County could legally levy a tax of four mills on the dollar under Sec. 2, Chap. 6, Laws 1861. *Piper v. Branham*, 14 Minn. 548.

### MERGER.

**1.** At law where the superior and inferior estates meet in the same person, they always merge; in equity, the question of merger will be governed by the intention of the party at the time, or if by operation of law such estates meet, the circumstances will determine whether there is a merger or not. *Wilson & Barber v. Davis*, 4 Minn. 197.

**2.** In equity, where the legal and equitable estate becomes united in the same person, the latter is merged in the former, unless the person in whom they meet in-

tends to keep them separate (which intention must be just and injurious to no one) and such intention (where not expressed) will be presumed if it is for the parties' interest to keep them separate. *Davis v. Pierce et al.*, 10 Minn. 376.

**3.** In equity, where the legal and equitable estates meet in the same person, they do not merge if it be his intention to maintain them separate; and such intention is presumed where it is clearly his interest that they should be kept apart. *Horton and wife v. Maffitt and wife*, 14 Minn. 289.

**4.** Plaintiff purchased land incumbered with two mortgages, then took an assignment of the first mortgage to himself, and commenced this action against his grantor and the second mortgagee, to foreclose the mortgage so purchased. The court found that in taking the assignment of the senior mortgage, plaintiff did not intend to extinguish its lien on the land, and that it was his interest to preserve the lien. *Held*, no merger, and plaintiff entitled to a judgment of foreclosure. *Davis v. Pierce et al.*, 10 Minn. 376.

## MINNEAPOLIS AND CEDAR VALLEY R. R. CO.

**1.** The act of the legislature, approved March 10, 1862, entitled "an act to facilitate the construction of the Minneapolis and Cedar Valley Railroad, and to amend and continue certain acts in relation thereto"—laws 1862, p. 226, Sec. 1, 2, 3, 4—did not revive the "Minneapolis and Cedar Valley Railroad Company," and continue and re-grant to it the franchises and property which it had forfeited to the State. *Fitz et al. v. The Minnesota Central Railway Co.*, 11 Minn. 414.

**2.** Liability of stockholders. The charter of the Minnesota and Cedar Valley R. R. Co., made it the duty of stockholders to "pay the amount (of their subscriptions) when called by the company, in installments not exceeding ten per cent. each,

upon thirty days' notice." *Held*, without such call and notice, no stockholder is liable to the company for unpaid subscriptions, assuming (but not deciding) that such liability exists by virtue of an implied promise, where the necessary conditions have been performed by the company. *Robertson v. Sibley*, 10 Minn. 323.

**3.**—The Minneapolis and Cedar Valley Railroad Company was incorporated during our territorial existence, by special act approved March 1, 1856, and does not come within the provision of the constitution relating to corporations, and the charter does not make individual stockholders liable for company debts, nor do the provisions of Comp. Stat. p. 330-1, 2, and 3, Sec. 321-2 apply. The liability of stockholders in this corporation are unaffected by statutory enactments. *Id.*

## MINNESOTA AND NORTH-WESTERN R. R. CO.

**1.** By the act of legislature of Minnesota, approved March 4, 1854, incorporating the Minn. & N. W. R. R. Co., the company acquired an interest and property in all the land subsequently granted by Congress to said Territory for R. R. purposes, by the act of June 29, 1854. *United States v. North-Western R. R. Co.*, 1 Minn. 128.

## MISNOMER.

(See CRIMINAL LAW, 8, *et seq.*)

## MONEY PAID, HAD, AND RECEIVED.

(See CIVIL ACTION, III.)

(See EVIDENCE, 180.)

## MORTGAGES.

[SCOPE NOTE.—This title comprises all the decisions in any way relating to Mortgages of Real Estate, except a few points more intimately connected with other titles, mentioned in the cross notes and Mortgages of Chattles, for which see those titles.]

- I. GENERALLY.
- II. WHEN A DEED IS A MORTGAGE.
- III. THE MORTGAGOR.
- IV. ASSIGNEE OF MORTGAGOR.
- V. THE MORTGAGEE.
  - a. *Generally.*
  - b. *Right to possession and timber.*
  - c. *Mortgagee's interest.*
  - d. *Rights of Mortgagees among themselves.*
    - 1. *Rights of senior mortgage against junior incumbrancer.*
    - 2. *Rights of junior incumbrancer against senior mortgagee.*
- VI. MORTGAGEE'S ASSIGNEE.
- VII. VALIDITY OF MORTGAGES.
  - a. *Generally.*
  - b. *Pre-emptor's mortgage.*
  - c. *Married Woman's mortgage.*
- VIII. LIEN OF THE MORTGAGE.
- IX. DISCHARGE OF THE MORTGAGE.
- X. MORTGAGE BY DEPOSIT OF TITLE DEEDS.
- XI. TACKING.
- XII. THE FORECLOSURE.
  - a. *Strict foreclosure.*
  - b. *Dismissal of action to foreclose.*
  - c. *Decree of foreclosure.*
  - d. *Setting aside sale.*
  - e. *Assignment, record of.*
  - f. *Foreclosure for installment.*
  - g. *The purchaser.*
    - 1. *Who may foreclose.*
    - 2. *Purchaser's rights.*
  - h. *Notice of sale.*
  - i. *Sale, by whom made.*
  - j. *Re-sale.*
  - k. *Sale in parcels.*

- l. *Postponement of sale.*
- m. *Impeaching sale.*
- n. *Defense to foreclosure.*
- o. *Surplus proceeds from sale.*
- p. *Redemption.*

(See CHATTEL MORTGAGE.)

(See U. S. LAND, 11.)

(See HUSBAND AND WIFE, 16.)

(See LIMITATION OF ACTION, 19, 20, 21.)

(See TRUSTS AND TRUSTEE, 19.)

(See PLEADINGS, 71.)

## I. GENERALLY.

**1. Power of sale assignable by virtue of the statute.** Under the statute (Comp. Stat. p. 394, Sec. 35; p. 396, Sec. 60; p. 596, Sec. 11), there seems to be a distinction between a mortgage and the power of sale—the latter, but for the statute, might be lost by an assignment, though the former would still exist in favor of the assignee without statutory declaration. *Folsom et al. v. Lockwood*, 6 Minn. 186.

**2. Execution.** A mortgage attested by but one witness, is not entitled to record under Sub. 3, Sec. 2, p. 644, Comp. Stat. *Ross v. Worthington*, 11 Minn. 438.

**3. Mortgage incident to the debt.** A mortgage is a mere security for the debt, and the debt draws to it the mortgage as its incident. *Hill et al. v. Edwards*, 11 Minn. 22.

## II. WHEN IS A DEED A MORTGAGE.

**4.** E. conveyed by warranty deed certain land to B. for the expressed consideration of one thousand dollars. On same date B. executed to E. a bond for a deed, of same land, on E.'s paying to B. four hundred and fifty dollars with interest, etc., according to his note of *that date*, in default the bond to be void. *Held*, the bond operated as a defeasance to the deed, and the two instruments, together with the note, all bearing same date, were to be construed together, and constituted simply a mortgage. *Ib.*

**5.** A conveyance or assignment trans-

fering an estate, if originally intended by the parties as a security for money, although in form an absolute conveyance, is in equity a mortgage, and where in the accomplishment of their purpose, the parties embrace their agreement in different instruments executed at the same time, all such instruments constituting one transaction, are to be read together as if but one instrument, in order to ascertain the real intent of the parties. *Holton v. Meighen*, 15 Minn. 69; *Everest v. Ferris*, 16 Minn. 26.

6. While the land was owned by third parties, plaintiff and defendant agreed that the latter should furnish the means for the purchase of said land, and with said means plaintiff should buy the land and convey the same by warranty deed *absolutely* and unconditionally to defendant, and plaintiff should have the privilege of purchasing said land from defendant in twelve months thereafter, and no longer, by paying him *said sum (advanced) with interest at 10 per cent. per annum* within that time, which purchase and *payment plaintiff promised to make*, and as evidence thereof, *executed his promissory note* to that effect; and defendant agreed to convey said land to plaintiff if he should make such payment, otherwise defendant's agreement to be void. In pursuance of this agreement, defendant advanced plaintiff \$202, with which means plaintiff purchased the land, and then conveyed by warranty deed to defendant, and delivered to defendant his promissory note as aforesaid, taking back from defendant a written agreement in which defendant, after reciting the plaintiff's note, agreed that if the note was paid at maturity he would on demand convey said land to plaintiff with special warranty against himself and others claiming under him, but on default of payment of the note, the agreement to be void. *Held*, all of these acts are to be construed together, they being parts of one and the same transaction, and it clearly appears that plaintiff's warranty deed to defendant, though absolute on its face, was in equity a mortgage, defendant's written agreement operating as a

conditional defeasance, and the facts do not show a conditional sale on part of defendant. *Holton v. Meighen*, 15 Minn. 69.

### III. THE MORTGAGOR.

7. **Mortgagor's relief against illegal sale.** Where mortgaged property has been illegally sold to satisfy the mortgage debt, and the mortgagor has been injured thereby, he has two remedies: 1st, apply to the court to have the sale set aside; 2d, hold the mortgagee personally responsible for the injury he has suffered by the unauthorized sale, and may set it up in defense to an action for the balance due on the mortgage debt, but he must show that the injury was by reason of the unauthorized sale. *Lowell v. North & Carl*, 4 Minn. 32.

8. **His right to restrain the sale or to have a re-sale.** Although under a foreclosure by advertisement of a mortgage containing power of sale, the sale of the whole of the mortgaged premises is regular, because authorized by the terms of the mortgage; nevertheless, a court of equity, on the application of the mortgagor or his representatives made before the sale, (or, after the sale, on showing good and sufficient reason why application was not made before the sale, and the property remains in the hands of the original parties to the mortgage—as where purchased by the mortgagee or his assignee), and it is clear the interests of the mortgagor or his representatives have been or will be sacrificed by sale of the whole—will restrain the sale to, or direct a resale (as the case may be) of such part of the land as may be sufficient to discharge the amount due on the mortgage and costs. *Johnson v. Williams et al.*, 4 Minn. 260.

9. **Right to purchase mortgage against land conveyed subject thereto.** B. conveyed land to H., subject to a mortgage, and afterwards paid the mortgage debt himself. *Held*, he could enforce the mortgage—to which he became subrogated by payment of the debt—against the land in

the hands of his grantee. *Baker v. Terrell et al.*, 8 Minn. 195.

**10. After conveyance with covenants against incumbrances may have mortgage cancelled.** Plaintiffs (mortgagors) brought this action to cancel the mortgage, and the sheriff's conveyance on foreclosure thereof, on the ground that it was never executed. After action was commenced, plaintiffs sold the land to S. by warranty deed. S. before the redemption period expired, redeemed the land from the mortgage out of the purchase money due plaintiff. Plaintiffs ask for an injunction restraining the sheriff from paying over the said redemption money to the mortgagee—defendants. *Held*, plaintiffs had nothing to do with this redemption money—if the mortgage was void, S. would still be liable to them, and have his remedy over against the mortgagee. And an injunction will not be granted against a person not a party to the suit. Plaintiffs have a right, however, to test the validity of the mortgage, although they have conveyed their estate since it was with covenants against incumbrances. *Chamblin and wife v. Slichter et al.*, 12 Minn. 276.

#### IV. ASSIGNEE OF MORTGAGOR.

**11. Right to possession after foreclosure.** Under the act of March 10, 1860—Session Laws, 1860, p. 275—an assignee of a mortgagor is entitled to remain in possession of the mortgaged premises one year after foreclosure, at any event. *Freeborn v. Pettibone*, 5 Minn. 277.

**12. Vendee of parcel—order of liability.** If the owner of mortgaged lands sells portions of them to third parties, retaining part of them himself, the portion so remaining in the mortgagor is primarily liable for the debt secured by the mortgage, and the portions sold are liable in the inverse order of their alienation. *Johnson v. Williams et al.*, 4 Minn. 260.

**13.**—F. mortgaged to plaintiffs, then mortgaged the same property, together with other, to H., then assigned the first

mortgaged property to E. *Held*, that E. was entitled to insist that H. make the amount due her out of property not covered by the first mortgage so far as she could, and if she redeemed from plaintiffs' mortgage without foreclosing her own, E. was entitled to be subrogated to her rights in her mortgage, on satisfying the amount due by the terms thereof. *Whittacre et al. v. Fuller et al.*, 5 Minn. 508.

#### V. THE MORTGAGEE.

##### a. Generally.

**14. Lien for taxes.** Taxes paid out by a mortgagee on property covered by the mortgage, became a prior lien in his favor upon the premises for that amount and interest. *Id.*

**15. Repairs.** A mortgagee will be allowed for all necessary repairs on the tenements of which he is in possession. *Lash v. Lambert et al.*, 15 Minn. 416.

**16. When confined to the mortgage.** Where a party takes a mortgage on land to secure a debt or other liability, without a covenant to pay, and takes no bond or other separate instrument to secure such payment, he is confined to the land mentioned in the mortgage, and cannot sue on a verbal promise—under Sec. 6, p. 398, Chap. 35, Comp. St. *Van Brunt v. Mismar*, 8 Minn. 232.

**17. Right to enjoin waste—cutting pine trees.** A mortgagor, prior to foreclosure, may sell and convey the land subject to the mortgage, and sell and convey anything which, though part of the realty, is capable of being made personalty by severance, subject to the right of the mortgagee to keep his security good. And where pine trees were converted into logs, and thus made personal property, the mortgagee had power to prevent their removal, or to follow them if removed, had it been necessary to preserve his security. *Berthold v. Holman et al.*, 12 Minn. 235.

**18. Bona fide improvements of mortgagee in possession.** Where a mortgagee in possession after foreclosure, and expira-

tion of the period of redemption, makes improvements in good faith, and in belief that he has title, and the mortgagor, with knowledge of the making of the improvements, delayed bringing his action to recover the premises by reason of a defect in the foreclosure proceedings which might have been overlooked by a prudent and cautious man, (omission from the records of the granting clause in the mortgage.) *Held*, the mortgagor was bound to pay the mortgagee for his improvements. *Bacon v. Cotrell*, 13 Minn. 194.

*b. Right to possession and timber.*

**19. Lawful possession after default.**

A mortgagee in possession of mortgaged premises, lawfully acquired after condition broken, cannot be dispossessed by an action of ejectment on behalf of the mortgagor. *Pace v. Chadderton*, 4 Minn. 490.

**20. Before foreclosure.** The owner of a mortgage of real estate, before foreclosure, is not entitled to the possession of the land, or the timber growing thereon, or cut thereon, after default in payment of the mortgage. *Adams v. Carriston*, 7 Minn. 456.

**21.**—It is settled in this State, that ordinarily the owner of a mortgage of real estate is not entitled, before foreclosure, to the possession of the lands mortgaged, or of the timber growing or lying thereon. *Berthold v. Fox et al.*, 13 Minn. 501.

**22. Logs cut before foreclosure.**

Where the mortgagor has, prior to foreclosure, severed pine trees standing on the land at the date of the mortgage, and converted them into logs, and the mortgagee on foreclosure purchased the mortgaged premises for the full amount then due on the mortgage, he thereby takes the land in full satisfaction of his debt, and has no claim to the logs cut before the foreclosure sale. *Berthold v. Hoffman et al.*, 12 Minn. 235.

*c. Mortgagee's interest.*

**23. No conveyable estate prior to entry and foreclosure after default.** A

conveyance by a mortgagee, not in possession, after default, and before foreclosure, passes no estate or interest, unless it was intended to operate as an assignment of the mortgage, and transfer of the mortgage debt, and such intention is made to appear. *Greve v. Coffin*, 14 Minn. 345; *Everest v. Ferris*, 16 Minn. 26.

**24.**—**warranty deed.** A mortgagee, out of possession, and before condition broken, conveyed the mortgaged premises by warranty deed, his grantee taking under the supposition that he was the owner, —a forged deed from the mortgagor to the mortgagee having been placed on record. *Held*, the facts show no intention to assign the mortgage debt, and when such intention does not appear, a conveyance of the premises by the mortgagee is wholly inoperative, since he has no conveyable interest until after foreclosure or entry for condition broken—following *Hill v. Edwards*, 11 Minn. 22. *Gale v. Battin and Wife*, 12 Minn. 287.

**25.**—E. mortgaged land to B., to secure a debt, by means of a conveyance in fee and defeasance back in shape of a bond for a deed, both of which were duly recorded. After default, B. executed a warranty deed of the property to plaintiff, who seeks to cancel the bond for a deed, by reason of E.'s default. The complaint alleged no entry after condition broken, nor any transfer to plaintiff of the mortgage debt. *Held*, B. being only a mortgagee, and not having foreclosed or entered after condition broken, had no conveyable interest in the mortgaged premises, and plaintiff, by his warranty deed, took nothing—there being nothing to show an assignment of the mortgage or mortgage debt. *Hill et al. v. Edwards*, 11 Minn. 22.

**26.**—A warranty deed of mortgage premises by a mortgagee out of possession, before foreclosure, which shows no intention to assign the mortgage debt, conveys nothing. *Id.* *Gale v. Battin and Wife*, 12 Minn. 287.

**27.**—**quit-claim deed.** B. held a note made by L., and a mortgage on real estate

as security. Before default, B. quit-claimed to B. and G., retaining both the note and mortgage. *Held*, nothing appearing to show that B. intended to transfer the indebtedness or assign the mortgage, the quit-claim deed conveyed nothing. *Johnson v. Lewis et al.*, 13 Minn. 364.

**28.**—A quit-claim deed from a mortgagee, of the mortgaged premises, before default, unaccompanied with the note or mortgage, conveys nothing. *Ib.*

*d. Rights of mortgagees among themselves.*

*1. Rights of senior mortgagee against junior incumbrancee.*

**29. Penalty collected by senior mortgagee.** A. mortgaged land to B. on the 3d of November, and on the next day executed another mortgage to C. The latter mortgage was first recorded. C. foreclosed his mortgage, and (without objection of the mortgagor) bid in the premises for the principal and penalty (stipulated to be paid), as interest after due at rate of  $3\frac{1}{2}$  per cent. per month. B. seeks in this action to recover the *penalty* thus collected by C. in excess of the principal sum due, and lawful damages—on the ground (among others) that as to this excess C. is not a purchaser in good faith. *Held*, C. purchased in good faith, (there being no averment to the contrary,) and by being allowed to collect the penalty without objection, was entitled to keep it—following *Whitney v. Bidwell*, 4 Minn. 76. *Potter v. Marvin et al.*, 4 Minn. 525.

**30. Voluntary payments, by mortgagor, of penalty.** The senior mortgage secured a note drawing interest at 5 per cent. per month, after due, until paid. The mortgagor voluntarily paid large sums to the mortgagee, after the note became due, in reduction of the 5 per cent. per month interest accruing after maturity of note. A junior mortgagee, who took his lien with notice of the terms of the note secured by the first mortgage, seeks to have the money so paid applied in paying the damages which accrued after maturity, at

rate of legal interest, (7 per cent. per annum,) and the balance in reduction of the principal. *Held*, having taken with notice, (see *Whitacre et al. v. Fuller et al.*, 5 Minn. 508,) and it not appearing that the land was insufficient to pay the junior incumbrance, after full discharge of the first, no equities arose to entitle the plaintiff to the relief asked. *Query*, whether plaintiff would be entitled to such relief against payments of that character, where the land was rendered inadequate to meet all its obligations, by the augmentation of the first, in applying payments to the reduction of the interest, as above, where the debtor was under a personal obligation to pay the debt secured by the junior lien, and was solvent, and able to respond after a sale of the land? *Mills et al. v. Kellogg et al.*, 7 Minn. 469.

**31. The mortgagee may apply collateral security to meet interest, though not mentioned in the mortgage.** F. made his promissory note for \$1,000, interest at 3 per cent. per month, in favor of E., and to secure the same, executed a first mortgage to E., conditioned on payment of the note making no reference to the interest, and also transferred, as a further security for the note mentioned in the mortgage, a note made by one B. This last note was put into judgment, and, in such shape, held by E. as collateral, on which he collected, by execution, \$1,200, and afterwards foreclosed this mortgage for the balance due on the principal of F.'s note and interest at 3 per cent. Plaintiff—junior mortgagee—claims that the record of the first mortgage making no reference to interest, entitles him to have the \$1,200 applied in reduction of the principal alone. *Held*, as between E. and F., the first mortgage secured the principal of the \$1,000, note and interest thereon, according to the terms thereof, till its maturity, and afterwards at 7 per cent. per annum. That B.'s note having been transferred as security for the *notes* mentioned in the mortgage, E. might apply the proceeds thereof on such note, whatever that might call for,

without regard to the mortgage; and neither party having made an application of the \$1,200, the law applies the payment—where the indebtedness consists of a principal and interest—first to satisfy the interest. *Lash v. Edgerton et al.*, 13 Minn. 210.

2. *Rights of junior incumbrancer against senior mortgagee.*

**32. Recourse to land sold under senior mortgage—in first instance, though he have other securities.** Where the first mortgagee forecloses his mortgage under decree of court, the purchaser at such sale, or his assigns, cannot compel subsequent incumbrancers, who have other securities, to exhaust such securities before resorting to the property purchased by him, for he has the right of the first mortgagee only, that is, to have the lien of the first mortgage first satisfied, and subject to such right the junior mortgagee has a right to have his mortgage satisfied out of the same premises; and under any circumstance would this be so, where the pleadings did not show that the “other securities” were sufficient to satisfy the second mortgage. *Rogers v. Holyoke*, 14 Minn. 220.

**33. Right to notice of sale.** Under the statute (1861) a subsequent incumbrancer is entitled to no other notice of sale under a prior incumbrance, than the published notice through the papers. *Bennett et al. v. Healey*, 6 Minn. 240.

**34. Right to have interest on first mortgage after maturity, computed at 7 per cent.** The record of a mortgage made no mention of the rate of interest specified in the note which the mortgage secured, the note actually being  $2\frac{1}{2}$  per cent. per month. *Held*, as against subsequent incumbrancers, in the absence of express notice, the interest should have been computed at 7 per cent. per annum. *Whitaeve et al. v. Fuller et al.*, 5 Minn. 508.

**35. Senior mortgagee can take only such interest as appears of record.** Where the mortgagor had made payments to the first mortgagee as interest, but the amount

far exceeded the interest due on the note as disclosed by the record of the mortgage. *Held*, that subsequent incumbrancers were entitled to have the payments applied on the prior mortgage, so as to reduce that lien as it appeared of record. *Id.*

**36. Right to set aside first mortgage sale.** W. recovered judgment against D. and C. as principals, and R. and B. as sureties, in this State, which was duly docketed Nov. 5, 1858. Execution thereon was returned partially satisfied; afterwards, on the 29th June, 1861, an *alias* execution was issued against certain land of one of the defendants (R.), on which plaintiff (F.) had a mortgage, (which lien was secondary to the judgment); the second execution was returned wholly satisfied. Afterwards, without the authority of the judgment creditors, their judgment debt was taken to Wisconsin, and there put in judgment against the defendants, and satisfied (on the 16th August, 1861,) out of lands belonging to one of defendants. Plaintiff asks that the sale under the *alias* execution, of property covered by his mortgage, be set aside, or proceeds transferred to him. *Held*, even supposing W. had authorized the proceedings in Wisconsin, those were the only acts that could be vacated, for his judgment had been satisfied when that sale took place; not so as to the proceedings in Minnesota. Nor does the plaintiff show facts which authorize equity to so marshal the assets of the judgment debtor as to compel the judgment creditor to satisfy his debt out of property not covered by plaintiff's mortgage, for he does not aver or show that such a course is necessary for the satisfaction of the claims of both parties, and he has waited until W. has satisfied his claim. *Franklin et al. v. Warden et al.*, 9 Minn. 124.

**37.**—A second mortgagee has the right to move the court upon cause shown to set aside the sale of the mortgaged premises under the decree of the court, in an action of foreclosure by the first mortgagee—the former being a party thereto—for he is entitled to resort to any excess from the first



sale to satisfy his lien, and may in this way protect that interest. *Rogers v. Holyoke*, 14 Minn. 220.

## VI. THE MORTGAGEE'S ASSIGNEE.

**38. Payment to mortgagee after assignment, without actual notice, extinguishes the lien.** If the mortgagor pays the mortgage (debt) to the mortgagee after it has been assigned, without notice of the assignment, the lien is extinguished, and the mortgagee becomes a trustee of the sum paid, for the benefit of the owner of the debt (assigned). *Johnson v. Carpenter*, 7 Minn. 176.

**39. Assignee takes subject to equities of mortgagor.** Where a debt is secured by a negotiable promissory note, and that by a mortgage on real estate, the mortgage is a *chose in action* as between the mortgagor and any subsequent assignee, and is taken subject to the state of accounts between the mortgagor and mortgagee at date of assignment, and to all payments made by the mortgagor to the mortgagee at any time before *actual notice*. *Ib.*

**40. Record notice of assignment insufficient.** A mortgagor may always pay his mortgage debt to the mortgagee, though the mortgage has been assigned, if he pay in good faith, without knowledge of the assignment, and the only way the assignee can fully protect himself against such payments is to bring home actual notice to the mortgagor—a simple record of the assignment not being sufficient under the statute, Sec. 28, p. 460, Comp. St. *Ib.*

**41. Liability for refusing payment.** Where a party holding a mortgage as assignee of the mortgagee refuses to accept payment and execute a release, the penalty imposed by statute cannot be imposed upon the mortgagee, nor any other than the assignee, for he is the only one who can comply. *Galloway v. Litchfield et al.*, 8 Minn. 188.

## VII. VALIDITY OF MORTGAGES.

### a. Generally.

**42. The validity or invalidity of a**

mortgage must be determined by the laws in force at the time of its execution. *Olson v. Nelson*, 3 Minn. 53.

**43. Debt owned by stranger.** In the absence of fraud, accident or mistake in its execution, a mortgage is valid, though the debt for which it was given was not owned by the mortgagee. *Foster v. Berkey et al.*, 8 Minn. 351.

**44. Witnesses.** A mortgage executed in the presence of but one witness is not entitled to record, and ineffectual to pass any interest—following *Parret v. Shaubhut*, 5 Minn. 373. *Thompson et al. v. Morgan*, 6 Minn. 292.

**45. Solicitor's clause.** A stipulation in a mortgage, that in case of foreclosure, the sum of fifty dollars, counsel fees, shall be included in the amount due, is not *per se* invalid, there being at the time of the execution no usury law to circumvent, nor any claim that it was more than the services were reasonably worth. If the mortgagor seeks relief from such a stipulation, he must pursue the same course suggested in the case of a stipulation for greater damages than the law allows for the non-payment of the principal. *Griswold v. Taylor*, 8 Minn. 342.

### b. Preëmptor's mortgage.

(See U. S. LAND, II, 11.)

(See CONTRACTS, XI. 53.)

**46. Mortgage for purchase money borrowed, valid.** A borrowed money of B., with which to pay for a certain piece of United States land, under the preëmption law, agreeing to give B. a mortgage on said land after the purchase as security, all of which was done. *Held*, the mortgage was valid under Sec. 13, preëmption act of 1841, Sept. 4, in the hands of the mortgagee, overruling *McCue v. Smith*, 9 Minn., and *Woodbury v. Dorman*, 15 Minn. *McMILLAN, J., dissents. Jones et al. v. Twinter et al.*, 15 Minn. 512.

### c. Married woman's mortgage.

**47. Husband must sign, though for the purchase money.** Under Sec. 105,

Comp. St., p. 571, a mortgage on land executed by a married woman, without the signature of her husband, as security for the purchase money, is invalid. *Selby v. Stanley*, 4 Minn. 65.

**48. Signing by wife in ignorance of character of the instrument.** A mortgage on a wife's separate property, which she signed without knowing its contents or nature, did not acknowledge, is void, and these facts may be shown in contradiction of the certificate of the officer taking the pretended acknowledgment. *Arman v. Folsom*, 6 Minn. 500.

(See HUSBAND AND WIFE, 16.)

**49. Separate examination from her husband.** Under the statute requiring married women, in executing conveyances, etc., to be examined separate and apart from her husband, and to declare her act to be free and voluntary, a mortgage signed and acknowledged by the wife in the presence of her husband, immediately after she had in another room expressed an unwillingness to sign the same, and had thereupon, in said room, been addressed by her husband in harsh, threatening, and abusive language, is invalid as to the wife, although the notary or mortgagee knew nothing of all those circumstances, except the husband's presence at the examination of the wife—that presence was coercive. *Edgerton et al. v. Jones et al.*, 10 Minn. 427.

## VIII. LIEN OF THE MORTGAGE.

**50. Void foreclosure does not affect lien.** Where a mortgage was illegally foreclosed by advertisement, and the same was set aside at the instance of the mortgagor, by a court of competent jurisdiction, and the debt remains unpaid, and the mortgaged property has in no degree been applied to the payment of the mortgage debt, the lien of the mortgaged still exists. *Folsom et al. v. Lockwood*, 6 Minn. 186

**51. Removal of building.** A mortgaged lot 6, with the house thereon, to plaintiff, afterwards A. removed the house to lot 7, and then mortgaged both lots to H., who

had notice of the facts. *Held*, A.'s mortgage still constituted a lien on the building, and after lot 6 was exhausted, A. might resort to the building for any unsatisfied balance. *Himlin v. Parsons and wife*, 12 Minn. 103.

**52. When secondary to judgment.** Where a mortgage had been executed on certain premises to secure the payment of a note given to cover accrued illegal interest on a former indebtedness; and the sum named in the mortgage being four times greater than said interest, and said mortgage was not recorded until nine months after its execution and delivery, and nearly three months after the docketing, without notice of defendant's judgment against the mortgagor. *Held*, the lien of the judgment should be preferred to that of the mortgage, the plaintiff's equities being no greater than defendant's, he having taken his mortgage for an antecedent indebtedness, thus not coming within the statute which gave *bona fide*, purchasers for a valuable consideration, a lien prior to a judgment, though the latter was recorded first. *Whittiere et al. v. Fuller et al.*, 5 Minn. 508.

**53. Lien to secure land warrant furnished pre-emptor.** A land warrant furnished a pre-emptor with which to purchase his land of the government is *purchase money* within Sec. 4, Chap. 36, and Sec. 93. Chap. 61, Comp. St., so as to give precedence to the lien of a mortgage executed on said land to secure the repayment of such amount over the wife's dower, or homestead right. *Jones et al. v. Twinter et al.* 15 Minn. 512.

**54. Lien not affected by probate proceedings.** The fact that the mortgagor had died, his estate administered upon, and commissioners appointed to adjust claims, before foreclosure, and the debt secured by the mortgage was not presented to the commissioners for allowance, in no way affects the lien of the mortgage, or the right to foreclose, whatever effect it may have upon the liability of the estate to pay the indebtedness evidenced by the note in a personal action. *Id.*

## IX. DISCHARGE OF MORTGAGE.

**55.** An extension of time on a note secured by mortgage does not discharge the property from the mortgage lien, as against subsequent incumbrancers. *Whittacre et al. v. Fuller et al.*, 5 Minn. 508.

**56.** Actual payment of the debt. Where a mortgage is given to secure the payment of money, it is the debt itself that is secured, and not the note or other instrument by which it may be evidenced. The lien of the mortgage lasts as long as the debt, and nothing but actual payment of the debt, or an express release, will operate as a discharge of the mortgage. *Folsom et al. v. Lockwood*, 6 Minn. 186.

**57.** A tender to one of two joint mortgagees, before sale, would be a good payment, and a satisfaction of the mortgage by him would discharge the lien. Practically the same relations would seem to exist between purchasers at a sale, and a party having the right of redemption. *Donnelly v. Simonton et al.*, 7 Minn. 167.

**58.** Forgiving the debt. It seems that any act, even the forgiving a debt by parol, will discharge the mortgage which secures it. *Johnson v. Carpenter*, 7 Minn. 176.

**59.** Release. Where a mortgagor alienates a portion of the mortgaged premises, and the mortgagee releases from the mortgage the parcel retained by the mortgagor, the security is thereby cancelled to the extent of the value of the land so released, and he will be permitted to collect only the balance of the debt out of the lands in hands of the mortgagor's grantee. *Johnson v. Williams et al.*, 4 Minn. 260.

**60.** The surrender and delivery of a note does not necessarily operate as a discharge of a mortgage which was given to secure it—the mortgage containing no covenant to pay. The surrender of the note may be designed only to discharge the personal liability, leaving the specific lien on the property in full force. *Donnelly et al. v. Simonton et al.*, 13 Minn. 301.

**61.**—intention may be shown by pa-

**rol.** Defendant, holding plaintiff's promissory notes secured by mortgages, contracted with plaintiff, in consideration of the transfer to defendant by plaintiff of an interest in certain property, "to deliver up the said notes." Held, the notes being given for the purpose of binding the mortgagor personally for the payment of the debt, while the mortgage binds only the specific property (containing no covenant to pay), a delivery up of the note does not necessarily operate as a discharge of the mortgage, and the intention of the parties in that regard not being collectable from the instrument itself, it was competent to show that intent by extrinsic evidence of the circumstances under which the instrument was framed, as the value of the property conveyed at time of the agreement to surrender the notes, as compared with the value of the lots covered by the mortgages, and with the nominal value of the notes. *Id.*

**62.** An insufficient tender not kept good will not discharge a mortgage lien, as where the maker of a note, payable at a time certain and bank named, tenders to the cashier of the bank the amount due coupled with the condition that the note be delivered to him—and the note itself then being in the possession of the payee, who was absent and that tender not kept good. *Balme v. Wambaugh et al.*, 16 Minn. 116.

## X. MORTGAGE BY DEPOSIT OF TITLE DEEDS.

**63.** Does not exist. The deposit of title deeds "to hold as security," for the payment of money does not create any lien on the land, but simply on the deed itself—the English doctrine discarded. *Gardner v. McClure et al.*, 6 Minn. 250.

## XI. TACKING.

**64.** Power to tack does not exist. Under our statutes, the mortgagee cannot tack to his mortgage debt any subsequent mortgage debt, bond, or other debt—the

mortgagor can redeem on payment of the mortgage debt simply. *Bacon v. Cottrell*, 13 Minn. 194.

## XII. THE FORECLOSURE.

### a. Strict foreclosure.

**65. Equity may decree a strict foreclosure.** A court of equity has power to decree a strict foreclosure of a mortgage—the statute not having taken away that power—and the time allowed for redemption in such a case is wholly discretionary with the court, and an appellate court will not interfere with its determination, except in case of manifest abuse. *Drew et al. v. Smith*, 7 Minn. 301.

**66.**—In an action commenced under the laws existing at time the General Statutes went into effect (Aug., 1866,) for the foreclosure of a mortgage, the court had power to decree a strict foreclosure, although a sale should in all cases be ordered, unless justice and equity require a strict foreclosure. *Bacon v. Cottrell*, 13 Minn. 194.

### b. Dismissal of action to foreclose.

**67. Action to cancel illegal foreclosure, and for foreclosure under decree.** B. foreclosed a mortgage against M. (by means of one who acted for him,) the land being bid in for B., who went into possession and rented the premises—no redemption being made by the mortgagor. After period of redemption expired, B. discovered that the party who acted for him had no authority, and by some irregularity in an adjournment, his foreclosure was not good. He brings suit to obtain a re-sale under decree of court, and have the foreclosure set aside. M. offered to release all his claims, and waive all irregularities, and claims that the subsequent entry of B., and leasing, was a ratification of the acts of his agent so as to bind him, and claiming that the property if sold now would not bring as much as it sold for on the foreclosure. *Held*,

complaint was properly dismissed on defendant's offer to release all interest and waive all irregularities. *Blake v. McKusick*, 8 Minn. 338.

### c. Decree of foreclosure.

**68. May attach a condition to redemption allowance.** Where a mortgagor or obligee in a bond for a deed are in default, and, in an action to foreclose and terminate their interests, the court allows them a certain time to complete performance, and thus avoid a forfeiture, it may attach a condition that they shall do equity by reimbursing such sums as the other party may have paid out for taxes to protect his interests from forfeiture. *Drew et al. v. Smith*, 7 Minn. 301.

**69. Future conditional decree.** Courts will not decree a foreclosure to take effect in the future, in case the mortgagor should redeem from a prior mortgage sale. *Potter v. Marvin et al.*, 4 Minn. 525.

**70.**—Where a court is applied to to enforce a mortgage, the court in the exercise of its chancery powers, may order the mortgagor to pay the amount due by a certain day, or “be forever foreclosed of all right to redeem.” The power of the courts to decree a foreclosure absolute has not been interfered with by the legislature. *Heyward v. Judd*, 4 Minn. 485.

### d. Setting aside the sale.

**71. Until the confirmation of a foreclosure sale, upon the coming in of the report of sale, the proceedings are not complete, and the sale may be set aside, for cause, by the court.** *Rogers v. Holyoke*, 14 Minn. 220.

**72.** A mortgage sale under decree of court, under Sec. 29, Chap. 81, G. S., cannot be set aside until the coming in of the report of the sale—for without that report the court has no jurisdiction to act, and this error may be taken advantage of in the first instance in the Supreme Court. *Trowbridge v. Forepaugh et al.*, 14 Minn. 133.

**73. Confirmation conclusive in collateral proceedings.** The confirmation of the report of a sheriff's sale under a decree, has the effect of a judgment, and until vacated by a direct proceeding in the action is conclusive, and cannot be attacked collaterally. *Hotchkiss v. Cutting*, 14 Minn. 537.

*e. Assignment.*

**74. What sufficient record thereof.** A mortgage, which had been recorded, was assigned by deed endorsed upon it, which described it as "the within described mortgage." Said assignment was duly acknowledged and recorded in a different place from the original record of the mortgage, without again recording the mortgage. *Held*, the assignment was recorded within the provision of the law which makes it necessary to record an assignment of a mortgage to entitle the assignee to foreclose it. *Carli v. Taylor et al.* 15 Minn. 171.

*f. Foreclosure for installment.*

**75.** Under Sec. 3, p. 644, Comp. Stat., a mortgage given to secure the payment of money due by installments, it is only each installment *after the first* that is to be deemed a separate mortgage, and it is only for *such* installments that a foreclosure is authorized. *Shorts v. Cheadle*, 8 Minn. 67.

*g. The purchaser.*

*1. Who may purchase.*

**76. Administrator of mortgagee.** A sale of mortgaged premises cannot be questioned by the mortgagor on the simple ground, that the administrator of the deceased mortgagee purchased the mortgaged property in his own right. *Baldwin v. Allison*, 4 Minn. 25.

**77. Mortgagee.** Under the Statute, Sec. 9, Chap. 75, Comp. St., 643, the mortgagee at a sale under a power running to

himself, may bid in the property, the sale being made by the sheriff in good faith. *Ramsay v. Merriam*, 6 Minn. 168.

**78. Administratrix.** The purchaser at a mortgage sale by an administratrix of the estate which owns the mortgage, can be questioned only by the *cestui que trust*—not by a stranger—following *Baldwin v. Allison*, 4 Minn. 25. *Kent v. Chalfant*, 7 Minn. 487.

**79. Where mortgagee bids, officer must sell.** On a mortgage foreclosure sale by advertisement, where the mortgagee's attorney in the foreclosure sale acts as auctioneer in making the sale, and makes the certificate and affidavit of such sale, the mortgagee cannot become the purchaser under the power, to enable him to purchase the sale must be made by the officer named in the statute—following *Ramsay v. Merriam*, 6 Minn. 168. *Allen et al. v. Chatfield*, 8 Minn. 435.

*2. Purchaser's rights.*

**80. Legal title vests after redemption expires.** On a mortgage sale, under the laws in force in 1862, the legal title to land does not vest in the purchaser until after the expiration of the time of redemption—following *Daniels v. Smith*, 4 Minn. 172. *Donnelly v. Simonton et al.*, 7 Minn. 167.

**81. Junior incumbrancers not parties to foreclosure.** An action by the purchaser at a mortgage sale under decree of court, against junior incumbrancers, not parties to the first action of foreclosure, to foreclose their equities is as to the latter a foreclosure *de novo*. *Rogers v. Holyoke*, 14 Minn. 220.

**82.**—Where a senior mortgagee forecloses by action his mortgage, without making the junior mortgagee a party thereto, the only right which the purchaser and his assigns acquires at the sale, is the right to a prior lien upon the premises to the extent of the money due and unpaid on the first mortgage, in the same manner as though the first mortgagee had assigned the mortgage without foreclosure. *Ib.*

**83. Right to deed at expiration of redemption.** At time of expiration of mortgage, the law authorized a redemption within one year from, etc. At time of sale on foreclosure, the redemption was extended to three years, the certificate of the sheriff stated that the mortgagee would be entitled to a conveyance in three years, which certificate the mortgagee received and recorded without objection. *Held*, mortgagee did not thereby waive his right to a conveyance at the expiration of one year, under the law existing at date of mortgage. *Carroll v. Rossiter*, 10 Minn. 174.

*h. Notice of sale.*

**84. Publication—number of weeks.** Notice of mortgage sale by advertisement, published for the first day on August 3, 1859, and each week successively up to and including the 14th day of September following, was published the six weeks required by statute. Excluding Aug. 3d and including September 14th, the day of sale, makes forty-two days or six weeks—the notice being in fact published seven times, once more than necessary—Comp. St., p. 630, Sec. 43. *Worley et al. v. Naylor et al.*, 6 Minn. 192.

**85.**—Notice of foreclosure sale was published seven times, the first publication occurring on the 4th day of January, 1867, and the last on the 15th day of February, 1867, the sale taking place on the 23d day of February, 1867, as per notice. *Held*, a notice of seven weeks where the statute required a notice for "six successive weeks once in each week," did not affect the validity of the sale. *Atkinson v. Duffy*, 16 Minn. 45.

**86. Discontinuance and re-publication.** After notice of foreclosure of mortgage had been published twice, and it was discovered the day of sale came on Sunday, the mortgagee discontinued its publication and commenced the publication of a second notice, wherein the amount claimed to be due, day fixed for sale, and date all

differed from those particulars in the first notice. *Held*, that the changes were of such a nature that persons would not naturally or reasonably be misled, and a sale regularly made under the second notice was valid—especially in the absence of any claim of prejudice on part of plaintiff—considering *Dana & Brown v. Farrington*, 4 Minn. 433. *Banning et al. v. Armstrong*, 7 Minn. 46.

**87. Change of date of sale.** Notice of sale of mortgaged premises for the 23d of May was changed to the 25th of May. It appears mortgagor was ignorant of the change until after the sale on the 25th, and that he attended the place of sale on the 23d, to protect his rights. *Held*, he was prejudiced by the change of notice, and sale void. *Dana & Brown v. Farrington and wife*, 4 Minn. 433.

**88.—Query.** Can a notice of sale (mortgage in this case) be changed in a material part (date of sale) after the notice has been once published, and the publication of the notice, as corrected, be continued immediately, or must the publishing of the corrected notice be delayed until the expiration of the period (six weeks) of the first notice. *Id.* \*

**89. Notice by administrator—signature.** A notice of sale of mortgaged premises by an administrator appointed to administer the estate of the deceased mortgagee, signed "Silas H. Baldwin, administrator of the estate of Rachel A. Baldwin, the mortgagee, deceased," is sufficient without setting out the death of the mortgagee—the administrator not being an "assignee" of the mortgage within Sec. 5, Comp. St., 644. *Baldwin v. Allison*, 4 Minn. 25.

**90. Publication: by what law governed.** Notice of foreclosure sale by advertisement is properly published, according to the law in force at the time when the publication is made, notwithstanding the mortgage was executed prior to the passage of such law. *Atkinson v. Duffy*, 16 Minn. 45.

**91. When published in an adjoining**

county. Where a mortgage is foreclosed by an advertisement, under Chap. 75, Comp. St., and the notice published in an adjoining county, but no copy served on the assignee of the mortgagor in possession, as required in Sec. 32, p. 592, Comp. Stat. *Held*, irregular, and Sec. 19, Chap. 3, Comp. St., does not do away with its necessity, for there is no "conflict" between the provisions. *FLANDRAU, J., dissenting. Heath v. Hall*, 7 Minn. 315.

**92. Amount claimed to be due,—when foreclosed for the last of three notes.** W. & F. executed to S. a mortgage on the land in question to secure the payment of *three* notes. D. purchased the land of W. & F. and assumed the payment of the notes thus secured. When the first note became due, S. foreclosed the mortgage by advertisement for amount of first note and costs; D. redeemed from this sale under Sec. 11, Comp. St. 645. When the *second* note became due S. sued the makers and levied on their property. *Held*, that D.'s redemption from sale operated to cancel the mortgage lien as to the first note only, he taking no title thereby. That S.'s levy on his judgment must be presumed to have been upon sufficient property to satisfy it and operated as a discharge of the mortgage on the land as security for the second note. S. afterwards foreclosed by advertisement for the *third* note, the notice stating that the mortgage was given to secure *three* notes, and that there was due on the last one the actual amount, saying nothing about what had been done with the former two notes. *Held*, *sufficient*, and that S. being the purchaser at the last sale, and period of redemption having expired, could maintain forcible entry and detainer against D. and, his tenant. *EMMETT, C. J., dissents. Daniels v. Smith*, 4 Minn. 172.

**93. Amount claimed to be due.** Where notice of foreclosure of mortgage by advertisement claimed as due 65 per cent. more than was actually due on the debt. *Held*, the sale was void in consequence; although a mere excess of trifling amount, arising from an error in computation

would not be deemed material, nor if a party honestly, through mistake of law or fact, claims more than is actually due, would the sale be disturbed unless the other party showed himself prejudiced thereby. *Spencer v. Anon*, 4 Minn. 542.

**94.—**In a mortgage foreclosure by advertisement, where by the strict terms of the notes, a greater sum could have been claimed than was demanded, and in no aspect of the case was the excess, when compared with the sum actually due, of sufficient magnitude to have influenced purchasers one way or the other. *Held*, sale should not be disturbed for that reason. *Ramsey v. Merriam*, 6 Minn. 168.

**95.—at date of notice.** The "date of the notice," under Sec. 5, Comp. St., p. 644, which requires that the notice of foreclosure shall state amount due at date of notice, does not mean exclusively the note appended to the notice stating its date, for, strictly speaking that is only the evidence of the date; it covers also the time of actual issuance of the notice, whether expressed or not. The absence of date would not affect its validity if amount claimed was correct at the true date. But where date is written on face of notice, that will control, and amount claimed must correspond with the time so stated; in the absence of date the time of the first publication is its date. *Id.*

**96. Notice of lien for taxes.** A notice of mortgage foreclosure by advertisement contained the following clause: "and whereas there is also claimed, as a lien upon said mortgaged premises, the sum of ninety-one dollars and eighteen cents, expended by said (mortgagee), in payment of taxes upon said premises," etc. *Held*, sufficiently particular to charge the land for the taxes under Sec. 80, p. 244, Comp. St. *Jones v. Cooper*, 8 Minn.

**97. Service of notice.** An agent is not a "personal representative" within Sec. 32, Chap. 63, Comp. St., requiring service of notice of mortgage sale on them in certain cases. *Jones et al. v. Twinter et al.*, 15 Minn. 512.

**98.**—An agent is not a “personal representative” within the meaning of Sec. 5, Chap. 81, G. S., which requires notice of foreclosure sale (when publication is made out of the county) to be served upon “the mortgagor, his heirs or personal representatives,” such term is used in its ordinary meaning of executor or administrator. *Atkinson v. Duffy*, 16 Minn. 45.

*i. Sale, by whom made.*

**99. Change in administrator.** The simple fact that the administrator who commenced proceedings for foreclosing a mortgage was removed, and a special administrator completed the sale, the order of removal being afterwards reversed—will not affect the validity of the sale. *Baldwin v. Allison*, 4 Minn. 25.

**100. Sheriff of county attached to another.** The sheriff of a given county is the proper person to make the sale of land on foreclosure of mortgage, under power of sale, though said county may be attached to another county for judicial purposes. *Berthold v. Holman et al.*, 12 Minn. 235.

*j. Re-sale.*

**101. Excuse for applying for re-sale.** Delay in applying for a re-sale in mortgaged premises until after the first sale is completed, is *sufficiently excused* by averring that, plaintiff “was an officer in the United States Navy, and has been for the last year on duty on a foreign cruise, and that until within a few days he has had no notice of the proceedings had on the afore-said mortgage foreclosure.” *Johnson v. Williams et al.*, 4 Minn. 260.

**102. Officer can sell but once.** Where an officer on a mortgage sale has once sold the property, his power to sell is exhausted, and he cannot again *re-offer* or *re-sell* the same. *Paquin v. Braley*, 10 Minn. 379.

*k. Sale in parcels.*

**103.** Where a mortgage covered two parcels of land, one of 80 acres and the

other of 320 acres, the latter lying “contiguous and in one body,” though in different townships and sections, the question being whether the sale of the latter parcel in one body was valid. *Held*, the fact of its being in different townships and sections, or that it was acquired from different owners did not make distinct farms or parcels within the statute. The object for which a body of land is held by the owner, the manner of its use, convenience attaching to its use, are more important than lines of survey in determining whether it is a distinct farm or parcel within the statute. The use of the term “distinct” in the statute (Comp. St. p. 644, Sec. 8), must mean a separation by some natural means, or by intervening space, and not by arbitrary imaginary lines. *Worley et al. v. Naylor et al.*, 6 Minn. 192.

**104.** Where the land at date of execution of the mortgage was in one tract, but the owner afterwards sold the same to two different persons—the sheriff on a foreclosure sale may sell the whole in one parcel—the *mere sale* not making *distinct tracts or lots* within the statute. WILSON, C. J., thinks a sale in separate parcels in accordance with the mortgagor’s conveyances could be enforced in equity, but without such interference the sale in one tract was valid. *Paquin v. Braley*, 10 Minn. 379.

*l. Postponement of sale.*

**105.** Under Sec. 7, Comp. St., 644, the postponement of a mortgage sale by advertisement may be made at any time; need not wait until the first named day shall arrive. *Bennett v. Brundage*, 8 Minn. 432.

*m. Impeaching sale.*

**106.** A mortgage foreclosure by advertisement cannot be impeached on the ground that the principal creditor, of whom the mortgagee had obtained the note by paying the same on his contract of surety, had issued execution which was not returned unsatisfied. *Ross v. Worthington*, 11 Minn. 438.



**107.** Mortgage covered lands in three counties. Was recorded in two of them only. *Held*, a foreclosure of the mortgage for those lands in the two counties where it was recorded was valid. G. S. Chap. 81, Sec. 2, Sub. 3. *Balme v. Wambaugh et al.*, 16 Minn. 116.

*n. Defense to foreclosure.*

**108.** It is no defense to a foreclosure of a mortgage by advertisement, (nor probably by action,) that the mortgagor had brought a suit for its cancellation, in which the mortgagee should have asked a foreclosure as affirmative relief. *Montgomery v. McEwen*, 9 Minn. 103.

*o. Surplus proceeds from sale.*

**109. Second mortgagee entitled, when.** The sheriff held in his hands surplus proceeds arising from the sale of land on first mortgage foreclosure. The mortgagor had executed a second mortgage to A., and afterwards conveyed to Stewart. It seems, that under Sec. 13, Comp. St. 645, which requires such proceeds to be paid to the "mortgagor, his legal representatives, or assigns," A., as against the first mortgagee, had an assignment of the mortgagor's equity of redemption; and as against the mortgagor himself, on the discharge of the first mortgage, he became the first mortgagee, and as assignee of his right to redeem, he had the right to receive the surplus proceeds in preference to Stewart, who took subject to plaintiff's right. *Ayer v. Stewart et al.*, 14 Minn. 97.

**110. Owner of equity of redemption entitled.** *It seems*, our statutes do not change the rule, that the mortgagee, upon making a sale under a power contained in the mortgage, holds such surplus (if any) in his hands, as trustee of him to whom the equity of redemption belongs. *McMILLAN, J. Ib.*

**111. Second mortgagee.** *It seems*, that where there are two mortgages upon the same premises, and the property is converted into money by a sale under the first

mortgage, the lien of the second mortgage attaches to any surplus proceeds of the sale, after satisfying the first mortgage. *McMILLAN, J. Ib.*

*p. Redemption.*

**112. Period of redemption same as on execution sale.** Under the act of May 5, 1853, abolishing all distinctions between proceedings at law and in equity, and establishing in lieu thereof the civil action, a sale of real estate made by order or judgment of a court, upon proceedings for the foreclosure or satisfaction of mortgages, is governed by the same rule as sales on execution, so that a mortgagor has the same right to redeem from foreclosure sale by order of court as from execution sale. *Stone v. Bassett*, 4 Minn. 298.

**113. Redemption governed by law in force at date of mortgage—the Legislature has no power to change it.** A mortgage containing power of sale was executed under a "one year's" redemption law. Before the sale the Legislature had extended the period of redemption to *three years*. *Held*, that where a valid power had been given, the Legislature could not interfere with its exercise, so as to change the estate to be sold by the mortgagor, without impairing the obligation of the contract; consequently, if the mortgagee foreclosed *under the power*, by advertisement, he could sell the land subject to the *one year's* redemption; but if he went into a court of equity, he would be compelled to sell such an estate as the law in force at that time authorized. *Heyward v. Judd*, 4 Minn. 483.

**114. Act of March 10, 1860.** Under the act of March 10, 1860, a mortgagor is entitled to three years after the sale, within which to redeem the premises—following *Heyward v. Judd*, 4 Minn. 483. *Whittacre et al. v. Fuller et al.*, 5 Minn. 508.

**115.**—The sale of mortgaged property being made by decree of court, and not under the statute, the time of redemption, and right of possession during that time, is governed by the law in force at date of

decree, and not by law in force at date of mortgage—following *Stone v. Bassett*, 4 Minn. 298, and *Heyward v. Judd*, 4 Minn. 483. *Turrell v. Morgan*, 7 Minn. 368.

**116.**—The law in force at time of making a mortgage, governs the period of redemption under it, and not the law in force at time of foreclosure. *Carroll v. Rossiter*, 10 Minn. 174.

**117. Waiver of redemption—binds assignee.** It seems, that by the G. L. of 1860, p. 276, Sec. 3, which provides that “any person may, in writing, etc., waive his right to redemption, as allowed by this act,” a mortgagor may bind himself and his assigns by such waiver. *Query*, whether creditors and others would be bound? *Armstrong v. Sanford*, 7 Minn. 49.

**118. Proof of right to redeem.** The plaintiff—(assignee of the mortgagee)—tendered the redemption money due on the mortgaged lands, which had been sold on a judgment constituting a prior lien, offering, as proof of right to redeem, an affidavit of one M., stating that he “saw John M. (the assignor) execute an assignment of said mortgage to plaintiff, and she was then the owner and holder thereof.” The statute required a “copy of any assignment necessary to establish his claim, verified by the affidavit of himself or a subscribing witness thereto.” *Held*, the facts stated by affiant made him a subscribing witness, within the statute, (Comp. St., Sec. 118, p. 573.) *Williams v. Lash*, 8 Minn. 496.

**119. A tender of redemption money to the officer in charge of the sheriff's office**—though it be the deputy sheriff—is sufficient, within the statute requiring the tender to be made to the officer who made the sale, or purchaser. *Ib.*

## MORTGAGE SALE.

(See MORTGAGES, XII. i.)

(See PLEADINGS, 43, 44.)

## MOTIONS.

(See PRACTICE, II. 17.)

## MUNICIPAL CORPORATION.

- I. GENERALLY.
- II. POWER TO LICENSE.
- III. POWER TO COLLECT ITS OWN TAXES.
- IV. ASSESSMENTS FOR CITY IMPROVEMENTS.
- V. LIABILITY TO CONTRACTOR.
- VI. LIABILITY FOR INJURIES TO INDIVIDUALS.

(See ST. PAUL, CITY OF.)

### I. GENERALLY.

**1. Acts of alderman bind the city.** Although the charter of the city of St. Paul conferred upon aldermen of each ward the duties of street commissioners, and gave the power to repair, etc., streets, etc., still their acts are the acts of the city. *City of St. Paul v. Louis Seitz*, 3 Minn. 297.

**2. Interest of a city in the public square.** A dedication, within a city, of a “public square,” under a statute which provided that “the land intended to be for the streets, etc., and other public uses in any city, etc., shall be held in the corporate name thereof, in trust, to and for the uses and purposes set forth and expressed or intended,” conveys to the corporation a legal right to the possession, with an interest in the land for the purposes of the trust, that is, the use of the public, that will sustain ejectment on the part of such corporation against a person in adverse occupation claiming title. *City of Winona v. Huff*, 11 Minn. 119.

**3. Liability for building destroyed to prevent spread of conflagration.** In the absence of statute, a city is not liable for the destruction of a building to prevent the spreading of a conflagration; and this

whether its destruction is ordered by the officers of the city assuming to act in their official capacity, or by the bystanders, of their own motion. *McDonald v. The City of Redwing*, 13 Minn. 38.

**4. Legislature can impose officers on a city.** The Legislature has undoubted power, in this State, to appoint officers within a city, for a specific purpose, such as laying out a street and assessing damages and benefits therefor. Officers so appointed, for purposes within the limits and sphere of municipal government, their acts are the acts of the city, precisely as if they had been done by the municipal authorities selected under the charter, so as to make the city liable for the damages to land over which such street is laid out. *Daley v. The City of St. Paul*, 7 Minn. 390.

**5. Requisites of complaint against a city—by contractor.** Where a city was liable to a contractor on a contract, although it had not taken the necessary steps to collect the means to pay him, performance of said acts need not be alleged by the contractor, in an action against the city. *Nash v. The City of St. Paul*, 8 Minn. 172.

**6.**—A municipal corporation does not inherently possess the power to order and contract for grading streets; the power is given by charter; and where the charter requires the contract to be let to the lowest bidder, the fact that it was so let must be alleged in a complaint against the city, by a contractor, and that it was let to the lowest bidder, not to one as the lowest bidder. *Ib.*

## II. POWER TO LICENSE.

**7. Regulations must be within clear intent of the charter.** While municipal corporations may adopt such regulations as may be necessary and reasonable, to protect the lives, health, property or morals of its citizens, the exercise of this right should be carefully guarded and limited, within the clear intent of the grant of power for such purpose. *City of St. Paul v. Laidler*, 2 Minn. 209.

### **8. What is illegal butcher license.**

That portion of the ordinance of St. Paul regulating sale of "fresh meat," and prohibiting its sale at other places than the market, without a license, and at the market without the renting of a stall, is not merely in regulation, but also in restraint of trade, and unreasonable, unnecessary, and inequitable, and cannot be sustained on principle or authority. *Ib.*

**9. Power to license, generally.** The legislature has the right to confer upon a city the power of regulating any business which may act prejudicially upon the health, morals, or peace of the inhabitants. And whether a particular business requires regulating, and if so, to what extent, rests in the legal discretion of the municipal corporation. *City of St. Paul v. Troyer*, 3 Minn. 293.

**10. Brewer's liability under St. Paul charter.** The charter of the city of St. Paul authorized it to "grant license, and regulate all persons dealing in fermented liquors." Under this charter it was provided, by ordinance, that "no person, etc., shall sell, vend, dispose of, traffic, or deal in, or give away fermented liquors, etc., in or at any place or house" within the city, without license, and that "any suitable person approved by the common council, on filing bond and paying license fee, shall be entitled to a license to sell, vend, deal, etc., in fermented liquors, and at any one certain place, house, or room," to be designated in the license. *Held*,—1st. The power to license involved the power to refuse to license, and that both were granted by the charter. 2d. A brewer who manufactures beer within the city, and supplies his customers by the keg or cask at their several places of business, is not within the terms of the ordinance. *Ib.*

**11. Amount of license.** The charter of the City of St. Paul (Sec. 5, Chap. 16 Special Laws 1865, p. 123,) authorized the city council to "license and regulate," etc., butchers' shops, etc., and provides "that not less than five dollars, nor more than five hundred dollars, shall be required to be

paid for any license," etc. The city council has power under this act to impose a license of \$200, on butchers' shops. *The City of St. Paul v. Colter*, 12 Minn. 41.

### III. POWER TO COLLECT ITS OWN TAXES.

**12.** "The Tax Law," and law prescribing duties of County Treasurers, approved March 9, 1860, and the law prescribing duty of county auditors, approved March 6, 1860, clearly express the intention of the Legislature to take from the Treasurer of the City of St. Paul the power of collecting city taxes, selling property for non-payment of taxes, and receiving the redemption money—and so of all other cities and towns. *Morgan v. Smith*, 4 Minn. 104.

**13.** Sec. 61 of the tax law, approved March 9, 1860, which apparently recognizes the right of a city to collect its own taxes, was not intended to have that effect. *Ib.*

### IV. ASSESSMENTS FOR CITY IMPROVEMENTS.

**14. Only substantial errors will vitiate an assessment for city improvements.** Charter of the City of St. Paul (Session Laws, 1854,) provided that "no error or informality of the officers entrusted with the same, (assessment of taxes for street improvements,) not affecting the substantial justice of the tax itself, shall vitiate or in anywise affect the validity of the tax or assessment." *Held*, not to prevent parties prejudiced thereby from obtaining the redress to which they would otherwise be entitled—a mere affirmance of an existing rule. *Weller v. City of St. Paul*, 5 Minn. 95.

**15. Filing of estimates a pre-requisite to improvements.** Sec. 6, Chap. 7, Session Laws, 1854, (charter of St. Paul,) provides that the commissioners shall make an estimate of the whole expense of any street improvements, etc., and of the proportion to be assessed each lot, etc., and file such es-

timate with the city comptroller. *Held*, these conditions—the making and filing of estimates—are imperative, and an omission vitiates the assessments, and all proceedings under it—following *McComb v. Bell*, 2 Minn. 295. *Ib.*

**16. Lots fronting "on such street" are not lots fronting "on the work done."** Cost on expense of "grading, gravelling, planking, or paving streets and alleys to the centre thereof, shall be chargeable to, and payable by the lots fronting on such street or alley." (Sec. 5, Chap. 6, Session Laws, 1854, p. 30,—charter City of St. Paul.) Under this charter the cost of work was assessed upon and charged to the lots fronting on the work done, specifically lot by lot, the work done opposite, or fronting on each specified lot, being assessed upon, and made chargeable to such lot alone. *Held*, the assessment was unauthorized and void. *Weller v. City of St. Paul*, 5 Minn. 95; *Morrison v. City of St. Paul*, 5 Minn. 108.

**17. To bind property for grading expenses, every step required by the charter must be taken.** In order to make lots fronting upon a street chargeable with the expense of grading it, every act which the charter requires the city officials to do, must be fully performed, or the assessments will be void. *McComb v. Bell*, 2 Minn. 307.

**18. Omission to make estimates, etc., prior to contracting for sidewalks, in absence of prejudice to the owner, does not vitiate the assessment.** Charter of St. Paul (Sec. 4, Chap. 7,) provided that whenever the street commissioners shall deem it necessary to construct or repair any sidewalk, etc., they should direct the owner of the lot to do it at his own cost; on his default, the commissioners "shall cause the same to be done at the expense of the lot adjoining such sidewalk." Sec. 6 provided that whenever they determined to make any such walk, they should "cause to be made an estimate of the whole expense, and portion to be assessed to each lot, and then enter into contract for the doing thereof." Under Sec. 10, after the performance of the contract, they were to issue certifi-

cates against the lots, "and if the notice to do the work required shall have been given, etc., no informality or error in the proceedings shall vitiate such assessment (against the lot on default in payment of certificate.) *Held, prima facie*, in the absence of any prejudice on part of lot owner, an omission on part of the commissioners to make the estimate of the expense and portion chargeable to any given lot, prior to letting the contract, does not render the certificates void—distinguishing this from *McComb v. Bell*, 2 Minn. 295, and *Weller v. City of St. Paul*, 5 Minn. 95, where such defect rendered them void in case of street grading. *DeRochbrune v. City of St. Paul*, 11 Minn. 313; *Griggs v. City of St. Paul*, 11 Minn. 308.

**19. Authority to contract must be strictly followed.** Under the city charter of St. Paul, street commissioners advertised for bids on "two separate contracts" to grade a certain street. They let the whole of the work under *one contract*. *Held*, the action was void, and imposed no liability on the city. *Nash v. City of St. Paul*, 11 Minn. 174.

## V. LIABILITY TO CONTRACTOR.

**20. For local improvements.** Where a city makes a contract which it is authorized to make by its charter, and charge to a particular locality, or ward, as—street improvements—the city is liable to the contractor, although it may have failed to take the necessary steps to cast the burden upon that particular locality or ward—the contractor deals only with the city—distinguishing this case from those where the city had no power to make the contract in the first instance, or in that particular way. *Nash v. The City of St. Paul*, 8 Minn. 172.

**21. Liability to contractor for neglect to collect necessary assessments.** Where the city contracted for certain street improvements, which, by the charter, "were to be done at the expense of any lot or parcel of land fronting on the improvements,"

and "in no event was the city or ward to be liable," and the city neglected to collect the necessary assessments of the property specified. *Held*, the city was liable—following *Daley v. City of St. Paul*, 7 Minn. 390. *Id.*

**22. Liability to contractor for local improvements, where the property has been bid in by the city in default of bidders, at a sale for the amount of the contractor's certificates.** Plaintiff's assignor graded certain streets in St. Paul, under contract with the city, and on completion thereof the city officers issued certificates to the contractor in regular form, under a law which required that the certificates should show on their face that they are a charge on the lots described therein, (not a charge against the city) and that "in case of sale, the money shall be collected for the use and benefit of the holder of the certificate, and that in no event shall the city be liable." Sec. 10, Chap. 7, charter St. Paul. The claims represented by the certificates were assessed upon the lots, and being unpaid, the lots were sold for delinquent taxes, and *bid in by the city*; there being no purchasers for the amount of the assessment, the city received a certificate of sale in its own name. *Held*, the defendant in the assessment and sale of the lots acted for the holders of the certificates, it neither assumed nor guaranteed the payment of the certificates, nor became liable to the holders thereof for the amount due and uncollected, by proceeding as required by law to collect the amount due thereon, nor by reason of the fact that said lots were, for want of bidders, struck off to the city. *Lovell v. City of St. Paul*, 10 Minn. 291.

## VI. LIABILITY FOR INJURIES TO INDIVIDUALS.

**23. Liability to open and repair a street.** Although it is the duty of a municipal corporation to keep its streets in such a condition as not to endanger the safety of travelers—still the dedication of land within corporate limits to the public

for a street, does not cast on the corporation the duty of immediately putting that street in order and render them safe for travelers, without any regard to the necessities of the city, its finances, or the ability of the property to be charged, and where they decide to act they may open a street partially (to pedestrians) or wholly to general travel, and when they commence they are bound to see that the public safety is not endangered. *City of St. Paul v. Louis Seitz*, 3 Minn. 297.

**24.—for injuries to persons, arising from defects in streets.** Though a municipal corporation may not be responsible for damages caused by the natural irregularities and imperfections in a street, which it has never improved, nor found necessary to repair for public travel; still, it may not “dig a pit or hole several feet deep and extending across” said street, either by its own servants, or cause it to be done by contract, and leave the same unguarded and protected without being liable for damages. *Ib.*

**25. Duty of protecting individuals from natural obstructions.** Where a duty rests upon a city to keep a street in safe condition, it is liable for accidents arising from a failure on its part to repair damages, or remove obstructions occasioned by natural causes over which it had no control and in which it had no agency, as in the washing of streets by rains, etc., while, where no such duty exists, to charge the corporation it must have been in some way instrumental in occasioning the injuries. *Ib.*

**26.—for injuries arising from negligent manner of doing work by contractor.** The city charter gave to the street commissioners “power to order and contract for making, grading, etc., streets, etc.” and to “direct and control the persons employed therein.” *Held*, the commissioners shall retain such control over the details of such work, and the manner of its performance as to protect the person and property of citizens against the carelessness of irresponsible contractors—and that a contract under that charter

for the grading of a street which stipulated that, “the work should be done under the direction of the Street Commissioners,” made the city liable for any injuries arising from the negligent execution of the work. *Ib.*

**27.—for injuries resulting from dangers incident to improvements.** Where a municipal corporation enters upon improvements (grading street in this case), damages to private individuals may result: 1st, from dangers incident to the very nature of the work undertaken, for which the city is liable; 2d, from dangers arising from an improper execution of the work, for which the city will be liable, unless from the terms of the contract the contractor is responsible. *Ib.*

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## MURDER.

(See CRIMINAL LAW, 31, 142.)

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## MURDER IN SECOND DEGREE.

(See CRIMINAL LAW, 149.)

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## NAME.

**1.** At the time of the commencement of the action and entry of judgment thereon; there were residing within the jurisdiction, two Michael Cummings—father and son. A judgment was recovered against Michael Cummings, *Junior*, by name of “Michael Cummings,” and the execution and sheriff’s certificate of sale of the land so described him. *Held*, the word “junior” forms no part of a name, and a grantee of Michael Cummings, *Jr.*, subsequent to the docketing of said judgment took with notice of said judgment lien. *Bidwell v. Coleman*, 11 Minn. 78.

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# NEGLIGENCE.

- I. GENERALLY.
- II. WHEN ACTIONABLE.
- III. WHEN A BAR TO AN ACTION.

(See EVIDENCE, 141, *et seq.*)  
(See DAMAGES, 29, 30.)  
(See CIVIL ACTION, XI.)  
(See MASTER AND SERVANT, I., a. b. c.)  
(See PLEADINGS, 48, 69.)

## I. GENERALLY.

1. The mere act of stepping on the connecting link between two railroad cars is not in itself negligence. *Johnson v. Winona & St. Peter R.R. Co.*, 11 Minn. 296.

2. Negligence is a mixed question of law and fact to be left to the jury, under the instruction of the Court as to what constitutes negligence. *Ib.*

3. The mere leaving a horse unwhitened is not in itself negligence; it must depend upon the disposition of the horse; whether he was under the observation and control of some person all the time, and many other circumstances, to be determined by the jury from the facts in the case. *Griggs v. Fleckenstein*, 14 Minn. 81.

4. Burning grass and stubble. At common law, every person is bound to use his property with due regard to the rights of others, and although it is lawful for a party to burn grass and stubble, he is not at liberty to do so, where, on account of the time, manner and circumstances, it appeared certain, or probable, that damage to others would follow. He is bound to use such care and diligence as an honest and prudent man would have observed to prevent accident and damage to others. *Dewey v. Leonard*, 14 Minn. 153.

## II. WHEN ACTIONABLE.

5. It is negligence to allow the water in the boiler of a steamboat to fall below three inches above the flue of the boiler, unless the same happened through inevit-

able accident—following *McMahon v. Davidson*, 12 Minn. 357. *McMahon v. Davidson*, *impl'd*, etc., 12 Minn. 357; *Fay v. Davidson*, 13 Minn. 523.

6. Excavating adjoining soil. Although defendant had the right to make an excavation, he was bound to exercise the same with all necessary and reasonably practicable care and skill, so as to save the neighboring proprietors from any injurious consequences which might result from changing the natural surface of the ground, and if in such case the defendant, by proper caution, might have avoided or prevented the injury to plaintiff's premises, the want of such caution is sufficient to sustain an action for damages—as where by the excavation a current of water was so altered as to injure plaintiff's land. *Rau v. Minnesota Valley R. R. Co.*, 13 Minn. 442.

7. For a statement of facts sufficient to sustain a verdict against defendant on ground of negligence, see *Carroll v. Minnesota Valley R. R. Co.* 14 Minn. 57.

8. Boiler explosion. While the steamboats "Albany" and "John Rumsey" were navigating the Mississippi near each other, the Rumsey's boiler exploded, injuring plaintiff, who was a deck hand on the "Albany." Held, the fact of the explosion is full *prima facie* evidence, as against those interested in the boat's navigation as joint owners of her earnings and profits, that it was caused by their fault or negligence or that of their servants, and Sec. 13, Act of Congress, July 7. 1838, is not limited in its applications to suits brought but by passengers. But such fact is full *prima facie* evidence of negligence in this action. *Connolly v. Davidson et al.*, 15 Minn. 519.

9. Construction of a building—negligence of sub-contractor. Where defendants had contracted with S. to build a building of the best material and in a workmanlike manner, and defendants sublet the job of building the stone walls to a sub-contractor, whether an independent one or not, it was the right and duty of de-

feudants to see that the materials used by the sub-contractor were of the best quality and work performed by him done in a workmanlike manner. If the materials furnished, or the work done by the sub-contractor, were of such a character that the walls were unsafe and unfit for the purpose for which they were intended, and defendant knew this, or might have known it with the exercise of reasonable care and diligence, and went on and made use of the walls and incorporated their own (wood) work with them, and made payments to the sub-contractors, and accepted the work as it proceeded, and if in consequence of the unsafe and imperfect character of the materials so furnished, and the work so done by the sub-contractor, the building fell upon and injured the premises and property of the plaintiff, the defendants are chargeable with negligence, and liable for the damages resulting. *Bast v. Leonard et al.*, 15 Minn. 304.

### III. WHEN A BAR TO AN ACTION.

**10. Contributory negligence: what is it.** In actions for negligence, in the sense in which the maxim, "*causa proxima non remota spectatur*," is used, one's misconduct is called "the proximate cause of those results, which a prudent foresight might have avoided." It is called the remote cause of other results. *Locke v. First Div. St. Paul & P. R. R. Co.*, 15 Minn. 350.

**11.**—Although the defendant may be guilty of negligence, unless there was some intentional wrong on his part, the plaintiff cannot recover for an injury to to which he contributed—following *McMahon v. Davidson*, 12 Minn. 357. *Carroll v. Minnesota Valley R.R. Co.*, 13 Minn. 57.

**12.** For circumstances which show such negligence on part of plaintiff, as will prevent his recovery from injuries resulting from negligence of defendant, see *Ib.*

**13.** Plaintiff in the discharge of his duty, placed himself upon the defendant's track and was injured by defendant's cars.

*Held*, although plaintiff placed himself on the track, with his back to the train in such a way that he could not see it, and the engineer could not see him, still if he attempted to give notice, or used reasonable care to do so, and had good reason to believe, and did believe, that those in charge of the train were notified of his intention to place himself upon the track, he was not, thereby, as a matter of law, guilty of negligence, even though those in charge were not, in fact, notified. *Ib.*

**14.** If the plaintiff in the discharge of his duty, with ordinary care and prudence, placed himself in a perilous position, and was there injured by the negligent act of defendant, the former is not chargeable with contributory negligence, although the possibility of such act of defendant made the position perilous. *Carroll v. The Minnesota R. R. Co.*, 14 Minn. 57.

**15.** In action for injury to person or property, plaintiff cannot recover if he contributed to the injury by his own culpable negligence, or if by the exercise of ordinary care, he could have avoided the injury. *Griggs v. Fleckenstein*, 14 Minn. 81.

**16.** Plaintiff's unlawfully allowing his cow to run at large, whereby she strays upon defendant's track and is killed, is a proximate cause of her death. *Locke v. First Div. St. Paul & P. R. R. Co.*, 15 Minn. 350.

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### NEW TRIAL.

#### I. GENERALLY.

#### II. GROUNDS FOR A NEW TRIAL.

- a. *Erroneous examination of witnesses.*
- b. *Admission or rejection of testimony.*
- c. *Misdirection or omission of the the court.*
- d. *Verdict not justified by the evidence.*
- e. *Variance.*



- f. Irregularity or misconduct of the jury.*
- g. Surprise.*
- h. Newly discovered evidence.*
- i. Trial by referee.*

## III. THE MOTION.

## IV. COSTS.

(See CRIMINAL LAW, 129.)

(See PRACTICE, II. 16, B. I. *e. f.*)

(See PRACTICE, II. 16, B. II. *j. k.*)

(See PRACTICE, II. 16, B. III. *g.*)

## I. GENERALLY.

**1. The power of the District Court to grant a new trial is not conferred by statute; it is inherent in courts of general jurisdiction—not given, but regulated by statute.** *McNamara v. Minn. Central R. Co.*, 12 Minn. 388.

**2. A new trial may be granted not only for error in law in some ruling or charge, but for reasons which, though manifest to the court that tried the case, cannot be clearly presented to the appellate court.** In the latter case, the application is ordinarily to a discretion which cannot be reviewed or overruled, unless clearly abused. And where it does not appear on what ground it was granted, or that there was no ground, the order will not be reversed. *Marsh v. Webber*, 13 Minn. 109.

**3. Where new trial would not change the result.** If it is apparent to the appellate court, from the whole case, that a new trial would not change the result already arrived at in the case, notwithstanding error may have occurred in the course of the trial, a new trial will not be granted. *Dorr v. Mickle*, 16 Minn. 20.

**4.**—The object of a new trial is to afford a fair trial; and if the court can see that there is no reasonable ground to apprehend that injustice was done by the reception of immaterial testimony, or to apprehend that the jury were misled by it, to the substantial prejudice of the objecting party, a new trial should not be grant-

ed. *Cole v. Maxfield*, 13 Minn. 235; *Clague v. Hodgson*, 16 Minn. 329.

**5. When it should be granted.** I think whenever an error complained of may reasonably be supposed to have influenced the minds of the jury generally, for or against either of the parties, or where there is any doubt whether it did so influence or not, a new trial should be awarded. *FLANDRAU, J. Bond v. Corbett*, 2 Minn. 258.

**6. Often discretionary with court.** It is well settled, that in many cases the granting of a new trial is matter resting within the sound legal discretion of the court, and that it should ordinarily be granted, if, for any cause, it appears substantial justice has not been done. *Marsh v. Webber*, 13 Minn. 109.

## II. GROUNDS FOR A NEW TRIAL.

*a. Erroneous examination of witnesses.*

**7. Harmless, erroneous cross-examination.** Even if a certain cross-examination was improperly allowed, unless some injury resulted, it is no ground for a new trial. *Dodge v. Chandler*, 13 Minn. 114.

*b. Admission or exclusion of evidence.*

**8.** Neither a refusal of the court to adjourn for the procurement of evidence impertinent to the issue, nor the admission of evidence in support or controversion of evidence already in, but irrelevant, nor the instructions to the jury on irrelevant topics, are sufficient grounds for a new trial. *Coit v. Waples et al.*, 1 Minn. 134.

**9.** Where no harm resulted from the unnecessary or improper admission of evidence, it will furnish no ground for a new trial. *Illingworth v. Greenleaf*, 11 Minn. 235; *Winona and St. Pt. R. R. Co. v. Waldron et al.*, 11 Minn. 515; *Cole v. Maxfield*, 13 Minn. 235; *Yale v. Edgerton*, 14 Minn. 194; *Baldwin et al. v. Blanchard*, 15 Minn. 489; *Clague v. Hodgson*, 16 Minn. 329.

**10.** Where immaterial testimony has been allowed to go to the jury, but in such

a way as to be clearly severable from the rest, it is no ground for a new trial. *Shelley et al. v. Lash*, 14 Minn. 498.

**11.** The admission of incompetent evidence, when also immaterial, is no ground for a new trial. *State v. Staley*, 14 Minn. 105.

**12.** The admission of parol testimony of a levy, where the same is not in issue, is no ground for a new trial. *Dodge v. Chandler*, 13 Minn. 114.

**13.** The exclusion of evidence of the date of an execution not in issue, is no ground for a new trial. *Ib.*

**14.** A verdict will not be set aside on the ground that irrelevant questions or testimony was admitted, unless it appeared, or might reasonably be inferred, that prejudice had been sustained by the complaining party. *Lynd v. Picket et al.*, 7 Minn. 184.

**15.** The reception of testimony not strictly rebutting, after the plaintiff had closed his case, (the defendant having begun in this case,) although certainly not in accordance with the general rule, would not furnish ground for a new trial, unless actual and manifest injustice were the result. *Thayer v. Barney*, 12 Minn. 502.

**16.** Assuming that there is in a case competent evidence sufficient to justify the finding of the court in the case, yet where the amount of testimony improperly admitted was large, and its character important, it is impossible to say the mind of the judge below was not influenced by it, or to what extent he was influenced, a new trial will be awarded. *Lowry et al. v. Harris et al.*, 12 Minn. 255.

**17.** Plaintiff set up two distinct libels as causes of action. The verdict of the jury was general. *Held*, the damages not being apportionable, the admission of incompetent evidence in support of one of the causes of action, will necessarily require a new trial. *Simmons v. Holster et al.*, 13 Minn. 249.

**18.** Where written correspondence is the only competent evidence of a material part of a cause of action—contract—and

oral evidence thereof was submitted to the jury which the court cannot say did not influence them, and the party introducing such evidence proceeded on the theory of proving the contract by parol evidence, and submitted the case on that theory, though a small portion of those letters were put in evidence, and the balance of the correspondence introduced by the other side, this court will not examine the correspondence to see if it establish a contract, but grant the injured party a new trial. *Steele et al. v. Etheridge*, 15 Minn. 501.

*c. Misdirection or omission of the court.*

**19.** Where a court refuses to charge as requested, and a party sits quietly by without taking an exception, he cannot afterwards, at his leisure, study out objectionable portions of the charge, and claim a new trial upon such ground. *Roehl et al. v. Baasen*, 8 Minn. 26.

**20.** Where a verdict is general, and passes upon more than one issue, an erroneous charge as to one, will reverse the whole. *Whitacre v. Culver*, 8 Minn. 133.

**21.** Where no injury could result from an instruction to a jury, it, though erroneous, is no ground for granting a new trial. *Shelley et al. v. Lash*, 14 Minn. 498.

**22.** An erroneous charge in relation to a mere abstract proposition of law, not applicable to the case, and where it is manifest no injury could have resulted to the party against whom the error was committed, will not be a ground for a new trial. *Blackman v. Wheaton*, 13 Minn. 326.

**23.** No ground for reversal of judgment, that the court refused to give in the charge to the jury a mere abstract proposition inapplicable to the facts, though correct. *State v. Staley*, 14 Minn. 105.

**24.** It is not error for a court to refuse to charge a jury upon a state of facts not disclosed by the evidence. *Cowley v. Davidson*, 13 Minn. 92.

**25.** The refusal of the court to charge certain requests based upon a state of facts which they would have no authority to

find, is not ground for a new trial. *Sanborn v. School District No. 10, Rice Co.*, 12 Minn. 17.

**26.** It is no ground for a new trial, that the court instructed the jury erroneously upon a point which, from the facts in the case, was not necessary—and it appears no injury resulted. *Ames v. The First Div. St. Paul and P. R. R. Co.*, 12 Minn. 412.

**27.** The court instructed the jury in such a way as to withdraw from their consideration questions of fact which the jury had a right to pass upon, but the verdict of the jury showed that they must have passed upon those questions, notwithstanding the instruction. *Held*, there being testimony to support the finding, the verdict will not be set aside, though the court, under all the circumstances, would have come to a different conclusion. *Dike v. Pool et al.*, 15 Minn. 315.

**28.** Where the refusal to give instructions is abstractly correct, though such refusal might mislead the jury, still it is not ground for a new trial, where it does not appear that the jury had knowledge of the same. *Ib.*

*d. Verdict not justified by the evidence.*

**29.** No reversal of a verdict or finding can be had in this court, on the ground that it is against the weight of evidence, nor unless it is plainly contrary to the weight of evidence. *Dixon v. Merritt et al.*, 6 Minn. 160.

**30.** Where a question of fact has once been submitted to a jury, upon which some pertinent evidence has been introduced, the verdict will not be set aside on ground of insufficient evidence to sustain the verdict—especially where no evidence to disprove the fact was offered. *Heinlin v. Fish*, 8 Minn. 70.

**31.** A verdict will not be set aside where any evidence was before the jury from which they could find as they did. *Maroney et al. v. State*, 8 Minn. 218.

**32.** G. S., Chap. 66, Sec. 235, Sub. 5,

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allowing a new trial when the "verdict, report, or decision is not justified by the evidence, or is contrary to law," is substantially the same as the prior statute allowing a new trial for "insufficiency of the evidence to justify the verdict or other decision, or that it is against law. Comp. St., Chap. 61, Sec. 59, Sub. 5, p. 564. *Tozer et al. v. Hershey*, 15 Minn. 257.

*e. Variance.*

**33.** Sec. 59, R. S. p. 359, (1851), does not authorize the granting of a new trial on ground of variance between the pleadings and proof. *Short v. McRea & Register*, 4 Minn. 119.

*f. Irregularity, or misconduct of the jury.*

**34.** The misconduct of a jury cannot be proved by the testimony of jurors, or by third persons who obtain their information from jurors. *St. Martin v. Desnoyer*, 1 Minn. 156.

**35.** Misconduct of a juror, as a basis for a new trial, cannot be established by the affidavit of one person, where the juror distinctly denies the same facts under oath—such proof leaves the matter *in equilibrio*. *State v. Dumphrey*, 4 Minn. 438.

**36.** After a jury had been out about twenty-four hours, they came in, and, being asked by the court if there was any probability that they would agree upon a verdict, the foreman responded that the jury stood eleven to one. Thereupon the court stated that "it was a very important matter that the jury should agree, and that he thought that they had better make another effort," whereupon said jury retired, and after an interval of about twenty-five minutes, returned a verdict for the defendant. *Held*, the disclosure of the foreman as to how the jury stood was no violation of his oath, nor had it any tendency to induce the juror who stood out to think that he was not doing right in adhering to his opinion. *McNulty v. Stewart*, 12 Minn. 434.

**37.** On motion for new trial juror's affidavit will not be received to impeach the

verdict—as a general rule—nor the affidavit of others as to what jurors have stated. *Knowlton v. McMahon*, 13 Minn. 386.

**38.** On motion for a new trial the affidavit of jurors will not ordinarily be received to show that the officer remained with the jury, conversed with certain jurors, and sought to, and did, influence them in regard to their verdict. *Ib.*

**39.** On a motion for a new trial, an affidavit of a juror, that he would not have concurred in the verdict, had not his health absolutely required him to be released from confinement as a juror, and that the verdict was contrary to his view of the case, cannot be received to impeach the verdict of the jury. Such affidavit is within the rule excluding affidavits of jurors to impeach their verdict. *State v. Stokely*, 16 Minn. 282.

**40. Special verdict not covering all questions.** It is no ground for a new trial that a jury in returning a special verdict do not answer in whole, or in part, a question submitted to them, where it does not appear for what purpose, or in what view, the question was material. *Finch v. Green*, 16 Minn. 355.

**41. Drinking liquor.** For remarks on the habitual drinking of liquors during a trial by jurors, and playing at cards late at night, see *State v. Purrant*, 16 Minn. 178.

**42. Query,** whether on motion for a new trial, the affidavits of jurors can be received to show the misconduct of the pre-  
vailing party. *Ib.*

*g. Surprise.*

**43.** New trial will not be granted on ground of surprise arising from the impossibility of a case being tried on the day set down for its trial, and the party leaving for home on advice of the counsel, and not returning until after the cause was called and tried. *Desnoyer v. McDonald, Gusse & Co.*, 4 Minn. 515.

**44.** Where the priority of record of plaintiff's lien over defendants was in issue, and the defendants in preparing for trial

had procured from the Register an abstract of the records, whereby it appeared defendants' lien was first recorded, and on the trial plaintiff was allowed to introduce parol evidence, that the record was erroneous, and lien of plaintiff was actually recorded first, it is such surprise as will authorize a new trial—where defendants have other evidence to sustain their position—the “abstract” showing the necessary degree of diligence. Sec. 29, p. 158, Comp. St. *Shaw v. Henderson*, 7 Minn. 480.

*h. Newly discovered evidence.*

**45.** In an action against P., on a contract of indemnity executed by his agent B., the defense was, want of authority in B. to make the contract. The plaintiffs claimed a subsequent ratification, and gave notice—before trial—to defendants P. and B. to produce all correspondence between them. On the trial no correspondence was produced. P. in his testimony denied all knowledge, and B. did not recollect having informed him. After trial and judgment, for defendant, plaintiffs discovered letters written by P. to B., touching the contract of indemnity, and material to the issue, of which they were ignorant before and at the trial, whereupon they moved for a new trial. *Held*, plaintiffs showed due diligence, and could not be chargeable with negligence in failing to elicit the facts contained in the letters by a cross-examination, for by the positive manner in which they testified, the plaintiffs were misled. Plaintiffs entitled to a new trial. *Humphreys et al. v. Havens et al.*, 9 Minn. 318.

**46.** A new trial on the ground of newly discovered evidence will not be granted where it goes only to one of several issues, which were all decided against appellant, and contrary finding on that issue will not alter the result. *Sharpe v. Traver, et al.* 8 Minn. 273.

**47.** Where it is apparent that the volume of testimony is largely against the facts alleged in the affidavits used on a motion for a new trial, and that with such ev-

idence a new trial would not be likely to change the result ; or there appears on the whole, evidence sufficient to sustain the verdict, a new trial ought not to be granted. *Mead v. Constans*, 5 Minn. 171.

**48.** Cumulative or impeaching evidence is never sufficient to warrant a new trial, even if not known until after the first trial has ended. *State v. Dumphey*, 4 Minn. 438.

**49.** The discovery of evidence since the trial, which is only impeaching, corroborative, or cumulative of what was given on the trial, is no ground for a new trial. *Mead v. Constans*, 5 Minn. 171.

**50.** A new trial will not be granted on ground of newly discovered evidence, where the same is cumulative; and cumulative evidence is additional evidence to support the same point, and which is of the same character. *Nininger v. Knox et al.*, 8 Minn. 140.

**51.** An affidavit on motion for a new trial, on ground of newly discovered evidence, which states that deponent *is informed and believes* a certain individual will testify to the existence of a particular fact, is entirely insufficient—he should show by the witness's own affidavit that he will so testify or excuse the failure to produce it. *Keough v. McNitt*, 6 Minn. 513.

**52.** On an application for a new trial, on ground of newly discovered evidence, the affidavit of the witness himself as to what he will testify to must be produced, or satisfactorily accounted for. *Eddy, Fenner & Co. v. Caldwell*, 7 Minn. 225.

**53.** A party applying for a new trial, on ground of newly discovered evidence, must make his vigilance apparent, for if it be left even doubtful that he knew of the evidence, or *that he might but for negligence* have known and produced it, his application will be denied. *Nininger v. Knox et al.*, 8 Minn. 140.

*i. Trial by referee.*

**54. Delay in filing referee's report.** Action was tried and submitted April 20, 1868; on Nov. 19, 1869, the referee made and

delivered his report to plaintiff's attorneys, and next day departed from the State, and took up his residence in Washington. On Jan. 31, 1870, the report was filed with clerk of court. *Held*, the delay in filing the report upon the part of the referee, and his subsequent absence—under the circumstances appearing in the affidavits used upon the motion—which were conflicting, are not sufficient grounds for a new trial. *Leyde v. Martin et al.*, 16 Minn. 38.

### III. THE MOTION.

**55. When after judgment.** Motion for a new trial may be made after judgment entered in District Court, for causes specified in Sec. 1, 2, 3, and 6, Sec. 59, p. 564, Comp. St., only. *Eaton v. Caldwell*, 3 Minn. 134. (See "*errata*," in 3 Minn. correcting this case.)

**56. On trial by the Court.** Under Sec. 33, p. 564, Comp. St., where the trial was by the Court, a motion for a new trial must be made as early as possible, after notice that decision has been rendered and before entry of judgment. *Groh v. Bassett*, 7 Minn. 325.

**57. After appeal.** The District Court cannot entertain a motion for a new trial after an appeal has been taken—for want of jurisdiction. *McArdle v. McArdle*, 12 Minn. 122.

**58. Counter affidavits.** On a motion for a new trial on the ground of newly discovered evidence, counter affidavits are admissible. *Finch v. Green*, 16 Minn. 355.

**59. Time for making, where case tried by jury.** It would seem to be necessary, under Sec. 222, Chap. 66, G. S., that where a case has been tried before a jury, the motion for a new trial should be made before entry of judgment. *Conklin v. Hinds*, 16 Minn. 457.

**60.—on trial by referee or court.** After judgment had been entered on the findings of the court, in an action tried before it without a jury, a motion for a new trial was made and denied. On an appeal from the order denying the motion for a

new trial. *Held*, that the statute being silent, and the District Court having adopted no general rule on the subject, it is for the judge before whom such motion is made, to decide upon the circumstances of each case, whether a motion for new trial made after judgment rendered upon the report of referee or decision of a judge, filed in vacation, comes too late; and this Court would not reverse such decision unless an abuse of discretion were shown, such as the entertaining of a motion for a new trial after the time for appeal from the judgment had expired. If made before such expiration in the absence of *laches*, it is discretionary. In this case, having been made at the next general term after the findings were perfected, and before expiration of time for appeal, it was in time. *Ib.*

#### IV. COSTS.

**61.** In all cases where a new trial is ordered for error committed by the Judge, the costs of the irregular trial should abide the event of the suit, and be recoverable by the party who ultimately succeeds. *Walker v. Barrow*, 6 Minn. 508.

### NEW PROMISE.

(See LIMITATION OF ACTIONS, IV.)

### NON SUIT.

(See PRACTICE, II., 11, B. j.)

## NOTES AND BILLS.

### I. REQUISITES OF A NOTE.

### II. WHAT IS A NEGOTIABLE INSTRUMENT.

### III. MAKER.

### IV. INDORSER.

### V. INDORSEMENT.

### VI. TITLE, HOW TRANSFERABLE.

### VII. ACCEPTANCE.

### VIII. PRESENTMENT FOR PAYMENT AND NOTICE OF NON-PAYMENT.

### IX. PROTEST AND NOTICE THEREOF.

### X. BONA FIDE HOLDER, WHO IS.

### XI. DEFENSES.

### XII. PRESUMPTIONS ARISING FROM POSSESSION, ETC.

(See ASSIGNMENT, I., 4.)

(See CIVIL ACTION, VII.)

(See EVIDENCE, 155.)

(See LIMITATION OF ACTIONS, 22.)

(See MECHANIC'S LIEN.)

(See PLEADINGS, 5.)

(See REGENTS OF THE UNIVERSITY OF MINNESOTA.)

(See SCHOOL DISTRICT, 7.)

### I. REQUISITES OF A NOTE.

#### 1. Must be a promise to pay money.

The following instrument is not a promissory note :

"Certificate of deposit. Chicago, July 14, 1864. Hyde and B. have deposited in this office five hundred and thirty-five and 75-100 dollars in treasury notes, to the credit of themselves, and payable to their order hereon, in United States six per cent. interest bearing bonds."

—It not being an agreement to pay money, but a contract to deliver U. S. bonds of the description specified, to the nominal amount of \$535.75, and its endorsement simply assigned the beneficial interest therein. Distinguished from a contract payable in a certain amount of cattle, etc. *Easton v. Hyde et al.*, 13 Minn. 90.

### II. WHAT IS A NEGOTIABLE INSTRUMENT.

**2.** An instrument under seal, though in the form of a promissory note, is not a negotiable instrument in the absence of statute. *Helper v. Alden, Cutter & Hull*, 3 Minn. 332.

**3.** A draft or bill payable in "cur-

rency," is payable in money, and negotiable. *Butler v. Paine*, 8 Minn. 324.

**4. A promissory note drawn upon a particular fund** is not a commercial negotiable note. *Regents of University of Minn. v. Hart et al.*, 7 Minn. 61.

### III. MAKER.

**5. A person who writes his name in blank on the back of a note at its inception**, before delivery, for the purpose of giving the maker, or principal, credit with the payee, is liable as an original promissor. *Pierce v. Irvine, Stone & McCormick*, 1 Minn. 377.

**6.**—Although the character in which one endorses in blank a note contemporaneous with the making of it, can be explained, yet, *prima facie*, he is a maker. *Id.*

**7.**—A party who signs his name on the back of a note before its delivery to the payee, is liable as a maker. *Marienthal, Lehman & Co. v. Taylor et al.*, 2 Minn. 149.

**8.**—If from parol evidence it can be made to appear that a party who signs his name on the back of a note before delivery to payee, did so sign to give the note credit with the payee, and the payee was influenced in receiving it, and parted with his money or property in consequence of such name, the party so signing may be held as original maker of the note. *McComb, Simpson & Co. v. Thompson*, 2 Minn. 146.

**9. Note made by "Trustees of a School District,"** how executed to exempt them from personal liability. The addition of the words, "Trustees of School District No. 5," to the signatures of the makers of a promissory note, will not relieve them from personal liability—to relieve them from all liability, except as trustees, it must appear in or from the instrument itself, that they executed the same in their capacity as trustees. See *Sanborn v. Neal et al.*, 4 Minn. 126. *Fowler et al. v. Atkinson*, 6 Minn. 578.

**10. Maker not entitled to demand and notice as an indorser.** A party who signs his name across the back of a note, before

same is delivered, in order to give the same credit, and induce the payee to take it, is a joint maker, and not entitled to demand and notice as an indorser. *Robinson v. Bartlett et al.*, 11 Minn. 410.

**11. Character in which signers make a note.** The makers of the following note are *prima facie* personally liable:

"\$69.00. Nine months after date, for value received, we, the Trustees of School District No. 20, County of Olmstead, promise to pay N. W. Bingham, or bearer, the sum of sixty-nine dollars, with interest at the rate of ten per cent. per annum from date.

WALTER STEWART, }  
ROBERT ROBERTSON, } Trustees.  
JOHN DAVISON, }

St. Charles, Minn., April 1, 1865."

—*Bingham v. Stewart*, 13 Minn. 106.

### IV. INDORSER.

**12. An indorser may pay a judgment against himself and maker, and take an assignment directly to himself.** Under Sec. 36, Comp. St. 535, an indorsee of a promissory note obtained judgment against the maker and indorser; the latter paid the judgment, and took an assignment to a third person for his benefit. *Held*, the payment by the indorser did not extinguish the judgment, and thus render it necessary for the indorser to obtain another judgment against the maker—that he might have taken the assignment directly to himself, without the intervention of a trustee. *Folsom et al. v. Carl*, 5 Minn. 333.

**13. An indorser may compel holder to first exhaust security.** Under act of 1860, March 8, p. 216, an indorser of a secured note may compel the holder to exhaust the security before resorting to him. *Swift v. Fletcher*, 6 Minn. 550.

### V. INDORSEMENT.

**14. Liability created by indorsement of non-negotiable note.** Indorsement of a non-negotiable promissory note creates the same liability as between the indorser and indorsee as though it was negotiable,

but not as to subsequent holders, unless the indorsement makes it payable to the order of the indorsee, or the indorser expressly promises to pay the note to the holder in consideration of the indorsement. *Helper v. Alden, Cutler & Hull*, 3 Minn. 332.

**15. What amounts to contract of indorsement.** A. drew up a note for B. to sign, in favor of C., and indorsed it before it was signed by B., with the understanding and agreement between him and C. that the latter should obtain the signature of B. to said note, and hold the same against A. as an indorser. The signature of B. was so obtained. *Held*, A. liable as indorser, for by delivering the note to C., with that understanding, made C. his agent to procure the note to be completed. *Rogers v. Stevenson*, 16 Minn. 68.

**16.—consideration, what sufficient.** A. sold goods to B. on the faith of a verbal promise by C., that he would pay for them if B. did not. C. afterwards indorsed B.'s note to A. for the amount of the debt. *Held*, sufficient consideration to support C.'s contract of indorsement. *Ib.*

**17.—**Extension of time to a debtor by taking his note on time, is a sufficient consideration to sustain a contract of indorsement on the debtor's note so given. *Ib.*

**18.—**It seems that if a note was given upon a good consideration, the same consideration would extend to and support a contemporaneous indorsement. *Ib.*

**19.—**An indorsement of a non-negotiable note amounts simply to an authority to the indorsee to receive the money of the maker, and an undertaking that it will be paid on due presentment, hence involving the ordinary responsibility of an indorser—though it gives the indorsee no right against any antecedent indorsee for want of privity of contract—following *Helper v. Alden, Cutler & Hull*, 3 Minn. 332. *Hart & Munson v. Eastman & Gibson*, 7 Minn. 74.

**20. Effect of indorsement unsigned.** Indorsements of payments on the back of a promissory note unsigned, and it not appearing in any way by whom they were

placed there, are not evidence for any purpose, and the note can be introduced in evidence without such indorsements. *Turrell v. Morgan*, 7 Minn. 368.

**21. Nature and effect of indorsements.** Indorsements on the back of written instruments are independent writings, in the nature of receipts or written declarations, and can be read in evidence only after proof made that they are signed by the party sought to be charged, or have received his assent in some binding form. *Ib.*

**22.—**As to force and effect as evidence of indorsements on promissory notes, see *Turrell v. Morgan*, 7 Minn. 368, as explained by *State v. Monnier*, 8 Minn. 212.

**23. Effect of an indorsement after due.** After a promissory note became due, the maker and holder agreed that if the former would procure defendant to indorse it, the latter would extend time of payment ten months. Defendant, at maker's request, but in ignorance of the agreement, wrote his name on the back, with date of signature. The holder thereupon extended time of payment ten months, at expiration of which time, note being unpaid, notified defendant thereof. *Held*, defendant was not liable as a maker, on the ground that his signing was a re-issue, for it never ceased to be the property of the holder; nor as an indorser, for being past due, it was in effect payable on demand, and entitled, hence, to reasonable notice of non-payment, but ten months was not such reasonable notice *prima facie*; nor as a guarantor, for no note or memorandum in writing, expressing the consideration, was written over his signature, to bind him to pay the debt of another, within Statute of Frauds. *Moore v. Folsom, impl.*, 14 Minn. 340.

## VI. TITLE, HOW TRANSFERABLE.

**24. Transferable by delivery.** A promissory note, like any other personal property, can be transferred by mere delivery, so as to pass the title, and the right



to sue in the name of the holder; where a note is payable to order, and found in the hands of a person not the payee, without the indorsement of the payee, the difference between such holder and one who holds by indorsement, is that the former is not a *bona fide* holder, and the latter is. *Pease, Chalfant & Co. v. Rush, Pratt & Co.*, 2 Minn. 111.

**25. Delivery not necessary.** A party can transfer his interest or title in a promissory note otherwise than by indorsement or actual delivery thereof. *Nininger v. Banning*, 7 Minn. 274.

**26.**—The title to a note will pass without indorsement. *Tulles v. Fridley*, 9 Minn. 79.

## VII. ACCEPTANCE.

**27. By partner.** Under Sec. 7, p. 375, Comp. St., which requires an acceptance of a bill of exchange, to be valid, to be in writing, signed by the acceptor or his lawful agent, "N.," partner of "N. & M.," cannot bind the firm by accepting a bill of exchange, drawn on the firm, in these words: "Accepted this 25th July, 1859." *Heenan v. Nash*, 8 Minn. 407.

**28. By partner, in his own name, etc.** An acceptance by an individual, in his own name, of a bill drawn on a firm of which he is a member, will not bind the individual—he being an entire stranger to the bill. *Ib.*

**29.**—It seems, that where a bill is drawn on several individuals, an acceptance by any one of them is binding upon him, although the bill may be treated, and should be, as dishonored, if not accepted by all the drawees, because the holder is entitled to the acceptance of all; but in such case a liability accrues against the party accepting, because he is a drawee as much as if the bill had been drawn upon him alone. *Ib.*

## VIII. PRESENTMENT AND NOTICE OF NON-PAYMENT.

**30. Presentment where place and**

**time are specified, as against maker.** As against the maker of a note or acceptor of a bill payable on a day certain, at a specified place, the holder is not bound to make a demand at that time and place, to enable him to maintain an action. But if the maker was ready, at that time and place, he may plead it, as he might plead a tender, in bar of damages and costs, by bringing the money into court. Hence, the payee of a note payable at a particular time and place, does not, as against the maker, *by the terms of the note*, bind himself to have the note at that place at or after its maturity, for delivery to the maker on payment or tender of payment; nor is a bank, or any of its officers—that being the place of payment—the holder's agent for any purpose, in such a case, except to receive the amount due on the note or bill, when *unconditionally* paid or tendered as payment by the maker or acceptor. *Balme v. Wambaugh et al.*, 16 Minn. 116.

**31. Known insolvency of makers will not excuse presentment** of a promissory note for payment as against an indorser. *Hart & Munson v. Eastman & Gibson*, 7 Minn. 74.

**32. Statements made by an indorser to an indorsee and holder**, that the maker of the note had no funds, is no excuse for a failure to present the same for payment in due time. *Ib.*

**33. Indorsers of non-negotiable promissory notes** are entitled to notice of non-payment. *Ib.*

**34. Presentment of non-negotiable note indorsed after due.** A non-negotiable promissory note, indorsed after due, must be presented for payment within a reasonable time, and what that is, is a question of mixed law and fact for the jury. *Ib.*

**35. Waiver of notice of non-payment.** The following indorsement does not constitute a waiver of notice of non-payment of a promissory note: "Eastman & Johnson, but not to be paid by us in any event

within one year from date, June 30, 1859." *Ib.*

### IX. PROTEST.

**36. By what law governed.** The protest of a promissory note is governed by the law in force at the time it falls due, not when it is made. *Levering et al. v. Washington*, 3 Minn. 323.

**37. Notice at common law.** At common law, notice of protest to indorsers, where they live in the same place, must be personal, and not deposited in the post-office. *Ib.*

**38. Service through mails.** Notice of protest was served on Baker, as indorser, by depositing a copy in the post-office at St. Paul. Baker lived nearer Roseville than St. Paul, and received most of his mail at Roseville, though he had a box in the post-office at St. Paul, and received some of his mail there. *Held*, the notice of protest was *irregularly* served, under a statute which required the notice to be deposited in the post-office "nearest the reputed place of residence of the party." Sec. 5, G. L. 1856, Chap. 5. *Marshall et al. v. Baker et al.*, 3 Minn. 320.

**39. Parol agreement between parties at making of note, as excuse for want of notice of protest.** A parol agreement between the maker, payee and indorsee of a promissory note, made at the time of the indorsement, that the note should not be paid by the makers until 15 days from date of transfer, and after maturity, is without consideration, and will not excuse demand and notice of protest between indorser and indorsee. Nor the fact that the makers had run away when note was due—for the fact of such absconding should have been brought to the notice of the indorser, and cannot be proved unless pleaded. *Michaud v. Lagarde et al.*, 4 Minn. 43.

**40. Requisites of notice by mail.** A notarial notice of protest, properly folded and addressed, is sufficient, whether under cover of an "envelope" or not. *Kern v. Phul et al.*, 7 Minn. 426.

**41.**—Sec. 101, p. 135, Comp. St., which makes competent evidence the "instrument of protest accompanying any bill of exchange or promissory note which has been protested," etc., applies to past as well as future protests. *Ib.*

**42. Notary's record not essential to validity of protest.** A notarial protest of a promissory note or bill of exchange is valid, though no record is made by him. *Ib.*

### X. BONA FIDE HOLDER, WHO IS.

**43. Note taken as collateral security for an existing debt.** SHERBURNE, J., thinks an indorsee of negotiable paper, as *collateral security* for an existing debt, would not hold it exempt from the equities between the original parties. *Becke v. Sandusky City Bank*, 1 Minn. 319.

**44. A note payable to order, passed without indorsement,** is not taken in the regular course of business, and is subject to the same disabilities as if it had been taken after due, but the title passes sufficiently to maintain a suit in the name of the owner. *Pease, Chalfant & Co. v. Rush, Pratt & Co.*, 2 Minn. 42.

**45. Note taken in payment of pre-existing debt.** Where a negotiable note of a third person is, before its maturity, taken in good faith as a *payment* (not collateral security) of a precedent debt, the indorsee is entitled to protection, as a holder for value, against any equities between the antecedent parties. *Stevenson v. Heyland et al.*, 11 Minn. 198.

### XI. DEFENSES.

**46. Equities between original parties do not bind an indorsee.** Equities arising between original parties to a promissory note cannot be set up as a defense in an action by the indorsee against the maker. *Becker v. Sandusky Bank*, 1 Minn. 318.

**47. Parol evidence to explain character in which person puts his name on the back of a note.** Where a person puts his

name on the back of a note, if there is anything to be found in the writing itself that indicates what particular relation the party intends to assume to the note, then parol evidence is inadmissible to vary such relation, but the party must be tried upon his written contract. The fact of the name being on the back of the note where an indorsement is usually made, is not as absolute in indicating its character as if it had written over it a contract of indorsement, and is capable of explanation as between all parties, before the note leaves the hands of the payee—not so in hands of *bona fide* holder. *McComb, Simpson & Co., v. Thompson*, 2 Minn. 146.

**48. Contemporaneous agreement.** In an action against defendants upon a promissory note, it is a good defense, if properly alleged and proven, that "at the making and delivery of said instrument, it was agreed by and between the plaintiff and the defendants that said instrument should be the promissory note of said school district, and not the note of the defendants." *Bingham v. Stewart et al.*, 14 Minn. 214.

**49. Improper disposition of mortgage security.** In an action on a promissory note to recover the balance due after the sale of mortgaged premises, as security for the same, it is a good defense to aver that the property was illegally sold, and that had it been legally sold, it would have brought more than enough to satisfy the note. *Lovell v. North & Carl*, 4 Minn. 32.

**50. Non-delivery, or want of consideration.** Between the original parties it may always be shown that the note was never delivered, or without consideration. *Ruggles et al. v. Swanwick et al.*, 6 Minn. 526.

**51.**—It seems, that a partial want of consideration cannot be interposed, as a defense to an action on a promissory note. *Walters v. Armstrong*, 5 Minn. 448.

**52. Partial want, or partial failure of consideration.** It seems, that in the absence of statute, a partial want or partial failure of consideration cannot be set up

in defense to a promissory note. *Whitacre v. Culver*, 9 Minn. 295.

**53. Note given on settlement.** If on a settlement between the maker and payee of a promissory note, the note is given for the balance found due the latter, and there has been found nothing paid on it since, the holder, who takes after maturity, is entitled to recover, unless it appears there was a mistake in that settlement. *Id.*

**54. Note was given for a policy of insurance which plaintiff had no power to issue.** Where an insurance company issued to defendant a policy which, by their charter, they had no power to issue, taking defendant's note for the premium. Held, that fact was a good defense to the note. *Rochester Insurance Co. v. Martin*, 13 Minn. 59.

## XII. PRESUMPTIONS ARISING FROM POSSESSION, ETC.

**55. Possession presumptive evidence of title.** Possession of a promissory note payable to bearer, is presumptive evidence that the holder is the proper owner or lawful possessor of the same, and sufficient to entitle the person producing it to receive payment therefor. *Woodbury et al. v. Larned*, 5 Minn. 339.

**56. Possession of unindorsed note payable to order of another.** Possession by B. of a note payable to the order of A., without any indorsement, is no evidence of ownership. *Van Eman v. Stanchfield et al.*, 13 Minn. 75.

**57. The giving a promissory note is prima facie evidence of an accounting and settlement between the parties, and that the maker was indebted, on such settlement, to the amount of the note.** This presumption may be explained—and a former indebtedness set up in defense to an action on a note by the payee against the maker. *Wakefield v. Spencer*. 8 Minn. 376.

**58. Where a negotiable note, payable to order, is transferred without indorsement, the holder takes it as a mere chose in action; and while he may maintain an**

action upon it in his own name, he must prove the transfer to himself; and mere possession is not *prima facie* evidence of the fact—explaining Pease, Chalfant & Co., v. Rush, Pratt *et al.*, 2 Minn. 107. *Van Eman v. Stanchfield et al.*, 10 Minn. 255.

**59. Where the facts admitted by the answer show the making and delivery of the note to the plaintiffs, they are presumptively the owners and holders of it, and the possession at time of suit by a bank, is the possession of the plaintiff.** *Hayward et al. v. Grant*, 13 Minn. 165.

## NOTICE.

(See MECHANICS' LIEN.)

(See BONDS, 2.)

(See SHERIFF, 8, 9, 10.)

(See DEEDS, VII.)

(See EVIDENCE, 139, 140.)

(See BONA FIDE PURCHASER, 3.)

**1. Notice of equitable lien.** Where a purchaser has notice of the existence of an equitable lien for the purchase money upon the land he buys, he will be bound by it, and *e converso*. *Selby v. Stanley*, 4 Minn. 65.

**2. The filing of a chattel mortgage,** under the law in force in 1857, was constructive notice of the mortgage to all parties—following Lienan v. Moran, 5 Minn. 482. *Eddy, Farmer & Co. v. Caldwell*, 7 Minn. 225.

**3. Possession of land.** A purchaser of land, knowing others are in possession, claiming a prior equity, (although the records disclosed no right in their behalf,) is presumed to purchase with full notice of those others' rights and equities. *Minor v. Willoughby & Powers*, 3 Minn. 225; *Seagar v. Burns et al.*, 4 Minn. 141; *Morrison et al. v. March*, 4 Minn. 422.

**4. What an insufficient possession.** A. by contract duly recorded, agreed to sell certain cultivated but unoccupied land to B., who assigned his interest to plaintiff

with A.'s consent. Plaintiff went upon the land in Oct., 1863, and repaired the fences, verbally agreeing with A. not to plow till spring, prior to which time he enlisted in the army, and left the State. In May, 1864, A. conveyed to defendant, who had notice of the written contract, but not of the assignment to plaintiff, nor of what plaintiff had done under it as aforesaid. *Held*, as the land was unoccupied, the mere entering thereon by plaintiff in the fall, repairing fences, and agreeing with A. that he need not plow till spring, the defendant being ignorant of any such transactions, is not a possession to affect defendant with constructive notice of his rights. *Smith v. Gibson*, 15 Minn. 89.

**5. Record notice,—defectively executed instrument no notice.** A bond for a deed, not acknowledged and having only one subscribing witness, is not entitled to record, and though recorded, cannot operate as notice actual or constructive. *Minor v. Willoughby & Powers*, 3 Minn. 225.

**6.**—Under Sec. 8, p. 398, Comp. St., which prescribes that all conveyances of real estate "shall be executed in the presence of two witnesses, who shall subscribe their names to the same as such," and Sec. 54, p. 404, Comp. St., which requires the same to be recorded to be notice against subsequent purchasers, for a valuable consideration. *Held*, a record of a mortgage purporting to have but one witness was not notice for any purpose. *Parret v. Shaubert*, 5 Minn. 323.

**7.**—Where a party desires to purchase or take an incumbrance upon land, his guide as to the title is the record of the county, and it is a well settled rule that the record of a deed is notice only of its contents, so far as the record discloses it. If the record contains any instrument which is not authorized to be recorded, either from the nature of its subject matter, or a defect in its execution, it is a mere nullity; and is not notice for any purpose. *Id.*

**8.** Whenever the instruments forming the purchaser's chain of title disclose an incumbrance, he is equally bound by such notice as by the record of the instrument

itself—*e. g.*, where a deed recited the existence of a mortgage for purchase money not on record—or as by actual notice of the same, as in case of vendor's lien without mortgage. *Daughaday v. Paine et al*, 6 Minn. 443.

### 9. Clause in deed recognizing lien.

Plaintiff took by conveyance, duly executed, which contained the following clause: "Subject to a mortgage executed by (grantor) to W," said mortgage had but one witness, hence void as such. *Held*, this clause is an express recognition by plaintiff of the existence of the defectively executed instrument, and of its nature as a mortgage, and being contained in a deed executed with all the formalities which should have been observed in the execution of the mortgage, is, *it would seem*, so far as the grantor and plaintiff are concerned, tantamount to a ratification or affirmance of the mortgage. *Ross v. Worthington*, 11 Minn. 438.

10. J., being the owner, conveyed to defendant, taking back a mortgage as security. The mortgage was recorded, but the deed was not recorded. Afterwards defendant conveyed to plaintiff, which deed was recorded, when J. conveyed to H. *Held*, the record of the mortgage and defendant's deed to plaintiffs, no notice to H. *Burke et al. v. Beveridge*, 15 Minn. 205.

11. Chap. 52, Sec. 1, G. Laws, 1858, making attachment and judgment creditors stand as *bona fide* purchasers against an unrecorded conveyance, is expressly limited to conveyances thereafter made, and consequently cannot have a retroactive effect. *Greenleaf v. Edes*, 2 Minn. 270.

12. **Quit-claim deed and possession as notice.** Swan conveyed to Bonham, deed never recorded. Bonham mortgaged to plaintiff, and then conveyed to Baldwin Brown, which mortgage and deed was recorded in their proper order. Baldwin Brown possessed the premises for two years—Chas. Brown living with him—having in possession or having destroyed the original deed from Swan, after which time he took a quit-claim deed from Swan of his

interest, for a nominal consideration of \$1, and then conveyed to Chas. Brown, who claimed to be a *bona fide* purchaser for value—expressed consideration \$1000; actual, \$400. *Held*, the quit-claim from Swan presupposed some interest in the grantee (B. Brown), and more particularly, he (Brown) being in actual possession, and Chas. Brown having lived with his grantor on the premises, prior to the execution of the quit-claim deed, and having examined the records, and there found plaintiff's mortgage, and Bonham's deed to Baldwin Brown, he had such notice, which, if pursued with reasonable diligence, would have led to knowledge of the unrecorded deed from Swan to Bonham. *Martin v. Brown et al.*, 4 Minn. 282.

13. **Defense of want of notice.** A defense on ground of want of notice never rests on proof alone—it must always be alleged fully, positively, and precisely, though the fact of notice be not charged. *Minor v. Willoughby & Powers*, 3 Minn. 225.

14. **Defective boundaries in deed on record—nonnotice.** R. and G. both claim a tract of land under a common grantor S. On Feb. 14, 1849, S. conveyed by warranty deed to R. described as follows: "One acre of land in the S. E.  $\frac{1}{4}$  of Sec. 32, T. 29, range 22, \* \* extending from the base of a bench of land north of the town of St. Paul, adjoining on the east by land by J. T., and on the west by land deeded by John Randall to Henry M. Rice, said acre of land so described being two chains in breadth, and five chains in depth," which deed was duly recorded March 2, 1849. On August 3, 1849, S. conveyed to G.'s grantor, one acre of land in Sec. 31, town 29, range 22. R.'s deed was intended to locate his acre in Sec. 31, so as to overlap on the west, part of the acre conveyed to G.'s grantor. The land described in R.'s deed as "adjoining on the east by land by J. T.," had not been deeded to J. T., but he was occupying the same, claiming title, under an understanding with the holder of the legal title that he was entitled thereto, and his boundaries

being readily ascertainable, and adjoining R.'s acre on the east, nearly but not quite the whole length thereof. R., prior to his deed, was not in possession of the tract claimed. The west boundary in R.'s deed was wholly untrue. *Held*, G.'s grantor had no notice, constructive or otherwise, of R.'s title. *Roberts v. Grace et al.*, 16 Minn. 126.

**15.—acts anterior to possession.** R., prior to his purchase of the land in question had performed certain acts thereon. After R.'s purchase, H. purchased the same land. *Held*, said acts of R. performed prior to his purchase was no notice to H. *Ib.*

**16. Attornment by tenant in possession.** Where there has been no visible change of possession, to indicate there had been a change of title, the attornment to the grantee, of a tenant holding under the grantor, will not supply the want of registry notice. *Ib.*

**17. Notice, what sufficient.** It seems that notice, which will put a man on inquiry, is such information as is sufficient to enable him to conduct an inquiry to a successful termination, otherwise the general rule that a title shall not be impeached by uncertainties will prevail. *Ib.*

## NUISANCE.

(See DAMAGES, 31.)

(See CIVIL ACTION.)

**1.** While the continuance of a nuisance is, in law, a new nuisance, yet where the nuisance was not erected or caused by a party, but simply continued, he should be allowed to abate it on notice, without suit, before being subject to an action. *Thornton v. Smith et al.*, 11 Minn. 15.

**2. Abatement and injunction discretionary with courts.** In actions to recover damages for nuisance, an abatement thereof, and a perpetual injunction against its continuance, under Sec. 25, Chap. 75, G. S., the abatement and injunction do not

follow the recovery of damages as a matter of course, but their allowance rests on the sound discretion of the court. *Finch v. Green*, 16 Minn. 355.

## OBJECTIONS.

(See PRACTICE, II., 11, B. g.)

## OFFENSES AGAINST CHASTITY, MORALITY, AND DECENCY.

(See CRIMINAL LAW, VIII, 5.)

## OFFENSES AGAINST LIFE AND PERSON.

(See CRIMINAL LAW, VIII, 6.)

## OFFENSES AGAINST PROPERTY.

(See CRIMINAL LAW, VIII, 7.)

## OFFICE DE FACTO.

(See OFFICE AND OFFICER, V.)

## OFFICIAL NEGLIGENCE.

(See CRIMINAL LAW, 39.)

## OFFICE AND OFFICER.

- I. GENERALLY.
- II. QUALIFICATIONS.
- III. WHO ENTITLED TO AN OFFICE.
- IV. VACANCY.
- V. OFFICER DE FACTO.
- VI. COMPENSATION.

(See MANDAMUS, 3, 4, 5, 10.)

(See SHERIFF.)

## I. GENERALLY.

**1. Presumption as to official character of officer in making contracts,—liability.**

Where a person known to be a public officer contracts with reference to the public matters committed to his charge, he is presumed to act in his official capacity only, though the contract may not in terms allude to the character in which he acts, unless by unmistakable language he assumes a personal liability, or is guilty of fraud or misrepresentation. *Sanborn v. Neal et al.*, 4 Minn. 126.

**2.**—Whenever a public officer makes a contract fairly within the scope of his authority, the presumption of law is that he made it officially, and in his public character, unless the contrary appears by satisfactory evidence. *St. A. D. Balcombe v. Northrup et al.*, 9 Minn. 172.

## II. QUALIFICATION.

**3. Residence.** Under the Territorial Law, six months' residence was necessary to make one eligible to office. The six months must have accrued before the election, not before the officer qualifies. *Territory of Minnesota ex rel. E. F. Parker et al., v. Smith* 3 Minn. 240.

**4.**—The law of the territory placed the necessary residence of a candidate for office at six months. The provisions of the constitution placed it at four months. At the election of 1857, the people voted for the adoption of the constitution, and for all officers contemplated by it. *Held*, that a residence of six months was necessary to

make any candidate eligible to the office of District Attorney—the constitution not becoming operative until after the election. *Id.*

## III. WHO ENTITLED TO AN OFFICE.

**5. One holding certificate of election, and having qualified, is *prima facie* entitled to the office—following *Crowell v. Lambert*, 10 Minn. 369. *Atherton v. Sherwood*, 15 Minn. 221.**

## IV. VACANCY.

**6. Death of officer elect before entry, does not create a vacancy.** G. having been elected Register of Deeds at the annual election in Nov., 1868, for the term commencing in Jan. 1, 1869, died in Dec., 1868, before qualifying or entering upon the discharge of that office. *Held*, G.'s death did not create a vacancy in the office, that not being in possession of the office he was not an "incumbent" thereof, within the meaning of Sec. 2, Chap. 9, G. S., and as the law stood, E., the then Register, had a right to hold until Jan. 1, 1871, for no successor could be "appointed" under the statutes, and the next election was in Nov., 1870. *State ex rel. Loring v. Benedict, Auditor, et al.*, 15 Minn. 198.

**7. Legislative power to appoint to unexpired term—power to declare a vacancy?** The newly elected Register of Deeds having died before his term of office commenced, and the old Register under the law being entitled to hold over until a successor was elected and qualified, which could not be for a year thereafter, the Legislature passed an act declaring the office vacant, and authorized the Board of Commissioners to fill the office by appointment for and during the term beginning Jan. 1, 1869, and ending Jan. 1, 1871. If the Legislature had no power under Sec. 2, Art. 13, Con., to declare such vacancy, the old register would hold over and relator would not be entitled, and if the act had gone no farther, an election in 1869 might have been proper; but the act provided for an appointment of a

successor for the unexpired term, which was within the power of the Legislature, Sec. 4, Art. 11, Const., being complied with by the statute providing for general elections of officers, leaving the power of appointment to fill vacancies until the next general election, or for the balance of an unexpired term, as may be deemed advisable. *Ib.*

## V. OFFICER DE FACTO.

**8. Entitled to salary.** A Board of Supervisors of a county are authorized in paying a salary, attached to an office, to the *de facto* occupant of the same—and the officer *de jure* must seek his remedy against the *de facto* officer so receiving the salary; and doubted whether the Board could pass upon the respective rights of such officers by refusing to pay the salary to the *de facto* occupant. *Parker v. Board of Supervisors, Dakota County*, 4 Minn. 59.

**9. Who is officer de facto.** The acts of an officer *de facto* are valid as far as they affect the public—and one in possession of an office by color of an election, and holding the certificates of an election, is an officer *de facto*. *Ib.*

**10.** Acts of officers *de facto* are valid as to the public or third persons. *McCormick et al. v. Fitch*, 14 Minn. 252.

**11.** An objection that “the judge had no authority to sit on the case, because his term of office had expired,” is a question that cannot be determined in a collateral proceeding. He was an officer *de facto*, and until his right to an office is settled by a direct proceeding for that purpose, it cannot be questioned. *State v. Brown*, 12 Minn. 538.

## VI. COMPENSATION.

**12.** A public officer cannot receive, for performing any official duty, any other compensation or reward than that which is prescribed by law. *Warner v. Grace et al.*, 14 Minn. 487.

**13.** An officer—chief of police—who performs nothing but his official duty in

the arrest and conviction of an incendiary, is not entitled to a reward offered for such arrest and conviction. *Duy v. Putnam Ins. Co. et al.*, 16 Minn. 408.

## OFFICIAL TRUST.

(See TRUSTS AND TRUSTEES, II.)

## ORDERS.

(See PRACTICE, II., 18.)

## ORDINANCE OF 1787.

**1.** The Ordinance of 1787 does not embrace the *Mississippi River*, in providing that “the navigable waters *leading into* the Mississippi and the St. Lawrence, and the carrying places between the same shall be *common highways* and forever free,” etc. *Castner et al. v. Steamboat Dr. Franklin*, 1 Minn. 73.

## PAROL EVIDENCE.

(See EVIDENCE, IX.)

## PARTIES TO ACTIONS.

(See CIVIL ACTION, XVIII.)

## PART PAYMENT.

(See LIMITATION OF ACTIONS, IV.)



## PART PERFORMANCE.

(See EQUITY, II., c. 1, 2.)

## PAROL CONTRACT TO CONVEY LAND.

(See EQUITY, II., c.)

## PARTNERSHIP.

## I. WHAT CONSTITUTES A PARTNERSHIP.

## II. RIGHTS OF PARTNERS AMONG THEMSELVES.

## III. POWER OF A PARTNER.

## IV. LIABILITY OF PARTNERSHIP TO THIRD PERSONS.

## V. PARTNERSHIP REAL ESTATE.

## VI. ADMISSIONS BY ONE PARTNER.

## VII. EVIDENCE OF PARTNERSHIP.

## VIII. PARTNERSHIP ASSETS, LIABILITY OF TO CREDITORS OF PARTNERS.

## IX. ACTIONS BY AND AGAINST PARTNERSHIPS.

(See ASSIGNMENT, II., 5.)

(See EVIDENCE, 157.)

(See PLEADINGS, 99, 100, 101, 102, 103.)

## I. WHAT CONSTITUTES A PARTNERSHIP.

**1. Tenants in common of a boat** are partners as to its business, and their business transactions are governed by partnership laws. *Russell v. Minn. Outfit*, 1 Minn. 162.

**2. Signatures to articles not necessary.** If C. was a dormant partner, or held himself out as a partner in the company, and ratified and approved of the agreement made by the company's agent with plaintiff, he is liable jointly with the partnership, although he did not sign the partner-

ship articles. *Wood v. Cullen, imp'l*, 13 Minn. 394.

**3. Receipt of profits as such.** D. and K. were engaged in the business of purchasing and selling beef, the former furnishing the capital, the latter the labor, skill and care necessary to carry it on, each participating in and receiving a share of the profits, *as profits*. *Held*, this made them partners as to third parties. *Wright et al. v. Davidson*, 13 Minn. 449; *Warner v. Myrick*, 16 Minn. 91.

**4. When profits, as such, are not divided—no partnership.** D. owned the boat "Chippewa Falls," and R. the "Rumsey." D. and R. agreed that at the end of the season, if the earnings of either boat, less running expenses, exceeded those of the other, less running expenses, the excess was to be divided. *Held*, D. did not become the owner of the excess until division, his claim is not upon the earnings of the "Rumsey," *in specie*, but a claim against R. personally, the latter being the exclusive owner of the earning of the boat "Rumsey." R. exclusively owning the boat, its earnings, and manager thereof, and exclusively hiring and controlling the employes, he was sole principal, so that D. would not be liable for the wrongful act or negligence of the employes of the "Rumsey," nor co-partner with R. *Fay v. Davidson*, 13 Minn. 523.

**5. Division of profits constitutes partnership.** Where plaintiff, a deck hand on the steamboat "Albany," had been injured by the explosion of the boiler of the steamboat "John Rumsey," and plaintiff introduced evidence, in an action against D. & R., tending to show that the latter jointly owned and managed the "Rumsey," and D. introduced evidence to prove that the "Rumsey" was owned and managed by R., and that R. being the owner of said boat and another, and D. several, "Chippewa Falls" among others, and D. and his brother owning the "Albany," each exclusively running his own boats, they had agreed to divide in certain proportions the earnings of said boats at the close of the

season. The Court charged, "if R. owned the 'John Rumsey,' and D. the 'Chippewa Falls' and other boats, and it was agreed between them that each should employ the men and manage his own boats, and at the end of the season divide the profits, that made them partners in running the boats, and each responsible for the carelessness and negligence of the officers and men of each boat. *Held*, correct in point of law, the presumption being that the language was used and understood by the jury as an agreement for a division of profits as such, which would vest a present interest or ownership in them as they accrued, and before division, and such an agreement constituting them partners as to third persons. *Connolly v. Davidson et al.*, 15 Minn. 519.

**6.**—If D. is equally interested with R. in the earnings and profits of a boat that makes them partners in running the boat—for *equality*, imparts *equality in all respects*. *Id.*

**7.** A contract between A. & B. to construct and put in operation certain mills, each furnishing materials and money; and that after the mills were completed, B. should operate them on joint account, each furnishing one half the funds and receiving half the profits, but A. guaranteeing that the profits thus coming to B. should equal *10 per cent. per annum* on the amount invested by him, exclusive of his labor, does not make A. & R. partners in the mills themselves, but in the business of running them. *Moody v. Rathburn*, 7 Minn. 89.

**8.** A., of the first part, and B. & C. of the second part, entered into an agreement of co-partnership for one year, containing a stipulation that, at the expiration of that time C. might elect to take a specified sum as salary in lieu of one-third the profits, etc. At the expiration of the time C. elected to receive, and did receive the sum specified as salary. *Held*, he thereby assumed the obligations of an employé and avoided the obligations of a co-partner—as *between themselves*; and M.'s action left A.

& B. co-partners as before. *Bidwell et al. v. Madison*, 10 Minn. 13.

## II. RIGHTS OF PARTNERS AMONG THEMSELVES.

**9. Power of partner to assign personal claim.** A captain of a boat and part owner, may assign a claim against another part owner—tenant in common, for freight—to a third party, and the debtor and part owner cannot set up his partnership equities as a defense. *Russell v. Minn. Outfit*, 1 Minn. 162.

**10. Sharing losses.** It seems that, from an agreement to share profits, the law will ordinarily imply an agreement to share losses. *Warner v. Myrick*, 16 Minn. 91.

**11. Partner's claim as salary.** A partner employed by the partnership to conduct the business cannot sue the partnership for his salary—a fair and full adjustment of the equities between the parties and a determination of the real merits of the plaintiff's claim, would seem to require an investigation of the partnership accounts. *Wood v. Cullen, impl, etc.*, 13 Minn. 394.

**12. Right of partner to an accounting.** Plaintiff and defendants, T. & B., entered into partnership for manufacturing staves, etc., T. & B. furnished a mill and machinery, plaintiff was to contribute \$3,000 money, but actually furnished only \$2,500. The "articles" provided that at the determination of the co-partnership the partners were to make to each other a just, true and final account of the business, and at such determination, said T. & B. should retain the mill, and plaintiff should be paid such sums as he advanced, and then they were to share alike in profits or losses. The business having proved unsuccessful by reason of the improvident, unskillful and inattentive management of T. & B., whereby all plaintiff contributed was lost, and debts contracted against the firm, the plaintiff at the termination of the partnership being unable to ascertain from

T. & B., who managed the business, the precise condition of affairs, and disputes having arisen between plaintiff and T. & B., in reference to claims made by the latter, and transactions of the firm, plaintiff prays for an accounting. *Held*, plaintiff is entitled to an accounting, plaintiff's failure to contribute the full \$3,000 being proper for consideration in the final adjustment, but it no way affects his interest and right to secure such interest; and plaintiff had a lien on the mill, as on all other assets of the concern, until the whole business was adjusted, and the partners were ready to settle among themselves, the stipulation in the articles having reference to a final settlement between the parties. *Palmer v. Tyler et al.*, 15 Minn. 106.

### III. POWER OF THE PARTNER.

**13. Implied authority within general scope of partnership.** Each partner has an implied authority to bind the firm in all matters within the general scope of the business in which the partnership is engaged; but not in any engagement unconnected with and foreign to the partnership, and in such a case affirmative evidence of the consent of other members would be necessary to bind them. *Bank of Commerce v. Selden, Withers & Co.*, 3 Minn. 155.

**14. No person to accept his individual check on the firm.** Where a partner drew his individual check on his firm in favor of plaintiffs, himself accepted it in name of the firm, without knowledge of the firm or being presented to it; he giving collateral securities, the plaintiffs agreeing to keep the check, on interest being paid by the maker, so long as they did not want money. *Held*, the partnership could not be held on such acceptance, without plaintiff first showed that they had authorized it or ratified it afterwards. *Id.*

**15. Cannot guaranty.** A partner may assign a note, debt, or judgment against a third party, within the scope of his business and for the benefit of the firm

—but he cannot guaranty it in name of the firm. (Opinion.) *Selden, Withers & Co. v. Bank of Commerce*, 3 Minn. 166.

**16.**—Where the note of third persons payable to plaintiff, was guarantied by a single partner in name of the firm. *Held*, plaintiffs' right to recover against the firm, depended entirely on the fact of the partner's authority, express or implied, or subsequent recognition or adoption of his acts by the firm, and not on plaintiffs' belief at the time the transaction took place. *Id.*

**17. Implied authority within partnership business.** One co-partner is not necessarily bound by the act of another; there must be an authority, express or implied. Co-partners are presumed to have authority to act on behalf of their firm in all matters of partnership business, but even in such a case it is important that the act of one partner, by which it is sought to bind the firm, should appear to be authorized or recognized by the others, or clearly within the scope of the partnership business. *Irvine et al. v. Myers & Co.*, 4 Minn. 229.

**18. No power to take claim out of statute of limitations as against his co-partner.** R. & H., co-partners, were indebted to plaintiffs, after their dissolution, and the statute had commenced to run, H. agreed that "the balance due from the undersigned to [plaintiffs] shall not be barred by the statute of limitations, \$2,365.66.

(Signed) R. & H., in liquidation.  
By H."

*Held*, whatever effect it might have to H. it could have no effect as to R., the other partner. *Whitney et al. v. Reese et al.*, 11 Minn. 138.

**19. Power to make a general assignment.** Under ordinary circumstances, one partner cannot, without the assent of his co-partner, make a general assignment of the partnership property for the benefit of creditors; yet if an extraordinary emergency occurs in the affairs of the partnership, and the non-assenting partner cannot be consulted on account of his absence, under circumstances which furnish reason-

able ground for inferring that he intended to confer upon the assigning partner authority to do any act for the firm which could be done with his concurrence if he were present, such an assignment, if fairly made, will be presumed, *prima facie*, to be valid. *Stein et al. v. LaDue*, 13 Minn. 412.

**20.**—One partner has no authority to make a general assignment for the benefit of creditors without the assent of his co-partner, because the creditors were pressing the firm at a time when the most active partner was out of the State, temporarily absent from his place of business, his return being daily looked for, although that absence was unexpectedly protracted, and it appears that he did return in three or four days after the execution of the assignment. *Id.*

#### IV. LIABILITY OF PARTNERSHIP TO THIRD PERSONS.

**21. Not bound by act of partner out of scope of ordinary business.** The public may deal with a partner in the full belief that he has authority to act for the firm in all things fairly pertaining to the partnership business. But if the partner be, dealt with, with knowledge that the partnership is limited on matters not within the range of the partnership business, (as if he receives money from him on his individual debt, knowing it to be partnership funds), the firm is not bound unless he show a previous authority, or subsequent assent, on part of remaining partners. And in such case the burden of proof is on the other party, not on the firm. *Selden, Withers & Co. v. Bank of Commerce*, 3 Minn. 166.

**22. Not liable on guaranty given by partner—prima facie.** Where the note of third persons, payable to plaintiffs, was guaranteed by a single partner in name of the firm. *Held*, the firm was not liable, without plaintiff first showed authority assent or recognition by the other partners, —and this on the supposition that the firm

was interested in the note, or the consideration on which it was given. *Id.*

**23. Onus of proof where partnership note, etc., is given for individual debt.** Where a partnership note is given for private debt of a partner, or partnership name is used for the accommodation of, or as surety of partner or third person, and it is known by the creditor at the time, or implied from the nature of the transaction, the onus is on the creditor to show previous authority of partnership, or subsequent consent. *Bank of Commerce v. Selden, Withers & Co.*, 3 Minn. 155.

**24. Conversion of property by partner to partnership use.** Where one partner unlawfully takes goods of another on account of the partnership, and converts the same to partnership use, the partnership is liable, without showing any express authority from the other co-partners. *Vanderburgh et al. v. Bassett*, 4 Minn. 242.

**25. Liability for act of one where a "board of directors" were to do the business.** Plaintiff sought to bind the defendants as co-partners, by virtue of a contract of insurance; having shown by their articles of agreement that the business was to be done by a board of directors—without showing that the organization had been completed—he offered to show that "several members had assumed to act for the rest; had built a boat; certain members had accepted it in the company's name, and given notes in co-partnership name, and agreed to secure the notes by a policy of insurance on the boat, to be taken in name of the company, and assigned, etc.; and that one Gilbert was acting master of the boat, with the consent of the defendants, and that he effected the insurance, assigned it, and the premium is unpaid." The judges were of the following opinions:—*FLANDRAU, J.*: There being a partnership between the defendants, the master being one of them, he had the power to effect the insurance in the name of the company, and bind them for the premium, and the evidence should have been admitted. *EMMET, C. J.*: Plaintiff

having shown that the "Board of Directors" alone had power to make contracts, he is presumed to have been aware of that fact at the time of the contract, and could not bind the company in the way he proposed, without showing assent or ratification. *ATWATER, J.*: Complaint charged defendants as an organized company, but he had failed to establish the existence of such company, signing of articles not being sufficient for that purpose—the proposed evidence was properly ruled out. *Pennsylvania Ins. Co. v. Murphy*, 5 Minn. 36.

**26. Statute of Limitations may run in favor of one partner, and not against others.** Where A., B. and C., as co-partners, contracted with D., and A. and B. removed from the State, C. remaining. *Held*, D. might maintain an action against A. and B. on their return, although the statute of limitations had barred the action against C. *Town v. Washburn et al.*, 14 Minn. 268.

## V. PARTNERSHIP REAL ESTATE.

**27. In equity it is treated as personal property.** Partnership real estate is, in equity, treated as mere personal property, and governed by the rules and doctrines applicable to that species of property. *Arnold et al. v. Wainwright*, 6 Minn. 358.

**28. Where land is partnership stock.** It depends upon the agreement of the partners whether land shall be deemed part of the partnership stock. That agreement may be by parol, or such facts and circumstances attending its acquisition or use as will raise an implied agreement to that effect. Where this does not appear on the face of the conveyance, the legal estate will be controlled by the terms thereof, but equity will look upon it as partnership assets. *Ib.*

**29. Resulting trust in favor of partnership, on conveyance to partner.** The statute of uses and trusts (Comp. St. 382-3-4) does not cut off the trust in favor of a partnership where lands are conveyed to individual members of a firm otherwise

than as partners, on an agreement between them, express or implied—though by parol—that it shall be used as partnership property. *Ib.*

**30. Rights of bona fide purchasers where conveyance vests title in partners as tenants in common.** If partnership lands, by the terms of the conveyance, vest the title in the several members as tenants in common, then the trust which exists between the partners cannot be enforced against *bona fide* purchasers or mortgagees without notice, (Comp. St. p. 382, Sec. 10,) but *contra* as to purchasers or mortgagees from one partner or his representatives, with notice that the land is partnership property. *Ib.*

## VI. ADMISSIONS BY ONE PARTNER.

**31. Admission by one partner not conclusive proof of partnership.** Plaintiffs sued defendants jointly, as late partners. One defendant denied the facts set up in the complaint, but alleged certain other facts which admitted a claim against the late partnership. Plaintiff's reply denied the "new matter." The other defendant admitted an indebtedness of \$40, against the old partnership. No joint contract was proved. *Held*, one partner having denied the complaint, consequently the partnership, the admission of the other was not conclusive, and no other proof being offered, it might be held insufficient by the court. *Beatty & Steadman v. Ambs & Wittman*, 11 Minn. 331.

**32. Admission insufficient proof of joint contract.** Even supposing an admission made by one partner after a dissolution will bind the firm, it is not *conclusive*, and the joint contract must be proved *aliunde*. *Ib.*

## VII. EVIDENCE OF PARTNERSHIP.

**33. Proof by articles of co-partnership.** Plaintiff complained against defendants as co-partners or corporators, and offered in evidence the articles of agree-

ment, without proof of signatures under the statute. Ruled out on that ground. He then proved the signatures of all but nine, whom he dismissed, and again offered the articles. *Held*, plaintiff was entitled to introduce the agreement in the first instance, under the statute, (Sec. 80, Comp. St. 685,) and being compelled under the ruling to dismiss as to part, he had a right to treat the company as consisting of those members whom he had been able to make proof against—and defendants could not first compel him to dismiss, and then take advantage of it. *Pennsylvania Ins. Co. v. Murphy et al.*, 5 Minn. 36.

**34.** In an action against D. as surviving partner of D. & K., butchers, it appeared that one of plaintiffs purchased cattle for D. & K., and the other plaintiff testified that forty-three head were slaughtered for them, and another witness testified that D. received part, at least, of the property purchased by plaintiffs. *Held*, the facts being admitted, sufficient proof that D. was co-partner with K. in this transaction. *Wright et al. v. Davidson*, 13 Minn. 449.

**35.** Holding themselves out as partners in the transaction of business, makes persons liable as partners, to third persons, and is *prima facie* evidence of partnership in an action by the persons so holding themselves out, or those claiming under them. *McCarthy v. Nash*, 14 Minn. 127.

**36.** For a statement of evidence which justifies a finding that certain parties were partners in business, see *Tozer et al. v. Hershey*, 15 Minn. 287.

#### VIII. PARTNERSHIP ASSETS, LIABILITY TO CREDITORS OF INDIVIDUAL PARTNERS.

**37.** On the dissolution of a partnership, the property is first subject to partnership debts, and then is distributed among the individual members—and firm property cannot be diverted in any other channel. *Pease, Chalfant & Co. v. Rush et al.*, 3 Minn. 112.

**38.** After an attachment in hands of third party. M. was indebted to Derby & Day, and the sheriff attached Day's interest in the co-partnership debt. *Held*, that fact constituted no defense to an action on the part of the other partner, Derby, on behalf of the firm D. & D., for the officer took only Day's interest after settlement of firm debts and an accounting, and the other partner had a right to all the assets, to close up the co-partnership affairs. *WILSON, C. J., dissents. Day et al. v. McQuillan*, 13 Minn. 205.

#### IX. ACTIONS BY AND AGAINST PARTNERSHIP.

**39.** Proof of name immaterial. Plaintiff's co-partnership being in issue, they proved the co-partnership without proving the co-partnership name. *Held*, sufficient, the co-partnership, not the name, being material. *Stickney & Carli v. Smith, Baker & Co.*, 5 Minn. 486.

**40.** Joint promise must be proved. In an action against defendants as partners, on their joint promise, plaintiff must prove the joint contract, and recover against both defendants, or he cannot recover at all. *Whitney et al. v. Reese et al.*, 11 Minn. 138.

#### PAYMENT INTO COURT.

**1.** Payment into court, what is. To constitute a payment into court, the payment must be made under a rule or order of the court to that effect; the reason being, that a payment under such rule is a judicial admission by the party making it, of the facts implied by the payment, in favor of his adversary. In the absence of such rule, it is no such admission. *Davidson v. Lamprey*, 16 Minn. 445.

PAYMENT.

(See CONTRACT, IX.)

(See EVIDENCE, 153.)

(See EQUITY, 7.)

PENALTY.

(See DAMAGES, 6.)

(See INTEREST, V.)

PERSONAL PROPERTY.

(See TRUSTS AND TRUSTEES, 18, 19.)

PERFORMANCE.

(See CONTRACT, VIII.)

PETIT JURY.

(See CRIMINAL LAW, 64.)

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PLEADING.

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## XII. DEFECTIVE PLEADING AND REMEDIES AGAINST.

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- b. *Irrelevancy and immateriality.*
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## XIII. WAIVER OF DEFECTS IN FORM AND SERVICE OF PLEADING.

## XIV. DEFECTS AIDED BY VERDICT.

(See JUSTICE OF THE PEACE, IV.)

(See MUNICIPAL CORPORATION, 5, 6.)

(See NOTICE, 13.)

(See U. S. LAND, 22.)

## A. PLEADING BEFORE THE CODE, IN EQUITY.

## 1. A bill in chancery may contain not

only any issuable fact, but any matter of evidence or collateral fact, the admission of which by the defendant may be material in establishing the general allegations of the bill as a pleading, or in ascertaining the limit or nature of the relief sought. *Goodrich v. Rodney et al.*, 1 Minn. 196.

2. An original and supplemental bill make but one pleading, and so far as they conflict, destroy each other. Such *inconsistent* and conflicting averments are not well pleaded and are not admitted on demurrer. *Choteau et al. v. Rice et al.*, 1 Minn. 109.

3. New matter arising after the filing of the original bill cannot be brought in by *amendment*—only by *supplemental* bill. *Choteau et al. v. Rice et al.*, 1 Minn. 106.

4. The objection that the statements of the supplemental bill are vague and uncertain—is to their *form* and *manner*, and not good on general demurrer. *Id.*

5. In chancery *special* replications are now disused and *general* replications, denying and putting in issue the matter of the plea, are the only ones allowed. *Id.*

6. Deeds, writings, and records recited in a pleading in *hoc verba* are impertinent. *Goodrich v. Rodney et al.*, 1 Minn. 196.

7. *Pertinency of allegations.* To ascertain whether an allegation in a bill is *pertinent*, see whether an issue can be found out of it which will be material in obtaining the relief sought. *Id.*

8. *Relevancy* of the discovery of facts sought in a bill, is determined by reflecting whether the facts if admitted, etc., would tend to establish the bill. Matters alleged not material to support the bill are important, and if reproachful, scandalous. But to be scandalous it must be impertinent. *Id.*

## B. BLEADING UNDER THE CODE.

## I. GENERAL RULES CONCERNING PLEADING.

9. *Designation of the court.* It is not error to designate the District Court of the Territory as "United States District Court," because in a qualified sense they are such,



being created by the United States. *Choctau v. Rice*, 1 Minn. 192.

**10. Names of the parties.** It is bad practice to designate either plaintiff or defendant, in a judicial proceeding, by the initial letters of their names, but demurrer will not lie for such a defect. *Gardner v. McClure et al.*, 6 Minn. 250.

**11.**—In entitling a cause, the full names of the parties should be stated, and the court is unwilling longer to apparently sanction the mere designation of parties by their initials. *Knox & West v. Starks*, *Sears & Matteson*, 4 Minn. 20.

**12. Descriptio personarum.** An action against "P., I. and S., supervisors of the town of Newport," is against the defendants as private persons—the addition "supervisors," etc., being *descriptio personarum* only. *Holton v. Parker et al.*, 13 Minn. 383.

## II. WHAT SHOULD BE PLEADED.

### a. Facts only are to be pleaded.

**13.** A complaint set up all the facts in the case, and then went on and averred a *special contract* with defendant. Held, that the averment in relation to the *special undertaking* might be treated as surplusage, and a failure to prove it should not preclude a recovery, if the facts proved sustain the action. *Steamboat War Eagle v. Nutting*, 1 Minn. 259.

**14. Facts, not evidence.** When the *intention* with which a party does an act becomes material, such *intention* is the fact which must be pleaded, and not the circumstances tending to establish it, for that would be pleading the evidence. *Wilcox & Barber v. Davis*, 4 Minn. 197.

**15. For equitable relief same facts as before the code.** Although all causes of action, both equitable and legal, are to be prosecuted as a *civil action*, yet the facts necessary to be pleaded to obtain equitable relief are the same now as before the code—and unless they are set up, nothing but legal relief can be granted. *Tullis v. Fridley*, 9 Minn. 79.

**16. On contract, the portion broken only.** In pleading it is only necessary to state the portion of a contract which has been broken, and according to its legal effect. *Estes v. Farnham*, 11 Minn. 423.

**17. An exception in the enacting clause of a statute** must be negatived in pleading; a proviso need not be. *Faribault et al. v. Hulett et al.*, 10 Minn. 30.

**18. Anticipating defense.** A complaint may set up facts which anticipate the defense of the statute of limitation. *Hoyt et al. v. McNeil*, 13 Minn. 390.

**19. An estoppel in pais** need not be pleaded under the code. It is not a *fact* to be pleaded, but is in the nature of conclusive evidence of facts already pleaded. *Caldswell v. Auger & Herbert*, 4 Minn. 217.

### b. Facts not pleaded, useless.

**20.** A party cannot avail himself of a promise of defendant to pay the debt of another which he has not pleaded. *Emmet et al. v. Rotary Mill Co.*, 2 Minn. 290.

**21. No proof of facts not pleaded admissible.** Demand and refusal cannot be proved unless alleged in the pleadings—because they are material facts. *McLaine v. White*, 5 Minn. 178.

**22. No judgment can be entered on facts not pleaded.** Where there is a total want of any allegation, in the pleading, of the subject matter as a ground of action or defense, the want of such allegations is not cured by Sec. 86, 87 and 88, Chap. 70, of Revised Statutes, p. 340, so as to allow of a decree to be founded upon the proof without allegation. *Loomis v. Youle*, 1 Minn. 175.

**23.**—If in the examination of witnesses facts come out, which, had they been alleged, would furnish ground for relief or defense, such facts must be disregarded unless they are warranted by the allegations of the pleadings. *Finley v. Quirk*, 9 Minn. 194.

### c. Matters judicially noticed.

**24. Private statute recognized by a**

**public act.** Courts will take judicial notice of a private statute which is recognized by a public act. Hence the act entitled "an act to reduce the law incorporating the city of St. Paul, in the county of Ramsey, and State of Minnesota, and the several acts amendatory thereof into one act, and to amend the same," approved March 20, 1868, being by its terms a public act, the court would take judicial notice that the city of St. Paul was a corporation, incorporated March 4, 1854, and possessed the authority given by that act and acts amendatory thereof, to levy, assess, and collect taxes. *Webb v. Bidwell*, 15 Minn. 479.

**25. Statutes of another State not judicially noticed.** Courts of our State do not take judicial notice of the statutes of another State, and where a party relies upon the law of a foreign State, such law must be pleaded, and so far as it is relied on, its terms must be set forth, that the court may determine whether the effect claimed for the law is legitimate. *Hoyt et al. v. McNell*, 13 Minn. 390.

### III. HOW FACTS SHOULD BE PLEADED.

**26. Facts in pleading must be alleged directly and positively,** and not by way of rehearsal, argument, inference or reasoning; and if not thus alleged, they are not admitted by a failure to traverse them. *Moulton v. Doran et al.*, 10 Minn. 67.

**27.**—Facts must be alleged directly, and not by way of recital, argument, inference or reasoning. *Taylor v. Blake*, 11 Minn. 255.

### IV. PARTICULAR AVERMENTS.

*a. Those held sufficient.*

**28. Attachment under which defendant justifies, existence of.** Where, in claim and delivery, an answer of an officer who justifies the taking under certain

attachments, averred that "defendant took said property as the property of H., (whose property it is claimed it was,) under and by virtue of certain writs of attachments, duly allowed and issued out of and under the seal of said court, in certain suits therein pending, wherein James W. Druser, William W. Hoyt & Co., Norton and Tuttle, \* \* \* and other parties, creditors of said H., were plaintiffs, and said H. defendants." *Held*, sufficient averment of the attachments and order of the court allowing the same, especially where the plaintiff did not show that he was misled to his prejudice. Better pleading, however, if the pendency of the action had been alleged more definitely by designating the plaintiffs in each action. *Blackman v. Wheaton*, 13 Minn. 328.

**29. Bonds, execution of by corporation.** A complaint alleged that defendant is a corporation, and that it, by its duly elected and qualified officers, and under their hands and seals, executed the bond sued upon. *Held*, these facts, admitted by the demurrer, constitute a sufficient averment of the execution of the bonds by defendant. *Wilson et al. v. Board of Education of Town of Minneapolis*, 11 Minn. 371.

**30.**—**at legal session of their board.** Where the execution of a bond was material, and the complaint charged that the "defendants executed in due form of law and issued" the bond, etc. *Held*, it sufficiently appeared that the defendants executed the bond at a legal session of the board. *Nininger v. Commissioners of Carver County*, 10 Minn. 133.

**31. Bank, incorporation of.** For allegations, which together amount to a sufficient averment of an incorporation of a bank, see *Yale v. Edgerton*, 14 Minn. 194.

**32. Corporate character of defendant.** An allegation that "the defendant is a corporation or company, established and doing business under and by virtue of the laws of the State of Illinois," is a sufficient affirmation of the corporate character of the defendant. *Browne et al. v. The Galena D. D. & M. Packet Co.*, 9 Minn. 239.

**33. Cause of action, plaintiff's interest therein.** Where a deed conveyed certain lands therein described specifically, and then contained general clauses transferring the right, title and interest of the grantor in and to any *lands*, chattels, etc., to which she was then or might at any future period be entitled as heir at law of her deceased father, or certain deceased brothers and sisters, allegations in a complaint to set aside such deed for fraud, showing plaintiff's heirship to such deceased persons, and the existence of inheritable property at their death, relates to plaintiff's interest sought to be passed by said general clauses in the deed, and does not affect the general allegation of title in fee to the land specifically conveyed, so as to make the complaint insufficient for want of showing sufficient interest in plaintiff to maintain the action. *Buckholz et al. v. Grant et al.*, 15 Minn. 406.

**34. Damages.** Where the complaint alleged a gross sum in damages, it was sufficient to warrant the reception of evidence in regard to the different items of damages of which the aggregate sum is alleged to be composed. *Bast v. Leonard et al.*, 15 Minn. 304.

**35. Election, notice of, and holding thereof.** Complaint alleged "that said defendant, on, etc., for the purpose of paying said indebtedness, and pursuant to the provisions of said act, duly called and ordered an election of the legal voters of said town of Minneapolis, for the purpose of voting for or against the issuance of bonds by said defendant in said sums therefor, to be held at, etc., in said town, upon the 2d day, etc.; that prior to said last named day, due and public notice of said election was given, according to the provisions of said act, which notice was duly printed, published, and posted, and contained the purpose aforesaid for which said bonds were to be issued, and all the requisite and necessary statements, and was in substance and form, and in all things as required by said act; that upon said 2d day, etc., said election was duly

held, and conducted in obedience and conformity to said act, and said notice thereof, at which said election a majority of the legal voters present, and voting thereat, voted for the issuance of said bonds," etc. *Held*, these allegations as to the election ordered, and the notice thereof, and the holding the election, are sufficient. They are conclusions of fact, or at least not such purely legal conclusions as to be objectionable in pleading. *Wiley et al. v. Board of Education of Town of Minneapolis*, 11 Minn. 371.

**36. Execution, that it issued regularly.** The answer showed that judgment was docketed "December 1," 1862, and that "on or about 28th November, 1862," execution issued out. *Held*, it not appearing absolutely that execution issued before the docketing of the judgment, the presumption of law is in favor of the regularity of the proceeding—it being a court of general jurisdiction—distinguished from *Lockwood v. Bigelow*, 11 Minn. 113. *Dodge v. Chandler*, 13 Minn. 114.

**37. Execution, that it was returned unsatisfied.** In an action to impeach a mortgage foreclosure on ground of judgment obtained, etc., an averment that an execution issued on a mortgage "was, in fact and in law, returned wholly unsatisfied," fully meets the requirements relating to foreclosure by advertisement. *Ross v. Worthington*, 11 Minn. 438.

**38. Fraud.** A complaint sufficiently states fraud which charges that at the time of making the contract with plaintiff, defendant "well knew he was not the owner of the land, nor in possession of it, but falsely represented himself so to be, with intent to deceive the plaintiff, and that the plaintiff, relying upon these representations, was induced to enter into the contract." *Brown v. Manning*, 3 Minn. 35.

**39. Ferry company and man: that they were, as agents of stage company, negligent.** Complaint, which alleged that said defendants, and their said agents and servants, who had the charge and control of said coach, of their own gross carelessness,

negligence and misconduct, \* \* \* drove, and allowed said coach to be driven out of the highway and usual road, and suffered the same, through like gross negligence and want of care, to run into and become submerged in the Mississippi River. *Held*, sufficient to include the ferry company and the ferry man, and their acts and omissions. *McLean, adm'r, v. Burbank et al.*, 12 Minn. 530.

**40. Highway, that certain land was an.** In an action to recover damages for obstruction of a public street, although the complaint failed to show distinctly that the street was a public highway, but contained several allegations as to "First Street," and the establishment of a grade thereon by the proper authorities of the town of Minneapolis, it is to be inferred that "First Street" is a public thoroughfare or highway. *Farrant v. The First Division St. Paul and Pacific R. R. Co.*, 13 Minn. 311.

**41. Levy of an execution.** In pleading a "levy," it is not necessary to set forth the specific acts constituting it—following *Tullis v. Brawley*, 3 Minn. 277. *Rohrer v. Turritt*, 4 Minn. 407.

**42.**—In pleading a levy, it is not necessary to state the specific acts of the sheriff constituting the levy in law; it is sufficient to allege generally that by virtue of the execution the sheriff "levied" upon the property. *First National Bank of Hastings v. Rogers et al.*, 13 Minn. 407.

**43. Mortgage sale, legal and valid.** A complaint, in an action against a mortgagee to recover the amount bid in excess of mortgage debt and costs, which states that "mortgaged premises were sold to the highest bidder at public auction, agreeably to the provisions of the statute in such case made and provided, and pursuant to the power of sale in said mortgage deed contained," is a sufficient averment of a legal and valid sale of the mortgaged premises—if controverted, then the plaintiff will be bound to establish the facts necessary to constitute a valid sale. *Bailey v. Merritt*, 7 Minn. 159.

**44.**—want of proper notice of. An

averment that notice of sale was not published in a newspaper printed in the county where the mortgaged premises were situated, nor in the nearest paper in one of the adjoining counties, is a sufficient allegation of want of proper notice or sale. *Lowell v. North & Carl*, 4 Minn. 32.

**45. Married woman's separate property.** Where a married woman, in a suit concerning her separate property, alleges that "she purchased and received said (property), and is now the lawful owner and holder thereof." *Held*, it sufficiently appears that the purchase was made with her separate property. The fact of purchase being alleged, it will be presumed that the purchase was legal and valid. *Nininger v. Commissioners of Carver Co.*, 10 Minn. 133.

**46.**—Complaint by husband and wife alleged that "on, etc., said, etc., was duly assigned, transferred, sold and delivered to the above plaintiff, F. B. K., (wife of the aforesaid R. K.,) and the said, etc., since, etc., and still are the property of the said plaintiff, Frances B. K., in her sole right and possession." *Held*, equivalent to saying the note is her separate property, and sufficient within Sec. 30, Comp. St. 535, as construed in *Wolf v. Banning*, 3 Minn. 206. *Kennedy v. Williams*, 11 Minn. 314.

**47.**—A complaint by a married woman concerning her separate property alleged that "the plaintiff purchased said above described premises," \* \* \* and "was the owner of the improvements on the said premises, and of the land." *Held*, after judgment it will be presumed that she purchased for herself, and with money that was her separate property. *Rich v. Rich*, 12 Minn. 468.

**48. Negligence.** Negligence is a question of fact, or mixed law and fact, and in pleading it is only necessary to aver negligence generally, not the specific facts constituting negligence. *McCauley v. Davidson et al.*, 10 Minn. 418.

**49. Non-delivery of deed.** For a statement of facts that, after judgment

will be held sufficient as setting forth "non-delivery" of a deed, where the objection is first raised in the Supreme Court that the complaint does not state facts sufficient to constitute a cause of action, see *Smith v. Dennett*, 15 Minn. 81.

**50. Ownership of property.** Complaint in action for the "claim and delivery of personal property," alleged that plaintiffs were possessed of the property taken "*as of their own proper goods.*" Held, sufficient averment of ownership, as it is a familiar allegation in common law pleadings, understood as alleging possession and ownership in contradistinction for possession without ownership. *Stickney & Carli v. Smith, Baker & Co.*, 5 Minn. 486.

**51.—of land in fee.** A complaint in an action to set aside a deed for fraud, an allegation that plaintiff, at time of the execution of the deed, was seized in *fee simple* and was the owner of the premises described in the deed, is a sufficient allegation of title. *Buckholtz et al. v. Grant et al.*, 15 Minn. 406; same, 16 Minn. 158.

**52.—of goods.** An allegation in a complaint, charging defendant as common carriers with the loss of "certain goods the property of the plaintiff," is a sufficient averment of plaintiff's interest. *Ames v. The First Div. St. Paul & P. R. R. Co.*, 12 Minn. 412.

**53.—of promissory note.** Complaint on promissory note charged among other things "that before the maturity of the said note, the said M. (payee) for value received, sold, transferred, endorsed and delivered it to the plaintiff." Held, sufficient allegation of title in plaintiff, and a subsequent averment that "plaintiff is now the owner and holder of said note; that the same has not been paid, nor any part thereof, but that defendant is now justly indebted," etc., were conclusions of law arising from the preceding allegations of the complaint. *Frasier v. Williams*, 15 Minn. 288.

**54.—of cause of action by stranger.** A defense that "the judgment on which the action is founded is the property of

and belonged to a stranger, is sufficiently definite to advise the adverse party of the nature of the defense. *Holcombe v. Tracy*, 2 Minn. 247.

**55. Performance of conditions concurrent and mutual.** In an action to compel specific performance of a contract to convey land, an allegation that plaintiff offered to perform on his part and the defendant refused is sufficient—the acts being mutual and concurrent. *St. Paul Division No. 1, Sons of T. v. Brown et al.*, 9 Minn. 157.

**56. Payees of a note, what sufficient showing that plaintiffs are.** A complaint which contains no direct allegation that the plaintiffs are the payees in the note, but sets forth the note in terms, and it appears that the surnames of the plaintiffs are the same as those mentioned in the note, and the complaint alleges delivery to plaintiffs, the presumption at law is that they are the payees named in the note. *Wilson, Ch. J., dissenting. Hayward et al. v. Grant*, 13 Minn. 165.

**57. Promise to pay the debt, etc., of another.** In pleading a promise to pay the "debt, default or miscarriage of another person," it is not necessary to aver it to be in writing. Unless the contrary appears it will be presumed to be in writing—following *Wentworth v. Wentworth*, 2 Minn. 277. *Walsh v. Kattenburgh*, 8 Minn. 127.

**58. Platting, a legal.** An averment that plaintiff, "on, etc., caused to be duly surveyed, marked and platted according to the statute in such case made and provided, by O., a competent surveyor, certain land, and caused said plat to be recorded in the office of the Register of Deeds," etc., shows a legal platting—especially after judgment. *Cathcart v. Peck et al.*, 11 Minn. 45.

**59. Possession on a given day.** Complaint alleged ownership and possession on 1st September, and afterwards charged that "plaintiff still remaining in possession as aforesaid defendant did," etc., on 1st January. Held, sufficient allegation of possession on 1st January. *Gould v. Sub.*

*Dist. No. 3 Eagle School District*, 7 Minn. 203.

**60. Recognizance, record of.** A complaint on a recognizance, after alleging the calling of the defendant and his failure to appear, and "whereupon his default was recorded by said Court, and said recognizance adjudged forfeited." *Held*, sufficient averment of a record of the default of the defendant within the statute. *Comp. St., Chap. 103, Sec. 28. State v. Grant*, 10 Minn. 39.

**61. Request, special.** Where a special request is required in good pleading, on demurrer, "although often requested," is sufficient. *Hall v. Williams et al.*, 13 Minn. 260.

**62. Surety, extension to debtor.** An answer charged that "the plaintiff (creditor) at the request of the said Woodman (debtor) and without the consent of the defendant (surety) after the maturity of the notes extended the time of payment thereon to said W., for a valuable and binding consideration from said W. *Held*, sufficiently particular to advise the plaintiff of the nature of the defense; it consisting of matter particularly within the knowledge of the plaintiff, and the most that could be required in any case would be the length of time the note was extended, and not the amount of consideration. *Huey v. Pinney*, 5 Minn. 310.

**63. Tender.** In pleading a tender it is sufficient, if enough is stated to show what the amount tendered was, within the maxim "*Id certum est quod certum reddi potest.*" *St. Paul Division No. 1 Sons of T. v. Brown et al.*, 9 Minn. 157.

**64. Taxes, levy and assesment of.** In an action to enforce liens for taxes under act of 1862, Sec. 8, where the authority to tax appears, and where the taxes and the property upon which they are a lien are stated in the complaint with sufficient certainty, the allegation that such taxes were "duly levied and assessed," is sufficient averment of the assessment of such taxes, and under this form of allegation, if issue is taken thereon, proof of all the acts con-

stituting the assessment of the tax and essential to its validity, is admissible. *McMILLAN, J., dissents. Webb v. Bidwell*, 15 Minn. 479.

**65. Value of use and occupation.** In a complaint for the recovery for the use of premises, an allegation that the value of premises during the occupation of the defendant was five dollars a month, and demand of judgment for that amount, is equivalent to an allegation that they were reasonably worth that amount, and that plaintiff has sustained damages to that amount. *Armstrong v. Hinds*, 8 Minn. 254.

*b. Those held insufficient.*

**66. Demand of specific articles.** In an action on a covenant to pay in *groceries, liquors and provisions* on demand. An averment that plaintiff demanded, etc., a large sum of money, to wit: the sum of \$200, and was refused, etc., is not good. The declaration should have averred a demand of the specific articles. *Snow et al. v. Johnson*, 1 Minn. 48.

**67. Existence of certain facts.** An allegation in a complaint that defendant "well knew" such and such things to be true, is merely an allegation of the *knowledge* of defendant, and not an allegation that the facts were, as it is alleged, the defendant knew them to be. *Taylor v. Blake*, 11 Minn. 255.

**68. Fraudulent acts.** Allegation that given acts—in themselves innocent—"were against the provisions of acts of Congress and in fraud of the plaintiff," is not an allegation that defendant acted fraudulently or that such acts were fraudulent. No evidence of fraud was admissible under such allegations. *Kelley v. Wallace et al.*, 14 Minn. 236.

**69. Negligence.** An averment that by reason of gross negligence of said "commissioners, and of all the defendant's agents in that behalf, in causing to be made an estimate, etc., and in not causing such estimate to be filed with, etc., each and all of the said certificates, at the time of said tender and delivery, were utterly worth-

less, and no lien upon, nor collectable, etc.," is wholly insufficient as charging traversable facts. Statement that the certificates are worthless and no lien, is a conclusion of law. "Gross negligence of defendant's agent," does not necessarily render the defendant liable. The acts constituting the negligence should have been specially alleged, and not left to be inferred. *Griggs et al. v. City of St. Paul*, 9 Minn. 246.

**70. Plat, that it was irregular.** An allegation that a plat mentioned was irregular, unlawful and void, and did not lawfully exist, is the allegation of a conclusion of law, and therefore bad. *Cathcart v. Peck et al.*, 11 Minn. 45.

**71. Postponement of foreclosure sale, that it was irregular.** An averment that a postponement of foreclosure sale was "irregular," that the sale did not "take place at the time specified in the notice, and that no postponement of the sale was ever duly given," states nothing on which issue can be taken. *Ramsey v. Merriam*, 6 Minn. 168.

**72. Road, opening of.** Where it was necessary that plaintiff's assignors should have opened a given road to enable them to maintain the action, an allegation that \* \* \* "did, and performed work and labor in the location, construction, opening out, surveying and planning" thereof, etc., is insufficient, for it may be true and no road opened. *Thorne v. The Commissioners of Washington Co.*, 14 Minn. 233.

**73. Plaintiff's title, invalidity of, from irregularity in sale.** An allegation "that the title of the plaintiff to said lots by virtue of said tax sale, is invalid from an irregularity in the notice of tax sale," is a conclusion of law, and bad—the facts should have been stated. *Webb v. Bidwell*, 15 Minn. 479.

**74. Title of plaintiff to land in question.** A complaint alleged that certain land "was sold by 'one B.,' and on, etc., for the consideration, etc., H., (plaintiff) became and was the purchaser thereof, the deed whereof is recorded, etc.," and set

forth a pretended claim on title, and prayed same to be removed. *Held*, the mere allegation of a sale by B. without alleging a conveyance from him, is insufficient to show title in the plaintiff. *Hill et al. v. Edwards*, 11 Minn. 22.

**75. Time of an act.** Where time was material to plaintiff's cause of action, and presumptively within plaintiff's knowledge, an allegation that it was "on or about" a given time, is insufficient—it must be alleged positively. *Lockwood v. Bigelow*, 11 Minn. 113.

**76. Unlawful possession of defendant.** Complaint alleged that on, etc., plaintiff "became and still is seized in fee simple of the title, and became on that day and still is entitled to the possession 'of certain land,' and that on said last mentioned day, the said defendants were, and all the time since have been in the possession and occupation thereof, without the consent and against the will of the plaintiff, and that the rights and interests of the plaintiff in and to the land, etc., have been, and still are, wholly denied and ignored by said defendants." *Held*, not a sufficient averment of defendant's unlawful possession. *Holmes v. Williams et al.*, 16 Minn. 164.

**77. Value of services.** An allegation that "defendant charged twenty-five dollars for his commission," is insufficient to admit proof to sustain a claim for that amount. Such an allegation would not be cured by the answer being verified. *Farrington v. Wright*, 1 Minn. 245.

## V. VERIFICATION OF PLEADINGS.

**78. By attorney.** Where an attorney verified a complaint on a foreign judgment by swearing that "he believed it to be true, and had in his possession a copy of record," etc., without stating why complainant did not sign it, *Held*, defective, and an unverified answer was sufficient. *Smith v. Mulliken*, 2 Minn. 322.

**79. A foreign judgment** is such a "written instrument for the payment of money only," within statute of 1856, as will

permit an attorney suing on it to verify the complaint by averring fact of possession only. *Ib.*

## VI. CONSTRUCTION OF PLEADING.

**80. In claim and delivery the affidavit cannot aid the complaint.** The affidavit in an action to remove the possession of personal property forms no part of the pleadings, and cannot be referred to or otherwise used to supply deficiencies in the complaint. *Loomis v. Youle*, 6 Minn. 178.

**81. Amended pleading not aided by the original.** It is not in accordance with the practice of the court to permit that portion of an original answer not demurred to, to be construed with the amended answer—the defendant must be confined to his amended answer—although the court does not decide that any amendment could not be tacked to what there was left of the original answer. *Becker v. Sandusky City Bank*, 1 Minn. 316.

**82. Plaintiff can take advantage of facts set up in the answer.** Where an opposing party answers and alleges a state of facts that would have entitled his adversary to the relief he seeks, had he established them himself, he may, *it seems*, take advantage of the point thus made for him. *Richards & Whiting v. White*, 7 Minn. 345.

**83. After trial, pleading good in substance, though somewhat defective, sufficient.** Where the purpose and the object of the pleading can be reasonably intended, and it contains substantially the necessary averments, and the parties go to trial upon the issue made by them, it will not be ground of error if the court refuse to instruct the jury that the pleading be disregarded, though to some extent uncertain and defective. *Barnsback v. Reiner* 8 Minn. 58.

**84. General averments, controlled by facts pleaded.** Where a pleader alleges a general result, as he may—*e. g.*, that a mortgage was “duly foreclosed,” and also the particular facts by which it is reached, and the facts do not sustain the result as

alleged, the facts will control. *Pinney v. Fridley*, 9 Minn. 34.

## VII. THE COMPLAINT.

### *a. Joinder of causes of action.*

**85. Claims by sub-contractor against contractor, and for lien on the building.** A complaint by sub-contractors, joined as defendants the original contractors, plaintiff's employers, and the owners of the building on which work had been performed—praying judgment against principal contractor for amount of debt, and that it be decreed a lien upon the building, and for sale of building to satisfy judgment. *Held*, several causes of action improperly united. *Lewis & Pickering v. Williams & Sons*, 3 Minn. 151.

**86.** A cause of action to recover possession of certain real property, and damages for withholding it, cannot be united with a cause of action for damages for withholding certain other property, under G. S., Chap. 66, Sec. 98, Sub. 1 and 5. *Holmes v. Williams et al.*, 16 Minn. 164.

**87. Private and public interests in an action to oust an usurper.** Sec. 5, p. 411, R. Stat., (1851) allows private interest to be joined with the public interest in an action, so that an usurper may be ousted, claimant installed, and recover damages for the usurpation of his rights. *Territory of Minnesota ex rel., E. F. Parker, and E. F. Parker v. Seagrave Smith*, 2 Minn. 240.

**88. Demand of judgment on note given for money loaned, with judgment of foreclosure, as a mortgage, of a deed absolute on its face given to plaintiff as security, also the surrender by agent of an instrument of defeasance held in escrow.** R. and M., through the agency of L., borrowed money of plaintiff, giving their promissory note with a quit-claim deed, from L. (absolute on its face) to plaintiff as security—plaintiff depositing in escrow with L. a quit-claim deed of the same property, to be held in safe keeping only, unless the note was paid, in which case the deed was to become



operative as plaintiff's deed. Complaint sought the following relief, viz.: judgment against the makers for amount due on the note, and that the premises conveyed by the first deed as security be sold to satisfy the same, also judgment against them to satisfy any balance, and judgment against L. that he surrender up to be cancelled the second deed in his possession. *Held*, several causes of action are not improperly united, under Sec. 11, p. 671, Comp. St. The prayer for the delivery up and cancellation of the deed makes no material difference, the makers of the note and mortgagors being properly joined for one purpose, the court will proceed to grant complete relief as against all. Consequently demurrer will not lie for misjoinder of parties defendant—following *Lewis et al. v. Williams & Son*, 3 Minn. 151. *Nichols v. Randall*, 5 Minn. 304.

**89. Abatement, injunction and damages, nuisance.** A party may in one action, under Sec. 25, Chap. 75, G. S., recover damages for a nuisance, an abatement of such nuisance, and a perpetual injunction against its maintenance or continuance. *Finch v. Green*, 16 Minn. 355.

**90. Legal and equitable causes of action.** Under Sec. 87, p. 543, Comp. St., cause of action arising out of the same transaction may be joined, though partly legal and partly equitable, or wholly of the nature of one or the other. *Montgomery v. McEwen*, 7 Minn. 351.

**91. Demand of purchase money by vendor, and surrender of mortgage indemnity against an outstanding lien since cancelled.** Where A. purchases of B. land on which a mortgage lien rests, and gives his promissory note for balance of purchase money, taking a mortgage from B. on other property to secure himself against the former lien, and fails to pay the note, B., may in one suit, under Sub. div. 1, Sec. 87, p. 543, Comp. St., demand the balance due on the purchase money, and the surrender to plaintiff of his mortgage, he having previously relieved the land sold from

the mortgage lien resting against it—not a misjoinder of actions. *Ib.*

**92. False warranty and deceit.** It seems that a complaint is objectionable which is drawn with a view to a recovery, either for a false warranty or deceit, as the evidence might seem to establish the one or the other action, but the remedy is by motion to strike out or make more definite, or when the case is called to trial, motion to compel the plaintiff to elect on which cause of action he would proceed—after judgment the objection comes too late. *Marsh v. Webber*, 13 Minn. 109.

**93. Recovery of possession, and then of the use thereof.** Cause of action for the recovery of premises may be united with a cause of action for the occupation of the same premises, under Sec. 83, Comp. St., Chap. 60. *Armstrong v. Hinds*, 8 Minn. 254.

**94. Claim for loss of child's services, and for suffering in mind and body.** In an action brought by a father for injuries to his infant child. *Query*, whether on proper objection, a claim for loss of service or for money paid physician could be joined with claim for compensation for injuries and suffering of body and mind consequent thereon? *The City of St. Paul v. Kuby*, 8 Minn. 154.

**95. Promise to plaintiff, and also to another.** Complaint may set up, as ground for recovery, as many promises of defendant as he may have made—as where he had promised a third person, and also promised the plaintiff. *Walsh v. Kattenburgh*, 8 Minn. 127.

**96. Against A. on account, and B. for his promise to pay the debt.** A complaint, setting up a cause of action against A., for goods sold and delivered to him, and also against B. for his promise to A. to pay the latter's debt to plaintiffs, improperly joins two causes of action, and is demurrable. *Sanders et al. v. Clason et al.*, 13 Minn. 379.

**97. Claims against trustees as such, and individually or against others.** Sub. div. 7, Sec. 87, Comp. St., was repealed by Sec. 4, Chap. 11, Collated Statutes, 1853,

(G. L. 1863?) so that under the latter act a claim against a trustee may be joined with a claim against the same person in his individual capacity, or against other persons. *Fish v. Berkey et al.*, 10 Minn. 199.

**98. Claim against A. for excavating a hole, and against B. for allowing it to remain open.** A complaint against F. and the City of St. Paul jointly, charging that F. made an excavation in the public street, without erecting proper guards, wilfully permitting the same to remain open, and that the city suffered it to remain open without proper protection, whereby plaintiff was injured, joins causes of action which do not affect all the parties to the action, under Sub. 7, Sec. 98, Chap. 66, G. S., and is demurrable by either defendant alone. *Trowbridge v. Forepaugh et al.*, 14 Minn. 133.

**99. In an action to wind up co-partnership, what may be joined.** Plaintiff brought an action against his co-partners T. and B., setting up facts which entitled him to an accounting, and joined as co-defendants, M. and Black alleging that T., knowing the condition of partnership affairs, corruptly contrived with M. and Black to evade the payments of his (T.'s) share of losses, and thereby cheat plaintiff and defendant, B., and secretly made a pretended sham sale of certain partnership assets, as and for his individual property to defendants M. and Black, who before the sale and delivery, or payment, had notice of the rights of plaintiff and B., as partners of T., in and to the same; yet said M. and Black secretly and fraudulently abstracted said property from the possession of the firm, and now claim the same as their sole property, clear of all claims of plaintiff and defendant B., setting forth the partnership indebtedness and inability of T. and B. to pay their share of losses without resorting to these assets, praying for an account of the partnership business, appointment of a receiver to hold the partnership property pending suit; that defendants be enjoined from disposing of the same during suit, vacation of sale to M.

and Black, and that the assets in their hands be turned over to the receiver, and that plaintiff be adjudged to have a specific lien on a certain mill and machinery, (which by the articles were to revert to T. and B. after settlement of partnership affairs,) for all moneys advanced by him, less his share of losses, and sale of mill to satisfy his claim, etc., with cost of suit. *Held*, complaint does not recite incongruous causes of action, within Sec. 98, Chap. 66, G. S., the object being *single*, viz.: to wind up the co-partnership affairs, and all the defendants were properly joined. *Palmer v. Tyler et al.*, 15 Minn. 106.

b. *Complaint by or against persons in special capacities.*

**100. Corporation must plead facts showing its existence, when.** A corporation created by a statute which requires certain acts to be done before it can be considered *in esse*, must show (and of course plead) such acts to have been done to establish its existence; but where a corporation is declared such by the act of incorporation, no such averment is necessary; as, acceptance of charter. *St. Paul Division No. 1 Sons of T., v. Brown et al.*, 9 Minn. 157.

**101. Corporations, actions by or against domestic.** At common law, in an action against a corporation by its corporate name, it was not necessary, for the purpose of alleging its existence, to aver the authority or act by or under which it was created. Sec. 94, Chap. 66, G. S., applies only in cases where it was necessary at common law for the pleader to set forth the law upon which he relied in the suit, and in order to obviate the necessity of pleading at length the statute relied on, renders it sufficient, in actions by or against domestic corporations, to refer in the pleadings to the act or proceedings by which such corporation was created. *Dodge v. The Minnesota Plastic Slate Roofing Co.*, 14 Minn. 49.

**102. Partnership, action by or against.**

In an action by or against partners as such, the pleadings must set forth the partnership. *Foerster v. Kirkpatrick et al.*, 2 Minn. 210.

**103.**—issue on the allegation of partnership, material. In an action by one co-partnership against another, the allegation of partnership, whether as to plaintiffs or defendants, is material, and its denial tenders an issue which the jury must determine. *Irvine et al. v. Myers & Co.*, 4 Minn. 229.

**104.**—An allegation of defendants' partnership is material, and if denied, must be proved—following *Irvine v. Myers & Co.*, 4 Minn. 229. *Fetz v. Clark & Co.*, 7 Minn. 217.

**105.** Partnership, when immaterial. It is not ground of demurrer that a complaint which describes the plaintiffs, in the title of the action, as partners, contains no allegation of partnership in the body thereof, nothing appearing to show that the existence of a partnership was necessary to give validity to the cause of action alleged. The addition of some character to the name of a plaintiff in the title of the action, as "executor," "partners," etc., being *descriptio personæ* only, and without something more, surplusage—distinguished from *Foerster v. Kirkpatrick*, 2 Minn. 210. *Jaeger et al. v. Hartman*, 13 Minn. 55.

**106.**—In an action by plaintiffs as partners, on a promissory note, not executed to them as partners, an allegation of partnership is not essential to a cause of action. *Hayward et al. v. Grant*, 13 Minn. 165.

c. On contract generally.

**107.** Complaint may set up a contract as modified by subsequent agreement. Where a contract has been made, and by a subsequent agreement between the parties, the former agreement has been modified and altered, the plaintiff may declare upon the contract as it stands altered by the subsequent agreement, without notice

ing the terms of the original agreement which have been dispensed with. *Estes v. Farnham*, 11 Minn. 423.

**108.** Consideration must be pleaded to an executory agreement. In an action on a contract, the consideration of which is an executory agreement, such agreement must be pleaded, performance averred, and such allegations are material and traversable. *Becker v. Sweetzer*, 15 Minn. 427.

**109.** Conditions, mutual and concurrent. J. covenanted to convey and sell, by good and sufficient warranty deed, a house and lot to S. and B., provided S. and B. pay, or cause to be paid to J., \$400, in groceries, etc., in manner following, viz., \$200 on demand, remainder in April next, and S. and B. to have immediate possession. *Held*, such covenants are concurrent, and performance, or an offer to perform, must be averred and proved. *Snow et al. v. Johnson*, 1 Minn. 49.

**110.** Damages by way of interest. In an action on breach of a money contract, (as note, etc.,) it is inadmissible under the code to plead damages which accrue in the nature of interest—it would be pleading a conclusion of law. Only where special damages are claimed, more than the rate allowed by law, must they be pleaded. *Talcott v. Marston*, 3 Minn. 339.

**111.** Special damages. If special damages are not particularly set up, they cannot be recovered. *Brackett v. Edgerton*, 14 Minn. 174.

**112.** Where a complaint for services and money advanced alleged the whole in a sum in gross, *Held*, the objection should have been taken by a motion to make more definite, and not by objecting to the evidence thereof on the trial. *Allis v. Day*, 14 Minn. 516.

**113.** Prayer for judgment. Where the complaint contained a prayer for specific, but not general relief, and it transpired that the plaintiff was entitled to relief different from that specifically asked, the Supreme Court declined to grant it. *Barnes v. Kerlinger*, 7 Minn. 82.

*d. Complaints in particular actions.*

*1. Actions on joint contract.*

**114. Joint contract must be pleaded and proved.** In an action against defendants on a joint contract, it must appear on the face of the pleadings that their contract was joint, and be proved on the trial—under a general denial. This at common law, and under the provisions of statute—Sec. 168 and 172, Comp. St., p. 554. *Fetz v. Clark & Co.*, 7 Minn. 217.

*2. Actions for money had and received.*

**115. Against mortgagee for surplus moneys arising from sale.** In an action against mortgagee for surplus moneys arising from sale of mortgaged property, it is not necessary to allege that—1. Defendant took possession of the land. 2. That plaintiff tendered defendant amount of mortgage debt. 3. The amount claimed to be due in notice of mortgage sale. *Bailey v. Merritt*, 7 Minn. 159.

*3. Actions for goods sold, etc.*

**116.** In an action for goods sold and delivered, the complaint must set up the value of the goods, (from which the law implies a promise to pay the amount,) or an express promise to pay on part of defendant the amount claimed—the time of sale ought to be stated also. *Foerster v. Kirkpatrick et al.*, 2 Minn. 210.

**117. When insufficient.** A pleading which alleges that a party is indebted to the complainant in a certain sum, for lumber sold and delivered to him at his request, without stating when it was sold, or that it was worth the sum charged, or that the person ever promised to pay that sum, states no cause of action—following *Foerster v. Kirkpatrick*, 2 Minn. 210. — *Holgate v. Browne*, 8 Minn. 243.

*4. Actions for use and occupation.*

**118. When sufficient.** Complaint charged that “defendant, on or about,

etc., and from that time until, etc., leased, hired and rented of and from the plaintiff, and was actually in the possession, etc., during that time, and was during that time the tenant of the plaintiff, and occupying, etc., and that they were worth and of the value and agreed price of, etc.; in consideration whereof, defendant became liable and promised said plaintiff to pay said sum therefor,” etc. *Held*, complaint declares on a lease, but states a cause of action for use and occupation, irrespective of any lease, and was susceptible of proof, though no lease was actually made. The pleading was double, but could not be corrected on appeal. *Dean v. Leonard*, 9 Minn. 190.

*5. Actions for work and labor.*

**119. When sufficient.** Complaint alleging a written contract between plaintiff and defendant, under and by virtue of which plaintiffs performed work and labor, within certain times, and at certain places—naming both, value of the same, amount paid, balance unpaid, and proper demand for judgment—states a good cause of action. *Nash & McGrorty v. Murnan & Grace*, 6 Minn. 577.

*6. Actions on negotiable instruments.*

**120. Promissory note of a corporation.** Where a complaint on a promissory note of a corporation refers to the charter which shows a corporation competent to make notes, it is unnecessary to allege the circumstances under which it was given, to establish the corporate authority to make it. Want of authority in the particular case is matter of defense. *Gebhard v. Eastman & Gibson*, 7 Minn. 56.

**121. Complaint against county commissioners,** to recover on evidence of indebtedness given, for the laying out and construction of a road, failed to allege that notice, etc., was published “at least three weeks.” The publication being condition precedent to the defendants’ power to act. *Held*, complaint insufficient. *Goodnow v. Commissioners of Ramsey Co.*, 11 Minn. 31.

**122. On promissory note—statute of limitations.** Complaint on promissory note showed that cause of action was barred by the statute of limitations so far as the note was concerned, but alleged a payment of a given amount, without specifying when it was paid. *Held*, the payment may have been made late enough to save the statute, hence not demurrable. *Kennedy v. Williams*, 11 Minn. 314.

**123. Complaint on note or bill.** A complaint on a note or bill is not demurrable for want of an allegation that the plaintiffs were "the owners and holders of the bill at the time of the commencement of the action," where it appears that they were the original owners—the presumption is that their ownership continues, nothing appearing to the contrary. *Jaeger et al. v. Hartman*, 13 Minn. 55.

**124. Bond issued by a corporation under legislative authority.** In a complaint on a bond issued by a corporation under an act of the Legislature authorizing such issue, it is not necessary to allege a record of the election held under the provisions of said act. *Wiley et al. v. Board of Education of Town of Minneapolis*, 11 Minn. 371.

**125.**—A complaint on bond issued by a board of education, under a special act authorizing it to raise money to pay existing indebtedness by the issuance of negotiable bonds, which alleges that the bonds were executed and delivered by defendant, the presumption *prima facie* is, that they were legally issued. It need not be alleged that they were taken at par. If the board were limited in their disposal, it was matter of defense. If the fact that they were not issued in accordance with the terms of the act conferring the authority to issue them, can be taken against an assignee for value and without notice, it must be taken by answer, and not demurrer. *Ib.*

7. *Actions on non-negotiable instruments for the payment of money.*

**126. Foreign judgments.** A complaint on a foreign judgment omitting an averment of jurisdiction in the foreign

court, is fatally defective. *Smith v. Mulliken*, 2 Minn. 319.

**127.**—Judgments of sister States are regarded as foreign judgments; and in an action on them, the complaint must show that it was rendered by a court of competent jurisdiction. Sec. 77, p. 339, R. S., does not change this rule. *Karns v. Kunkle*, 2 Minn. 317.

**128. Replevin bond, by officer from whom property was taken.** Plaintiff possessed property as constable, by virtue of attachment issued out of a justice court. Defendant replevied it, and failed to prosecute. Plaintiff brings suit on replevin bond. *Held*, though the attachment alone would protect plaintiff in trespass, if regular and valid on its face, where he brings suit to recover property levied on by him, his right to recover depends on the validity of his process and his liability over; hence he must, in pleading a process of a court of limited or inferior jurisdiction, allege every fact, to show the court had jurisdiction of subject matter, parties and process. *Clark v. Norton*, 6 Minn. 413.

**129. Official bond of deputy collector.** In an action against a defendant for breach of his official bond as deputy collector, the complaint must aver the appointment of the defendant as such deputy; the fact that the bond, which recites such appointment, is made part of the complaint, will not suffice—it must be averred, not recited. *Hall v. Williams et al.*, 13 Minn. 260.

**130. Recognizance.** In a complaint on a recognizance, it need not appear that the amount of the penalty has not been paid—it is matter of defense. *State v. Grant*, 10 Minn. 39.

**131.**—A complaint on a recognizance which shows that the defendant failed to appear to answer the indictment when called, shows a breach, without alleging that the bail was called with the principal. *Ib.*

8. *Actions for unliquidated damages for breach of contract.*

**132. Covenant under seal.** A complaint which states that plaintiff and de-

defendant were partners; that for the sum of \$100 plaintiff sold, etc., all his interest, etc., to defendant, and surrendered possession of the property of the firm to defendant, who covenanted under seal to pay the firm liabilities; that plaintiff had been compelled to pay a certain debt of the firm—states a good cause of action. *Rose v. Roberts*, 9 Minn. 119.

**133.** *Stipulation by lessee to insure.* In an action by a lessor for damage for breach of a stipulation to insure the building by the lessee—a distinct averment of ownership of the building by the plaintiff at the date of the lease will be presumed to continue, until the contrary is affirmatively shown. *Rhone v. Gale et al.*, 12 Minn. 54.

9. *Action for injuries to personal property.*

**134.** Where the facts in a complaint show a “wrongful” taking, it is sufficient, although the pleader has not used that word. *Buck v. Colbath*, 7 Minn. 310.

**135.** Complaint alleged, substantially, that on or about October 21, 1868, defendant unlawfully took, “or caused to be taken,” from plaintiff’s possession, and carried away, a buck, the plaintiff’s property, of the value of twenty-five dollars; that on or about the 23d day of said October, plaintiff was entitled to the immediate possession of the buck, and defendant, being then and there in possession of it, unlawfully converted and disposed of it to his own use, thereby depriving plaintiff of the possession, and also of the use of it, to the plaintiff’s damage in the sum of seventy-five dollars, and prays for judgment in that sum. *Held*, though redundant and unskillful, it sufficiently states a cause of action in the nature of trespass *de bonis asportatis*. *Clague v. Hodgson*, 16 Minn. 329.

**136.** Complaint alleged plaintiff’s ownership and right of immediate possession of the personal property therein described, its value, defendant’s possession of it, a demand thereof by plaintiff of defendant, and defendant’s refusal to deliver up the

same, to plaintiff’s damage in the sum of \$1,000. *Held*, though not in the best form, it is a sufficient statement of a cause of action for a conversion of the property. *Jones v. Rahilly*, 16 Minn. 320.

**137.** Complaint charged that plaintiff owned and possessed certain property, (giving date and value,) that defendant on, etc., took and carried away the same, and detains it against sureties and pledges, to his damage, etc. *Held*, states a good cause of action, and unnecessary to aver that it was “unjustly detained,” if the facts show that it was unjust. *Adams v. Corrison*, 7 Minn. 456.

**138.** Complaint alleged that one B. wrongfully and forcibly severed a “barn” from land owned by plaintiff, and located and has ever since “used and occupied” the same, upon land then owned by one E., which B. occupied as a tenant, and which said E. afterwards sold to defendant with notice, etc., and plaintiff has demanded said barn of defendant, who refuses, etc. *Held*, assuming the barn to be personal property, the taking having been done by B., to show a cause of action against defendant, there must appear an *unlawful detention*, but the complaint negatives that by alleging that the barn has been “used and occupied” by said B. ever since its removal, thus showing that defendant had no control over it. *Tozier v. Merriam*, 12 Minn. 87.

10. *Actions for claim and delivery of personal property.*

**139.** A declaration in replevin, under the statute of Wisconsin, which omits the averment of a *wrongful taking*, is bad on demurrer, but cured after verdict. The defendant, by pleading to the merits, waives such objection. *Coit v. Waples et al.*, 1 Minn. 134.

**140.** In an action for the recovery of the possession of personal property, the complaint failed to aver property in the plaintiff, or that he was entitled to the possession. *Held*, that in this action, like the

old action of replevin, the complaint must set out title and right to possession in the plaintiff, otherwise fatally defective. *Loomis v. Youle*, 1 Minn. 177.

11. *Actions for injuries to the person.*

**141. Assault and battery.** In an action for assault and battery, it is not necessary to charge in terms that it was "willful" or "malicious," to entitle the plaintiff to maintain his action. *Andrews v. Stone*, 10 Minn. 72.

12. *Action for injuries to real property.*

**142. For damages assessed by commissioners in laying out a road.** Where commissioners have awarded damages to owner of land, taken in laying out a road, a complaint in an action to recover such damages need not allege that the road has been opened and graded—an averment that all the acts required of the commissioners were performed, setting them out in detail, and that the land was taken, is *prima facie* sufficient. Any abandonment is matter of defense. *Daley v. City of St. Paul*, 7 Minn. 390.

**143.**—The general allegation of title in fee in the plaintiff, at and previous to the commencement of the action, is sufficient to maintain an action for assessed damages to land in laying out a road. *Ib.*

**144. Where plaintiff was a foreign executrix at time of trespass.** A complaint by an executrix to recover damages for an alleged unlawful entry upon land, and cutting and removing standing timber growing thereon, and converting the same to defendant's use in 1866, 1867, and 1868, which states that plaintiff's testator resided in Pennsylvania at the time of his decease; that he died seized of the land in 1858, and leaving a will appointing plaintiff sole executrix, whereon letters testamentary were duly issued to her in Pennsylvania, and she was duly appointed, and has since continued, executrix; that on Dec. 29, 1869, a duly authenticated copy of said letters and

her appointment were duly filed in the office of the Probate Court, for the proper county in this State, is demurrable, as not stating facts sufficient to constitute a cause of action; it not appearing that plaintiff had either possession, or right of possession of the premises at time of committing the alleged trespass. *Pott v. Pennington*, 16 Minn. 509.

**145. Injuries committed by a corporation.** In a complaint against a corporation for damages for injuries to the plaintiff's property, it is not necessary to state that the act was done by the corporation through its agents. *Gould v. Sub. Dist. No. 3, of Eagle Creek School District*, 7 Minn. 203.

**146. Plaintiff's interest in the property.** Complaint alleged possession in plaintiff of "a portion" of a certain dwelling house, and that while in possession as alleged, the defendant "broke, and entered, etc., and took possession of a part of said dwelling house," without plaintiff's consent, etc. *Held*, that it does not appear that defendant trespassed on property in possession of plaintiff. *Ib.*

**147. Where a railroad company trespassed on plaintiff's land.** A complaint against a railroad company for entering upon plaintiff's land, and committing divers acts of trespass, in laying down their track, etc., need not show affirmatively that the "defendant has not, since its entry upon and appropriation of the land, had the damages assessed and paid him, or that proceedings for the ascertainment of such damages were not commenced contemporaneously, with or even before the entry complained of, or that such proceedings are not now pending undetermined, or that defendant has ever refused to pay the value of the land taken pursuant to its charter, or that plaintiff has ever demanded such payment. The acts charged (*i. e.* the building and operating daily of their road on the land) constitute a taking of private property; the other matters are for the defense. *Gray v. The First Division of the St. Paul & P. R. R. Co.*, 13 Minn. 315; *Molitor*

*v. The First Division of the St. Paul & Pacific R. R. Co.*, 13 Minn. 285.

13. *Actions to recover the possession of real property.*

**148. Sufficient.** Complaint alleging that plaintiffs are "absolute owners in fee" of the land, that defendant is in actual possession, that plaintiffs have demanded in writing of defendant that he surrender the possession, that defendant has refused so to do, and wrongfully and unlawfully withholds the possession from the plaintiff, is sufficient in ejectment. *Wells et al. v. Masterson*, 9 Minn. 566.

**149. Insufficient.** In action to recover possession of real estate, the complaint showed title in plaintiff on Dec. 6, 1860, then alleged a wrongful entry, etc., of defendant on Sept. 17, 1861, without alleging title in plaintiff at that time. *Held*, insufficient—as title in plaintiff at time of wrongful entry in commencement of action is essential—following *McClane v. White*, 5 Minn. 178. *Armstrong v. Hinds*, 8 Minn. 254.

**150.** In an action to recover the possession of real property, the complaint showed that when plaintiff became owner of an undivided one-half thereof, defendant was in lawful possession, and did not show that defendants since unlawfully withheld possession. *Held*, insufficient either for the recovery of the possession, or damages for withholding the same. *Holmes v. Williams et al.*, 16 Minn. 164.

**151.**—In an action for the recovery of possession of real property, the complaint alleged title in defendant at a certain day; then a mortgage to plaintiff containing "full covenants and conditions," (describing the condition), default in condition, foreclosure of the mortgage by advertisement (setting out particularly each step up to day of sale, and then alleging) that on, etc., said mortgage was "duly foreclosed" by a "sale at public auction," etc., then showing purchase by plaintiff, and all steps required, such as recording papers, etc., and that time for redemption had expired,

and that under and by virtue of said mortgage and foreclosure thereof, plaintiff is seized in fee simple, and entitled, etc., with demand and refusal. *Held*, by showing title in defendant at some prior time (unnecessarily as he might have alleged ownership in fee in himself,) he must then trace title out of defendant to himself. Having attempted to do that by means of a mortgage, and certain foreclosure proceedings, if they are not perfect, he fails, and a failure to allege that the mortgage contained a "power of sale," is fatal to the complaint, nor does the averment that the mortgage was "duly foreclosed" aid the defect. *Pinney v. Fridley*, 9 Minn. 34.

14. *Actions given by statute.*

**152. Action by contractor against city lot owner.** Where a statute gave a city contractor two remedies—1. By ordinary means of levying and collecting a tax. 2. By action against the lot owner. *Held*, that, in either case, if the payment was resisted, the contractor must show step by step that everything has been done which the statute makes essential to the due execution of the power; and being necessary to prove them, they must be pleaded. *McComb v. Bell*, 2 Minn. 295.

**153. Action to enforce a lien.** Complaint in an action to enforce a lien should state the facts which authorize the demand sued to be decreed a lien on the specific premises, and then so to declare it in the decree or judgment. *Mason & Craig v. Heyward*, 5 Minn. 74.

**154. Action to assail validity of a tax.** The presumption is that the taxes were legally assessed, and a complaint which assails the validity of a tax must show that the tax is illegal. *St. Peter's Church v. The Board of Co. Com. of Scott Co.*, 12 Minn. 395.

**155. Action to enforce lien for taxes.** Sec. 8, Act of 1862, providing that, if the title of any purchase at such tax sale shall be adjudged invalid, "he shall retain a lien,



etc.," embraces only a judgment of a court of competent jurisdiction, but it need not be rendered in a separate action, but a judgment declaring it invalid, and enforcing plaintiff's lien may be given in one action. But plaintiff must either prove a judgment of invalidity, or set out facts showing it invalid, and claim judgment accordingly. *Webb v. Bidwell*, 15 Minn. 479.

**156.**—In action, under Sec. 8, Act of 1862, to enforce the lien for taxes transferred to plaintiff by the State, where it relates to the taxes of several years, as they are levied annually, the State acquires a separate lien for each year, and the plaintiff should set forth definitely each lien of the State which he claims to have acquired, by stating the nature and amount of each year's taxes embraced in the sale, and the particular lot or parcel on which they were assessed; but a defect therein should be remedied by notice to make more definite and certain, and cannot be reached by motion for judgment on the pleadings. *Ib.*

15. *Actions for equitable relief.*

**157. Cancellation of deed executed by a junior.** A complaint, praying cancellation of a deed, claimed to have been executed by plaintiff, during his minority, under duress, etc., of defendant, failed to state the age of the plaintiff at date of execution of deed, or that he had attained the age of majority at time of bringing the action. *Held*, insufficient. *Irvine v. Irwin*, 5 Minn. 61.

**158. Action to set aside mortgage on homestead.** A complaint under Sec. 93, Comp. St., 570, to set aside a mortgage on the homestead by reason of its not being executed by the wife of the owner—must show affirmatively that the mortgage was not given to secure the purchase money thereof—and thus negative the exception in the statute. *McMILLAN, J. Carver v. Slingerland*, 11 Minn. 447.

**159. Action to compel conveyance of town site land entered in trust for occupant.** A complaint which alleged that plain-

tiff, "at time of making the survey, etc., and record thereof, was in occupation (of the land), occupying and improving the same as a town site, etc., and that at date of application to enter (the land), and of the entry and purchase thereof by the corporate authorities, he was the sole and exclusive occupant of the land described in his statement in writing addressed to the town council, occupying and improving the same, for the purpose of erecting and building a town, etc., and that defendants, nor either of them, did not occupy or improve said land, nor any part, etc., at time of survey nor at any time," is sufficient to entitle plaintiff to a conveyance from the town which entered said lands under Chap. 33, Comp. St., in trust for occupants. *Cuthbert v. Peck et al.*, 11 Minn. 45.

**160. Action to declare a deed a mortgage.** To have an absolute conveyance decreed to be a mortgage in equity, it is only necessary to show the deed was given to secure the payment of money, and it is not necessary to allege damage in such case, or any special value, overruling *Belote v. Morrison*, 8 Minn. 945. *Holten v. Meighen*, 15 Minn. 69.

16. *Action for forcible entry and detainer.*

**161.** In an action under the "Forcible Entry and Detainer Laws" of the Territory, the property must be "particularly" described as the statutes require. *Lewis v. Steele et al.*, 1 Minn. 90.

**162.** In an action under the Forcible Entry and Detainer Law—Rev. Stat. Chap. 87, 1852, the complaint charged that the defendants forcibly entered, and did detain certain lands, and demanded restitution of the premises. *Held*, fatally defective. *Fullmans v. Gilmore*, 1 Minn. 179.

**163.** In a complaint under the forcible entry and detainer act, it is sufficient to allege title and right of possession in the plaintiff, and wrongful withholding of the possession by the defendant. *Pinney v. Fridley*, 9 Minn. 34.

## VIII. THE ANSWER.

a. *Time to answer.***164. After notice of appearance.**

Under Sec. 51, p. 537, Comp. Stat., a defendant has the same time to answer a complaint after it is served upon him, that he had of unexpired time, when he served notice of appearance. *Swift v. Fletcher*, 6 Minn. 550.

**165. In divorce suits.** Rule 43, of District Court Rules, so far as it allows a defendant in a divorce suit 90 days to answer, after service of summons, is inoperative, it being in conflict with the statute which requires an answer in thirty days. *Flagbank v. Flagbank*, 9 Minn. 72.

b. *Who may answer.*

**166. Married woman separately—when.** If a *feme covert*, joint defendant with her husband, puts in a separate answer without leave, the court will on motion quash it. *Wolfe and wife v. Banning & Buckwell*, 3 Minn. 252.

**167. One defendant cannot defend for another** who does not answer, it not appearing he has any right to answer for him, or interest in sustaining his title. *Cathcart v. Peck et al.*, 11 Minn. 45.

c. *Joinder of Defenses.*

**168.** Under the statute a defendant may set up as many defenses as he may have; the only limit to this right is that such defenses must not be inconsistent; if true, they may stand together. *Booth v. Sherwood et al.*, 12 Minn. 426.

**169. Denial of plaintiff's title, and plea of license.** Where a tenant in common sues his co-tenant for conversion of the property held in common, a plea of license by the plaintiff does not admit plaintiff's title, where by a general denial it has been put in issue. *Ib.*

**170. Statute of limitation and satisfaction.** An answer which sets up as a

defense to the same cause of action: 1st, the statute of limitations; 2d, a "full settlement and satisfaction of all claims of said plaintiff against said defendant," is not inconsistent, the second defense being a denial rather than an admission of a liability. *Conway v. Wharton*, 13 Minn. 158.

**171.** Duplicity, in the sense of pleading two or more defenses to the same cause of action, is permitted by the statute, Sec. 81, p. 460, G. S. *Ib.*

d. *Inconsistent defenses.*

**172. General denial and justification.** Plaintiff charged defendant with taking and converting personal property. Defendant answered by—1st, generally and specifically denying every allegation in complaint; 2d, "for a further defense," alleging matter in justification under writ of attachment, etc. *Held*, the two defenses were inconsistent with each other—and the one neutralizing the other, as to any denial of the gist of the action, in this case, taking, etc.; but the admission of the taking will be allowed to stand. The provision of the code that, "the defendant may set forth by answer as many defenses as he shall have," means defenses that are true, and such as the facts to be proved will sustain. *Derby & Day v. Gallup*, 5 Minn. 119.

**173.**—A party will not be permitted to plead a justification and a denial of plaintiff's possession—following *Derby & Day v. Gallup*, 5 Minn. 119. *Zimmerman v. Lamb et al.*, 7 Minn. 421.

**174.** The answer denied payment of a note on which plaintiff based his right to recover as surety, and then alleged that the cause of action did not accrue within six years. *Held*, the pleading was hypothetical, and the latter averment inconsistent with the former. *Barnsback v. Reming*, 8 Minn. 58.

**175. Remedy for inconsistency.** Inconsistency between two defenses may be such as to show that one of them is sham,

that is to say, false, so as to authorize a court to strike it out on motion. *Conway v. Wharton*, 13 Minn. 158.

**176.**—Our statute does not authorize a defense to be stricken out for inconsistency—and, in most cases in which one defense is inconsistent with another, the better practice would require the court to compel a defendant to elect upon which defense he would stand, rather than to strike out. Although inconsistent, it may be impossible to tell, from an inspection, what is false. *Ib.*

*e. Counter claims.*

1. *Generally.*

**177. Counter claim admitted requires no proof.** In an action for work and labor, the answer set up a special contract, and plaintiff admitted the existence of the contract in the reply. *Held*, to be error for the court to charge the jury that proof of the contract was on defendant, and if not made they should allow plaintiff value of her services—for the contract was admitted by the pleadings, and the action should have been for the breach of contract for damages. *Bond v. Corbett*, 2 Minn. 253.

**178. Immaterial whether damages are liquidated or unliquidated.** Under Sec. 71, p. 541, Comp. St., defendant may set up by way of counter claim any cause of action arising *ex contractu*, whether the damages are liquidated or unliquidated. *Morrison et al. v. Lovejoy*, 6 Minn. 319.

**179.** Sub. Div. 2, Sec. 71, p. 541, Comp. St., providing what may be *set off* in “an action arising on obligation,” viz.: “any other cause of action arising also on obligation”—was intended to apply to all matters arising *ex contractu*. *Folsom v. Carl*, 6 Minn. 420.

**180.** The fact that a breach of a contract may enable the injured party to bring an action in the nature of an action *ex delicto*, does not preclude the matter from being the subject of a set off, or *vice versa*. *Ib.*

**181.** The counter claim contemplated

by Sec. 170, p. 554, and Sec. 71, p. 541, Comp. St., must be one upon which an action can be maintained by the defendant at law or in equity. *Swift v. Fletcher*, 6 Minn. 550.

**182.** An allegation in an answer that “the premises described in the complaint were a homestead,” does not constitute a counter claim, in the sense that it is admitted to be true if not denied in a reply. *Englebrecht v. Rickert*, 14 Minn. 140.

**183. Admitted by not denying.** Counter claim or set off, set up in an answer, will be taken as true unless denied by the plaintiff’s reply. And if not denied, not necessary to prove them. *Taylor v. Bissell*, 1 Minn. 225.

2. *Effect of counter claim.*

**184. Counter claim admits plaintiff’s cause of action.** In an action on a special contract, which by its terms required a full performance on part of plaintiff, before any liability was cast upon defendant, and plaintiff pleads performance of *conditions precedent*, defendant cannot avail himself of an alleged *non-performance* on part of plaintiff, and a further defense by way of recoupment or *counter claim*. The first defense *denies any claim* in favor of the plaintiff, while the latter *admits a claim* on part of plaintiff, which it is attempted to avoid by a *counter claim*. *Mason & Craig v. J. F. Heyward*, 3 Minn. 182.

**185.**—Under the code a defendant may now not only plead in reduction or bar of plaintiff’s claim, but may establish a claim and recover judgment for damages against the plaintiff. But if he insists on a counter claim, and that the court shall examine into the damages he has sustained from *non-performance* of plaintiff, rather than only on the non-performance, he will be held to the issue on the counter claim, and will be held to admit the existence of a claim against him in favor of plaintiff. *Ib.*

**186.**—Plaintiff claimed damages for breach of contract; defendant in defense

set up: 1st, non-performance of contract by plaintiff; 2d, counter claim for damages by reason of non-performance. The reply put the counter claim in issue. *Held*, by pleading a counter claim, defendant admitted a claim on part of plaintiff against him, which he thus attempts to avoid, and thereby tenders an issue upon all the equities existing between him and the plaintiff arising out of the contract, and cannot, after an examination of all those equities, fall back and defeat a recovery against him on the plea of non-performance—following *Mason & Craig v. Heyward*, 3 Minn. 182. *Whalon et al. v. Aldrich*, 8 Minn. 346.

**187.**—The rule of pleading a general denial and counter claim as laid down in *Mason & Craig v. Heyward*, 3 Minn. 186, and *Whalon et al. v. Aldrich*, 8 Minn. 348—applied in *Kæmple v. Shaw*, 13 Minn. 488.

**188.**—The nature of a counter claim would seem to render necessary the admission by defendant of a claim against him in favor of the plaintiff, arising out of the contract, or the transaction, as the case may require, which is the *cause of action* or the ground of the plaintiff's claim set forth in the complaint. *Steele et al. v. Etheridge*, 15 Minn. 501.

### 3. When is counter claim allowed.

**189. Defendant cannot counter claim after a general denial.** Where plaintiff claims damage by reason of an alleged breach of contract of sale on part of defendant, and the latter denies the fact of sale, and claims that the transaction in question constitutes a contract of agency which the plaintiffs have broken, to his damage, but that he has performed and is not liable to plaintiffs, and prays judgment for damages by way of counter claim. *Held*, defendant, by denying all liability towards the plaintiff, and failing to set up any facts showing a liability, could not counter claim against the plaintiff, and had no right to introduce evidence as to the alleged damage sustained by reason of

the plaintiff's breach of the alleged contract of agency. *Ib.*

### **190. One joint defendant cannot set up individual claim as counter claim.**

One of several joint defendants cannot set up an individual—sole claim—as a set off to plaintiff's demand. *Laws of 1849*, p. 18, Sec. 1, Sub. 6. *Cooper v. Brewster*, 1 Minn. 96.

### 4. In particular cases.

### **191. Illegal interest paid, not good counter claim against the balance of the debt.**

Where a mortgagor suffers the foreclosure of a mortgage, given to secure a note drawing 5 per cent. interest per month after due till paid, by way of penalty, and the mortgagee realizes more than enough to satisfy the principal and interest at 7 per cent. per annum, the mortgagor cannot recover that excess nor set the same up as a counter claim in an action in favor of the mortgagee for the balance due. *EMMETT, C. J., dissents. Culbertson v. Lennon*, 4 Minn. 51.

**192. Claim for contribution as co-surety against rent of land.** In an action for rent of land, defendant set up by way of counter claim against plaintiff, for contribution as co-surety in a bond which defendant had been compelled to pay. Whether a proper subject for counter claim under Comp. St., 481, Sec. 23-24. *Ib.*: 541, Sec. 70, 71, and 73—doubted. *Schmidt v. Coulter*, 6 Minn. 492.

**193. Claim for use and occupation against a note in hands of one claiming adversely.** A claim for use and occupation against a person who claims adversely to the claimant—both parties being total strangers—cannot be set up as a counter claim against a promissory note under Sub. Div. 2, Sec. 71, p. 541, Comp. St.—for no contract, either in fact or by implication of law exists, and claimant can only enforce his claims by ejectment or trespass. *Folsom v. Carli*, 6 Minn. 420.

**194. Breach of covenant of seizin against mortgage foreclosure.** Under Sec. 66 and 67, p. 54, Comp. St., breach of

covenant of seizin, to the whole or a part of the premises conveyed, be set up as a counter claim, in an action to foreclose a mortgage given for the purchase money of the premises sought to be foreclosed. *Lowry v. Hurd, et al.*, 7 Minn. 356.

**195. Debt due husband no counter claim against debt due from wife.** Plaintiff brought an action against a husband and wife to charge the separate estate of the wife on her contract. *Held*, in such an action a debt due from the plaintiff to the husband constituted no defense or proper counter claim. *Carpenter and wife v. Leonard*, 5 Minn. 169.

**196. Claim against a stranger.** R., the mortgagor, conveyed in fee to plaintiffs. B., the mortgagee, collected rent from tenants before the expiration of redemption, but after foreclosure, and thereby became liable to plaintiffs. *Held*, B. cannot set up as a counter claim, in an action for such rent, the fact of having paid certain amount of taxes, whether before or after sale—in either event it was only a lien on the land—nor any unpaid balance due on the mortgage debt, for that is a claim against R., and not the plaintiff. *Spencer et al. v. Levering et al.*, 8 Minn. 461.

**197. Loss sustained by dealer for negligence of bank, against dealer's note held by bank.** A claim which the dealer at a bank has against the latter, for damages arising from the non-fulfilment of a contract to make demand, and gave the notice necessary to fix the liability of an indorser, is a proper subject of set-off (counter claim) against the dealer's note held by the bank. Comp. St. 541, Sec. 71. *Bidwell et al. v. Madison*, 10 Minn. 13.

**198. Landlord's over due promissory note in forcible entry and detainer.** In "forcible entry and detainer" to recover possession for non-payment of rent, the fact that defendant tendered at proper time, and holds plaintiff's over due promissory note, is not a counter claim within either subdivision of Sec. 80, Chap. 66, G. S. *Barker v. Walbridge*, 14 Minn. 469.

**199.**—In an action to recover the pos-

session of real estate, under the forcible entry and detainer act, by a landlord against his tenant, for non-payment of rent, defendant cannot set up in defense ownership of plaintiff's overdue note at time rent became due, as an "equity," under Sub. 3, Sec. 79, G. S., Chap. 66; for an "equity," to come within the meaning of this provision, must be one for which an adequate remedy at law cannot be had—the test being whether the facts would have authorized relief in equity under the old practice. *Ib.*

*f. General denial.*

**200. A denial of each and every allegation of the complaint, goes to each and every fact alleged, and puts them all in issue.** *Fetz v. Clark & Co.*, 7 Minn. 217.

**201.—except what the court may construe to be admitted.** A denial of each and every allegation of the complaint, except what the court may construe to be admitted in the foregoing part of an answer, is bad, as both indefinite and uncertain. *Starbuck v. Dunklee*, 10 Minn. 168.

**202.** The denial of "each and every material allegation" of the complaint is bad. *Montour v. Purdy et al.*, 11 Minn. 384; *Dodge v. Chandler*, 13 Minn. 114.

**203. What amounts to a general denial.** Any language in an answer which clearly indicates the allegations which the pleader intends to controvert, and denies with certainty the substance of such allegations, is sufficient. *Kingsley v. Gilman, impl., etc.*, 12 Minn. 515.

**204.** The sufficiency of a general denial, where it puts in issue the substance of the allegations to which it is addressed, cannot now be questioned. *Ib.*

**205.** An answer that "denies each and every statement and averment, and every part of the same, in said complaint contained, as therein stated or otherwise, save as hereinafter stated, admitted or qualified," is sufficiently definite and certain, as to the portion of the complaint which the pleader intended to controvert, if there is no ambiguity in what is afterwards stated,

admitted or qualified in the subsequent portions of the answer, and is a denial in form and substance of the allegations controverted. *WILSON, Ch. J., dissenting*, thinks that in this case the general denial covers parts of the complaint which cannot be put in issue by a simple denial, and was therefore properly struck out on motion—to wit, allegations of time, or indebtedness of a given amount. *Ib.*

**206.** A general denial followed by special matter inconsistent therewith, is controlled by the latter—following *Derby & Day v. Gallup*, 5 Minn. 119. *Scott v. King*, 7 Minn. 494.

*g. Qualified denial.*

**207.** Admitting facts and denying intention or qualifying circumstances. If a complaint alleges a fact which is qualified by a particular intention, or by its connection with other facts alleged in the pleading, there is no reason why the simple fact may not be admitted, and the qualifying facts or circumstances be denied; nor do we see why, in the case of an allegation embracing a fact and a qualifying intention, a general denial of the allegation, except as afterwards admitted, followed with an express admission of the simple fact, is not sufficient to put in issue the intention alleged, and is not sufficiently definite and certain. *Kingsley v. Gilman, impl., etc.*, 12 Minn. 515.

**208.** Setting up another and different contract. Where the answer denies the contract upon which the action is founded, except as admitted by a contract set up materially and substantially different from, and would not under the pleadings support the contract set up in the complaint, the latter is put in issue. *Becker v. Sweetzer*, 15 Minn. 427.

*h. Denial of knowledge or information.*

**209.** What may be so denied. The rule of the New York courts, under the code, “that where a fact alleged in the pleadings is *presumptively* within the knowledge of the other party, he is not to be al-

lowed to deny it by averring want of sufficient knowledge or information to form a belief,” (but must specifically deny it,) approved. *Morton v. Jackson*, 2 Minn. 222.

**210.** Indorsements on note. In an action on a promissory note, the complaint set forth two indorsements. *Held*, that the allegations of indorsement were material and necessary for plaintiff to prove, to show title, and a denial of information sufficient to form a belief as to the indorsements put them in issue. *Ib.*

**211.** Existence of a judgment. Where a party may not in fact have had knowledge or information sufficient to form a belief as to the existence of a judgment, etc., although matter of record, he not being a party to the transaction, and not bound to take notice of judicial proceedings, he may deny its existence, or want of knowledge or information sufficient to form a belief. *Mower v. Stickney*, 5 Minn. 406.

**212.** Amount of wood the defendant received for transportation. Where defendant admits having received a large lot of plaintiff's wood for transportation under contract, he cannot deny all knowledge or information sufficient to form a belief as to whether the quantity stated in the complaint is correct or otherwise. If there were any special reasons why he did not know, he should have stated them—he is presumed to know. *Starbuck v. Dunklee*, 10 Minn. 168.

**213.** Value of goods. An averment in an answer that “the defendant denies any knowledge or information thereof, sufficient to form a belief as to the value of all or any of the said goods,” forms a good issue on the question of value. *Ames v. The First Div. St. Paul and P. R. R. Co.*, 12 Minn. 412.

*i. Denial of conclusions of law.*

**214.** Indebtedness. A general denial of indebtedness is not good—it being a denial of a conclusion of law. *Freeman v. Curran et al.*, 1 Minn. 169.

**215.** Ownership and indebtedness. Al-

legations of ownership and indebtedness, unless coupled with the facts from which the ownership or indebtedness can be legally inferred—such as an indorsement or other legal transfer, where ownership of a note is alleged—are mere conclusions of law, and need not be denied. *Bennett et al. v. Crowell et al.*, 7 Minn. 385.

**216. Conclusion of law falls with the facts on which it stands, and is not admitted by not being denied.** Complaint charged want of consideration and fraud in certain conveyance of defendant—which court found against plaintiff—and further alleged that defendant “now has and continually has had the possession, control and use” of the property, “notwithstanding the deeds aforesaid,” and plaintiff “is informed and believes he is the real owner of the land.” Answer admitted the averments quoted. *Held*, the averments were conclusions of law based on allegations of want of consideration and fraud, which being found in favor of defendant, said general conclusions fell to the ground, and their admission in the answer could not warrant court in giving plaintiff judgment. *Dana et al. v. Porter et al.*, 14 Minn. 478.

(See ANSWER IN PARTICULAR CASES.)

*j. Allegation of new matter.*

**217.** A defendant who admits the *facts* alleged, but wishes to avoid their effect, may and should affirmatively set up the special matters on which he relies as an avoidance. See *Finley v. Quirk*, 9 Minn. 194. *WILSON, C. J.*, in *Nash v. City of St. Paul*, 11 Minn. 174.

*k. Negative pregnant.*

**218.** A general denial of the value of goods alleged to have been converted, will not put the value in issue. *McClung v. Bergfeld*, 4 Minn. 148.

**219.**—Where the value of property becomes material, and the answer denies that it is of the value charged in the complaint, but fails to state how much less, or what it was worth, such a denial is a *negative pregnant*, and is an admission of the

value charged in the complaint. *Burt v. McKinstry & Seeley*, 4 Minn. 204.

**220. Amount of property conveyed.** The answer charged that a certain assignment, under which plaintiff claimed, “conveyed all the debtor’s property not exempt from execution.” The reply denied that the assignment “conveyed all the debtor’s property not exempt from execution.” *Held*, too broad, as it would be true if the debtor had only a dollar’s worth of property not included in the conveyance, over legal exemptions; and yet it would not change the character of the conveyance. *Truitt, Bros. & Co. v. Caldwell*, 3 Minn. 364.

**221. Value.** Where the question of value is material, a denial that the property is worth the sum alleged in the complaint—specifying it—admits the value as charged—it being a *negative pregnant*. Where a party would controvert an allegation of value, he must allege that the article is of no value, or the value as he claimed it to be. *Lynd v. Picket et al.*, 7 Minn. 184.

**222.**—A general denial that use and occupation of premises were worth the sum charged in complaint, is an admission of the value as charged—following *Lynd v. Picket*, 7 Minn. 184. *Dean v. Leonard*, 9 Minn. 190.

**223.**—A denial of “each and every allegation in the plaintiff’s complaint mentioned and set forth,” does not put in issue an averment in the complaint that the property in question is of a given value. *Hecklin v. Ess*, 16 Minn. 51.

**224.**—A general denial of each and every allegation in a complaint does not put in issue an averment that property was “sold for \$12,000.00,” it being a *negative pregnant*. *Pottgeiser v. Dorn*, 16 Minn. 204. (See ANSWER IN PARTICULAR CASES.)

*l. What must be denied.*

**225. Where an intent charged was material.** Where the *intent* with which an act was done becomes material and is alleged, the answer must deny the *intent*, and not merely set up facts tending to show

such intention did not exist, for that is pleading the evidence and will admit the intent. *Wilcox & Barber v. Davis*, 4 Minn. 197.

**226.**—Where a vendee of land incumbered with two mortgages procured an assignment to him of the senior mortgage, with the intent, as alleged in his complaint, of holding the same as an incumbrance; and to avoid a merger, the junior mortgagee must deny the intent specifically, or it is admitted, and not merely plead circumstances tending to show want of such intent. *Ib.*

*m. Evidence admissible under different denials.*

**227. General denial of a loan.** Where plaintiff claimed recovery of money loaned to defendant, and defendant denied the loan in general terms. *Held*, defendant could, under such denial, prove any fact in connection with the transaction claimed to be a loan by plaintiff, to show it was not a loan, without an averment of any special defense—though he might thus defeat a recovery. *Bond v. Corbett*, 2 Minn. 255.

**228.** Where plaintiff, to establish his ownership and right to the possession of certain property, had introduced evidence showing that he purchased from a former owner, who had pledged the same to defendant, and that he had tendered defendant the amount for which it had been pledged, the defendant, under a general denial of such ownership and right to the possession, may show that such tender was insufficient in amount to discharge his lien as a pledgee. *Jones v. Rahilly*, 16 Minn. 320.

**229. General denial, generally.** Under a general denial, anything that tends to controvert directly the allegations in the complaint, may be shown—following *Bond v. Corbett*, 2 Minn. 248. *Caldwell v. Bruggerman*, 4 Minn. 270.

**230. Simple denial of the existence of a contract.** Where an answer simply denies the existence of a fact, (as of a contract,) the defendant cannot show that the

same is void in point of law, as for instance on the ground of usury, gaming, stock jobbing, coverture, fraud, etc.; such matters are new matter, constituting a “defense,” within the meaning of the statute, and must be specially pleaded, and thus give the plaintiff notice of the defense. *Finley v. Quirk*, 9 Minn. 194.

**231. Denial of a sale.** A simple denial of a “sale” alleged in a complaint, will not permit the defendant to show that it was illegal by reason of having been made on Sunday, because, 1st, an issue of fact arises only on a denial of a material allegation in the complaint, and the “legality” of the sale is not alleged, but is presumed by law from fact of sale—hence not traversable. Such a denial puts in issue only the sale in point of fact, and all matter in confession and avoidance showing the contract void or voidable in law must be specially pleaded. *Ib.*

**232. Under a denial of a contract, another contract inconsistent with new matter alleged, is admissible.** Complaint alleged that the price for sawing certain lumber was agreed upon at \$17.06 per thousand feet. Answer denied this, and alleged that defendant was to pay what it was reasonably worth. Plaintiff having given in evidence certain conversations tending to prove the allegations in the complaint, defendant could show that there was a contract price less than that alleged by plaintiff, as tending to disprove plaintiff’s alleged contract, although not set up in the answer. *Plummer et al. v. Mold*, 14 Minn. 532.

*n. Denials in particular cases.*

**233. Denial of notice.** The complaint to charge notice on defendants, averred the use, occupation and erection of buildings on the lot in question, from April, 1850. The answer admitted the facts, but denied on information and belief the time at which the use, occupation, etc., commenced. *Held*, an admission of actual notice of the possession of plaintiff. For where one sets up



want of notice, his allegations must be precise and positive, and must deny knowledge of the circumstances charged, from which notice may be reasonably inferred. *Minor v. Willoughby & Powers*, 3 Minn. 225.

**234. Denial of legal conclusion, without denying the facts.** A complaint set forth specifically certain facts from which fraud could be inferred—*e. g.*, that an assignment was, without consideration, made at a different time from that alleged, etc., the answer denied that he confederated with, etc., to cheat, delay, or defraud the plaintiff. *Held*, that the denial was too general, that the specific allegations must be specifically denied or considered true. *Johnson v. Piper*, 4 Minn. 192.

**235. Conveyance to plaintiff.** A complaint set up certain conveyances, under which plaintiff claimed—the answer denied any conveyance to plaintiff. *Held*, plaintiff's title being material, the answer was not demurrable. *Hill et al. v. Edwards*, 11 Minn. 22.

**236. Account stated.** If a party desires to attack an account stated, for mistake or error in the same, he should apprise his adversary of his intention to do so, by specially pleading the incorrectness upon which he relies. A bare general denial of the allegation, that an account was stated, raises no proper issue upon the correctness of the account. *Warner v. Myrick*, 16 Minn. 91.

*v. Answer in particular actions.*

**237. Claim and delivery.** A plea of the general issue in action of replevin in the *cepi* puts in issue only the *taking* and time and place when material—but not the title. *Coit v. Waples et al.*, 1 Minn. 134.

**238. Actions to determine adverse claims to land entered for town site purposes.** Under Chap. 33, Comp. St., Sec. 5, a mere denial of the facts stated by the plaintiff does not entitle the defendant to a position in court. He must set out his own title, or the facts upon which it is based, and unless such facts disclose a right

superior to the plaintiff, the answer is bad—following *Castner v. Gunther*, 6 Minn. 119. *Weisberger v. Tenny*, 8 Minn. 456.

**239. Mandamus.** On mandamus to compel an incumbent to deliver books and papers to his successor, holding certificate of election, the incumbent may deny the issuance of the certificate on information and belief, he not being a party to the proceedings. *Atherton v. Sherwood*, 15 Minn. 221.

**240. Notes and bills: denial of making, and presentment for payment.** F. brings suit on bill of exchange against C. and L., who in their answer admit the making and acceptance of the bill, but deny any knowledge or information sufficient to form a belief as to whether the bill was *presented*, and *payment demanded*. *Held*, that no issue was raised by such denial, as it was unnecessary to aver or prove a presentment, since if defendant had funds at the place, it would have protected him from costs—but not discharge him of the debt. *Freeman v. Curran et al.*, 1 Minn. 169.

**241. Denial of immaterial allegation of partnership.** The complaint on a bill of exchange alleged that plaintiff, Phineas Freeman, made the bill of exchange by name of C. P. F. & Co., on defendant. The defendant in his answer averred that he "had no knowledge, etc., to form belief whether the plaintiff was surviving partner of the firm of C. P. F. & Co., or whether Phineas Freeman was a member or not. *Held*, to be an immaterial denial, since the allegation of partnership was not necessary. Such an allegation could only be necessary when the making of the bill was denied by the answer. *Ib.*

**242. Denial of legal conclusion of ownership without a traverse of facts, bad.** In an action on a bill, the complaint set forth facts from which the law presumed the ownership of the bill to be in him, and then averred the conclusion of law that "he was the lawful owner and holder of the said bill." The answer denied "all knowledge or information, etc., as to wheth-

er the plaintiff is the legal owner and holder of the bill, etc. *Held*, that the allegation of ownership was unnecessary in terms, and that the facts which raised the presumption being set forth, a traverse of the conclusion of law, and not of the facts, was bad. *Ib.*

**243. Denying that plaintiff was payee.** Complaint alleged the making and delivery by defendants of a promissory note to plaintiff "*whereby they promised to pay to said plaintiffs or their order,*" etc. The answer denied that "by the note mentioned, etc., the defendants, or either of them, ever promised to pay the plaintiffs or their order," etc. *Held*, that the allegation in the complaint was in substance, that the plaintiffs were the *payees* therein, and the denial raised a material issue, because if plaintiffs were not payees, other allegations were necessary to warrant a recovery. *Bennett et al., v. Crowell et al.*, 7 Minn. 385.

**244. Defense by maker and endorser, want of consideration.** In an action on a promissory note against the maker and endorser jointly. The maker in his answer alleges that the note was given for "a pretended book account which did not exist," and consequently was without consideration, and adds that previous to date of the notes he had purchased several thousand dollars' worth of goods of the payees in the note—but "*did not allege that he had paid for the same.*" *Held*, the denial of indebtedness to the payees at date of note, (while admitting an existing debt at one time,) was the averment of a conclusion of law, and no defense; and an allegation of the endorser that the consideration to the maker was "*insufficient*" to charge him as endorser, was clearly bad without alleging the facts showing how or wherein it was insufficient. *Dunning & Stone v. Pond*, 5 Minn. 296.

**245. Denial of delivery controlled by facts pleaded.** In an action on a promissory note, the answer admitted that defendant "signed a note similar to the note described in the complaint, but denied that he delivered the note described in the

complaint or any note to the said plaintiffs, and alleges that the same was delivered to one B." *Held*, the making of the note described in the complaint not being denied, is admitted, such note, as appears from the complaint, being negotiable, signed by defendant, payable to plaintiff. From these facts the law presumes a consideration moving from the payees to the maker, who are thereby the owners—the delivery to B., an entire stranger, being a delivery in fact, the legal effect of which is a delivery to the payees. The denial of delivery to plaintiffs, coupled with facts showing a delivery in law, the denial must give way to the facts—and be rejected as false, or qualified so as to harmonize with the admitted facts. *WILSON, C. J., dissents. Heyward et al. v. Grant*, 13 Minn. 165.

**246. Denial of ownership without denying facts from which it is inferred.** Where a complaint set forth the making and delivery of the note, and then alleged that the plaintiffs were owners and holders thereof—the latter averment is a conclusion of law, based on the facts of making and delivery, and a denial of this conclusion, without a denial putting in issue the facts upon which it rests, forms no issue, and is immaterial and irrelevant. *Ib.*

**247. Denial of transfer at time alleged—negative pregnant.** Complaint alleged "that before the maturity of the said note, the said M., for value received, sold." The answer denied, "that before the maturity of the said note, the said M., for value received, sold," etc. *Held*, the denial in the answer puts in issue, at the most, *the time*, not the *fact* of transfer, and as to *that* it involves a negative pregnant, and is insufficient; the fact of transfer not being specifically controverted is admitted. *Frasier v. Williams*, 15 Minn. 288.

**248. Denial of ownership, without denying facts from which the law infers it, bad.** Complaint on promissory note, after setting up facts showing title in plaintiff, alleged the conclusion of law that plaintiff was owner thereof; the answer having denied that the plaintiff was owner

thereof in terms, averred that the plaintiff is not the owner, but did not deny the facts set up in the complaint, showing ownership. *Held*, the denial raised no issue, and was immaterial and irrelevant. *Id.*

**249. Action for specific performance: defendant need not plead statute of frauds in defense, when.** In an action for specific performance of a parol contract for sale of lands, on the ground of part performance. *Held*, it was not necessary for defendant to plead the statute of frauds in defense, when the complaint failed to show the contract was *in parol*. Where the parol contract is set up, but no part performance is averred, it is *demurrable*, and need not plead the statute. *Wentworth v. Wentworth*, 2 Minn. 277.

**250. Action against corporations: when defendant must plead its charter.** A defendant cannot put in evidence its act of incorporation, where it is a foreign corporation, by pleading its title only—all foreign laws are facts which must be proved, consequently pleaded—Sec. 7, Chap. 66, p. 605, Comp. St., referring to corporations of this State, and Sec. 2 (*ibid*) refers to *prosecuting* corporations, not *defending* ones. The whole act of incorporation, or the essential portion, should have been pleaded. *Becht v. Harris et al.*, 4 Minn. 504.

**251. Action by principal against surety.** In an action by a principal against his surety, the answer set up as a defense a request of the plaintiff to sue the debtor, accompanied with an allegation, that the debtor had at the time (of the request) sufficient property, out of which the plaintiff's claim could have been collected by due process of law. *Held*, it sufficiently appeared that the debtor was solvent *within the jurisdiction of the State* at the time the request to sue was made. *Huey v. Pinney*, 5 Minn. 310.

## IX. THE REPLY.

**252. Averment of conclusions of law needs no reply.** Defendant averred in his answer, that the note, on which suit was

brought, was given to secure a debt which the plaintiffs falsely and fraudulently represented was due from the defendant, whereas no debt was due, etc. The reply claimed the fraudulent representations, without alleging any debt due, etc. *Held*, sufficient to put the existence of the debt in issue. *Dunning v. Pond*, 5 Minn. 302.

**253. Departure from the complaint.** To constitute a departure in pleading, the party must quit or depart from the case or defense which he has first made, and have recourse to another. If he preserve the legal identity of the cause of action or defense, there will be no departure, though the natural identity be lost. *Estes v. Farnham*, 11 Minn. 423.

**254. Complaint cannot be aided by the reply.** A defective complaint, or one which does not contain facts sufficient to constitute a cause of action, cannot be cured by the necessary averments in the reply. *Bernheimer v. Marshall & Co.*, 2 Minn. 85.

**255.**—In an action by the drawee of a forged draft to recover the money paid on the same, the setting up of negligence or want of good faith, on the part of defendant in the reply, will not avail the plaintiff. Such an averment should be in the complaint, and cannot be admitted in the reply, under the R. S. p. 338, Sec. 71, p. 9 of amendments. *Id.*

**256.**—The complaint itself must state a good cause of action, and cannot be helped out by the reply. *Tullis et al. v. Orthwein*, 5 Minn. 377.

**257.**—If an essential fact is not pleaded in the complaint, the omission is not cured by pleading it in the reply. *Webb v. Bidwell*, 15 Minn. 479.

**258. New matter defined.** *It seems*, that matters which a defendant should plead affirmatively as a defense, are "new matters" within the meaning of our statute; those that amount merely to a traverse of the allegations of the complaint are not. *WILSON, C. J. Nash v. City of St. Paul*, 11 Minn. 174.

**259. Complaint charged that the plain-**

tiff, by his agent J. C., performed services at the request of and for the defendant; the answer averred that the performance of the services were intrusted to J. C., not denying that plaintiff employed J. C. as his agent. *Held*, no new matter, requiring a reply. *Cooper v. Stinson*, 5 Minn. 201.

**260.** In an action on a promissory note, an averment in the answer that the same has been paid, is not new matter requiring a reply. *McArdle v. McArdle*, 12 Minn. 98.

**261.** The amended complaint admitted a credit in favor of defendant "by sundries on account, and small sums of money, in all \$300." The answer, *inter alia*, set up a counter claim specifying items, dates, values, etc., thereof. The reply denied "each and every statement, averment, matter and thing in said answer, and each and every part and portion thereof, whether as stated in said answer or otherwise, save as hereinafter stated, admitted or qualified, and save as stated in the amended complaint," and then referred to specific items of the counter claim admitting some charges in part and denying the residue, denying others in toto and omitting any reference of a third class. *Held*, the items of the third and last class were admitted by the reply. *Leyde v. Martin et al.*, 16 Minn. 38.

## X. DEMURRER.

### a. Generally.

**262. Error in sustaining, how waived.** In District Court any error in sustaining a demurrer to an answer is *waived* by answering over, and cannot be available in the Supreme Court. *Becker v. Sandusky City Bank*, 1 Minn. 316.

**263. Demurrer puts to the test all previous pleadings.** The rule that a demurrer puts to the test the sufficiency of all prior pleadings, is retained under the code, but the requisite *sufficiency* is altered. The former strictures and nicety is much relaxed, but every material and necessary substance must be plainly and directly stated. *Loomis v. Youle*, 1 Minn. 177.

**264. On demurrer to answer, complaint may be attacked.** On demurrer to an answer defendant may attack the complaint, and if so bad in substance as not to be aided after verdict, he must have judgment, and this where he has pleaded the general issue—if complaint is not cured by verdict. *Smith v. Mulliken*, 2 Minn. 321; *Yoss v. De Freudenrich et al.*, 6 Minn. 95.

**265. Special demurrer for want of jurisdiction, confers jurisdiction.** Under Sec. 37, p. 629, Comp. St., and Sec. 26, p. 628, Comp. St., a foreign corporation by demurring, though specially, for the express purpose of questioning the jurisdiction, thereby confers jurisdiction. *Reynolds v. La Crosse & Minn. Packet Co.*, 10 Minn. 178.

**266. After answer complaint is only assailable for want of jurisdiction or insufficiency.** Under the code, on demurrer to the answer, the complaint can only be assailed for want of jurisdiction and facts sufficient to constitute a cause of action. *Stratton v. Allen & Chase*, 7 Minn. 502.

**267.**—A demurrer reaches the first defective pleading, if the objection be to the jurisdiction, or that it does not state facts sufficient to constitute a cause of action. *Lockwood v. Bigelow*, 11 Minn. 113.

**268.** A demurrer operates as an abandonment of a previous demand for an assessment of damages. *EMMETT, C. J., dissents. Daniels v. Bradley*, 4 Minn. 158.

**269. Specific objections as to insufficiency may be raised anew in the Supreme Court.** Under a general demurrer to complaint for want of facts sufficient to constitute a cause of action, the party may urge any specifications pertinent to the general objection; and this, though the particular objection was not made in the court below. *Monette et al. v. Cratt et al.*, 7 Minn. 234.

**270. Admissions of demurrer.** A demurrer only admits *traversable facts*, not inferences or conclusions of law. *Griggs v. City of St. Paul*, 9 Minn. 246.

**271.**—A demurrer does not admit facts set up by way of recital, inference or conclusion. *Taylor v. Blake*, 11 Minn. 255.

*b. When it lies.*

**272. Defect of parties.** A defendant can object to parties plaintiff as defective, when there are other persons or person not joined, that would not be precluded from bringing another suit for same cause of action. *Castner v. Sumner & Co.*, 2 Minn. 46.

**273.**—When it appears from the complaint that certain persons not joined are necessary parties, the objection may be taken by demurrer—when it does not appear on the face of the complaint, by answer, under Sec. 78, Chap. 66, Gen. Stat. *Lowry et al. v. Harris et al.*, 12 Minn. 255.

**274. To one of two sets of facts in support of same defense.** An answer set up two distinct statements of fact in support of one defense; plaintiff demurred to one set of facts, and replied to the other. *Held*, that the answer, though bad in form, contained the substance of two distinct defenses, and the proper way was to correct the pleading by motion, but if the plaintiff chose to waive the irregular pleading, he might demur and reply under Sec. 26, R. S., p. 9, and the defendant could not object. *Bass & Co. v. Upton*, 1 Minn. 413.

**275. When it clearly appears that the statute of limitations has barred the action.** When it appears on the face of the complaint that the cause of action is barred by the statute of limitations, it is demurrable, and good ground for reversal of judgment by default on writ of error. *Kennedy v. Williams*, 11 Minn. 314.

**276.**—such defense must clearly appear. To take advantage of the statute of limitations, by demurrer, it must clearly appear from the complaint that the statute has taken effect. *Eastman v. The St. Anthony Falls Water Power Co.*, 12 Minn. 137.

**277.**—As held by this court heretofore—when it clearly appears from the complaint, that the action is barred by the statute of limitations, a demurrer will lie, on the ground that the complaint does not state facts sufficient to constitute a cause of action, then it follows that the objection

may be taken after judgment, but should not be allowed to prevail if the proceedings can be sustained by any reasonable intentment. *McMILLAN, J., dissenting*, thinks that in actions of this character (for money demand) the statute of limitations must be pleaded by a party seeking to take advantage of it. *McArdle v. McArdle*, 12 Minn. 98.

*c. When it does not lie.*

**278. When defense of statute of limitations does not clearly appear.** A complaint showed that "on or about the first day of April, 1857," the plaintiff loaned defendant a certain sum of money, to be repaid on demand, etc. Suit was commenced in September, 1865. *Held*, it did not conclusively show the action was barred, hence not demurrable. *Ib.*

**279. Redundancy or immateriality.** If facts stated in a pleading are sufficient to constitute a cause of action, demurrer will not lie, because other redundant and immaterial averments are contained in it. It should be pruned by a motion to strike out. *Loomis v. Youle*, 1 Minn. 175.

**280. Indefiniteness.** A general demurrer does not reach indefiniteness. *Devey v. Leonard*, 14 Minn. 153.

**281. Duplicity or misjoinder of actions.** A general demurrer can only be sustained where the pleading does not state any cause of action, it does not reach duplicity or an improper joinder of actions. *Smith v. Jordan et al.*, 13 Minn. 264.

**282. Does not lie to less than a distinct cause of action or defense.** A demurrer will not lie to a portion of a complaint or answer which sets up less than a distinct cause of action or defense. *EMMETT, C. J., dissents. Daniels v. Bradley*, 4 Minn. 158.

**283. Prayer for improper relief.** Where it appears from the complaint that the plaintiff is entitled to certain relief, the fact that it does not ask for the proper relief, or asks for inconsistent relief, is not ground of demurrer. *Connor v. Board of Education of the City of St. Anthony*, 10

Minn. 439; *Metzner et al. v. Baldwin et al.*, 11 Minn. 150.

**284. Misjoinder of defendants.** Excess of parties defendant is not cause of demurrer on part of those properly sued, but non-joinder is. *Lewis & Pickering v. Williams & Sons*, 3 Minn. 151.

**285.**—Demurrer on part of all the defendants will not lie by reason of misjoinder of some of the defendants. *Goncelier v. Foret et al.*, 4 Minn. 13.

**286. Where the complaint did not show affirmatively that the premises in dispute were within the jurisdiction of the Court.** Held, no cause of demurrer. To sustain a demurrer on that ground, the complaint should show that the property is without the jurisdiction, or if he fails to show that fact (if it exist), it is matter to be set up by answer. *Powers v. Ames et al.*, 9 Minn. 178.

**287. Action was commenced in the wrong county.** The fact that an action is not commenced in the proper county will not deprive the court of jurisdiction, consequently is not ground of demurrer. *Nininger v. Commissioners of Carver County*, 10 Minn. 133.

**288. When part of relief should be granted.** A demurrer to the whole of a complaint, where plaintiff is entitled to any portion of the relief asked, is bad. *Lockwood v. Bigelow*, 11 Minn. 113.

**289.** A demurrer cannot be allowed as to a part of a defense and disallowed as to the remainder. *Armstrong v. Hinds*, 9 Minn. 356.

## XI. SUPPLEMENTAL PLEADING.

**290. Defect of title, cured since commencement of suit, may be set up by supplemental complaint.** Where the complaint showed facts which constituted plaintiff owner, in fee, except for one deed in chain of title, which was not entitled to record by reason of want of one witness, and the proper acknowledgment. Held, sufficient to pass an *equitable interest* be-

tween the parties, and competent to set up by supplemental complaint, a quit claim deed executed since commencement of suit which operate to cure the defects in the first deed and passed the legal title. *Lowry et al. v. Harris et al.*, 12 Minn. 255.

**291. Objection to supplemental, how taken.** Where the original complaint was wholly defective, and a supplemental complaint was filed curing defects by reason of matters transpiring subsequent to the commencement of the action; objection thereto on that ground, must be taken by demurrer to the supplemental complaint, or by objection to its being filed, otherwise it is waived. *Ib.*

## XII. DEFECTS IN PLEADINGS, AND REMEDIES AGAINST.

### a. The motion to strike out.

**292. Notice of trial waives the right to move to strike out.** The rule that by noticing a cause for trial a party waives the right to move to strike out redundant matter, is good where the motion does not include the whole of an answer, or the error does not vitiate the pleading; but not good if the whole answer is worthless. *Freeman v. Curran et al.*, 1 Minn. 169.

**293.** On motion to strike out an answer, the defendant may attack the sufficiency of a complaint, as on demurrer. *Smith v. Mulliken*, 2 Minn. 321.

**294.** On motion to strike out portions of a pleading, the object is to correct bad pleading, and the moving party is not in the position of one who demurs, so as to expose his own pleading to attack. *Brisbin et al. v. American Express Co.*, 15 Minn. 43.

**295. Time to make the motion.** Motion to strike out an answer will be entertained, though not made within twenty days of the service of the same. *Freeman v. Curran et al.*, 1 Minn. 169.

**296. When the motion lies.** Portions of an answer containing statements of evidence, irrelevant matter, or denying legal

conclusions, traversing negative allegations, immaterial time, or reciting facts by way of argument will be stricken out on motion. *Cathcart v. Peek et al.*, 11 Minn. 45.

*b. Irrelevancy and immateriality.*

**297. Irrelevancy defined.** An *irrelevant* pleading is one which has no substantial relation to the controversy, though it may be both good in form and true in fact. *Morton v. Jackson*, 2 Minn. 222.

**298. Immaterial allegation.** Where the plaintiff asks to recover damages for an alleged breach of a contract which defendant admits to exist and be in force, and said contract specified defendant's compensation for his services, an allegation in his answer that his services were reasonably worth so much, is immaterial, and properly stricken out on motion. *Starbuck v. Dunklee*, 10 Minn. 168.

**299.** For illustration of irrelevant and redundant pleading, see *Brisbin et al. v. American Express Co.*, 15 Minn. 43.

**300.** An answer which admits the execution and delivery of a promissory note, but denies any knowledge sufficient to form a belief as to each and every allegation not set out and fully admitted, cannot be stricken out as irrelevant. *Morton v. Jackson*, 2 Minn. 222.

**301.** Plaintiff sues defendants as surviving partners of J. W. & Co., and asks judgment against them as such, but not against either member separately. *Held*, an allegation setting up default of an individual member, (W.,) whereby the partnership had suffered, was properly stricken out as immaterial. *Berkey v. Judd et al.*, 12 Minn. 52.

**302.** Where plaintiff was entitled to recover, as part of his damages, the rent of certain mills which he had rented from other parties, by reason of defendants having failed to supply him with logs as per contract, and he incorporated in his complaint the original lease from said third parties, claiming to recover the rate of

rent agreed upon, unpaid therein. *Held*, the lease was properly stricken out on motion, as immaterial—the defendant being in no way a party thereto, and only bound to respond for the value of the premises, which value could not be thus determined. *Lovejoy et al. v. Morrison et al.*, 10 Minn. 136.

**303. Where whole answer is immaterial, it will be struck out.** Where an answer traverses an immaterial averment, it is doubtful whether a motion to strike out such answer would be granted where enough was left to make a good answer. But where the motion comprehends the whole answer, and it is entirely bad, then there can be no propriety in applying this principle. *Freeman v. Curran et al.*, 1 Minn. 169.

*c. Sham pleading.*

**304. Sham pleading defined.** A *sham answer* is one the falsity of which is clear and undisputed, and which tenders, or purports to tender an issue *on new matter*. *Morton v. Jackson*, 2 Minn. 221.

**305.** An answer which merely denies certain allegations in the complaint, and sets up no new matter, cannot be stricken out as sham. *Ib.*

**306. Verified answer.** *It seems* that a *verified answer* cannot be stricken out as sham because it is not *indisputably false*. *Ib.*

**307.**—A verified answer may be struck out as sham. *Conway v. Wharton*, 13 Minn. 158.

*d. Indefiniteness and uncertainty.*

**308.** Complaint on promissory note for \$740, admitted payment of \$240. Original answer admitted \$500 to be due, and to avoid interest and cost after maturity, set up an agreement between plaintiff and defendant, "*made when the note became due and payable*," that it should be paid at a particular place, and that defendant had funds at said place to meet it, etc., but the

note was not presented. Plaintiff demurred to this agreement as a defense, for want of consideration. Demurrer sustained, and defendant allowed to amend. The amended answer charges that "*about two weeks prior to the time when said note became due and payable,*" said agreement was entered into, and "*in consideration thereof, and about ten days thereafter, defendant paid the plaintiff \$300,*" and a deposit of money, as before stated. On motion to strike out this portion of the answer as "evasive and uncertain," under Sec. 76, R. S., (1851,) as amended. *Held*, it should be struck out in every respect except as pleading a payment of \$300 on the note, instead of \$240. *Colter v. Greenhagen*, 3 Minn. 126.

**309. Where an amended pleading is attacked for evasiveness and uncertainty,** on a point in which the original pleading had been determined "uncertain and indefinite," the court is not confined to the examination of the amended pleading only, as on *demurrer*, but may examine both pleadings together; and the moving party may produce proof, outside of the pleading itself, to satisfy the court that the allegations are intended to evade a direct averment, which the pleader cannot in conscience make. *Ib.*

*e. Frivolous pleading.*

**310. Frivolous pleading defined.** A frivolous answer is one which, if true, does not contain any defense to any part of plaintiff's cause of action, and its insufficiency as a defense must be so glaring that the court can determine it on bare inspection, without argument. *Morton v. Jackson*, 2 Minn. 221.

**311. Remedy against.** Doubted if *frivolous* answers can be stricken out under Sec. 76, R. S., p. 339,—but they can be reached by demurrer, and is the better practice. *Ib.*

### XIII. WAIVER OF DEFECTS IN FORM AND SERVICE OF PLEADING.

#### 312. Objection to form or service

**must be taken promptly.** An attorney must take advantage of all defects in form of pleadings, and service of the same, at once—*i. e.*, within a reasonable time—in New York, twenty-four hours—or they will be considered waived. *Smith v. Mulliken*, 2 Minn. 322.

**313. Unverified pleading.** Where plaintiff's attorney retains an unverified answer which should have been verified, he waives such defect. *Ib.*

**314.** The failure to return an unverified pleading, is a waiver of the defect—following *Smith v. Mulliken*, 2 Minn. 319. *Heyward et al. v. Grant*, 13 Minn. 165.

**315. Where an issue of fact is taken on a defense defectively pleaded,** evidence to prove such defense should not be excluded on the ground of such defect. *Howland v. Fuller*, 8 Minn. 50.

### XIV. DEFECTS AIDED BY VERDICT.

**316.** Where a complaint is defective because a particular matter is not stated in express terms, and yet contains general allegations sufficient to comprehend such matter in fair and reasonable intendment, which allegations are such as to require proof of the particular matter in order to entitle the plaintiff to recover, the defect will be aided by a verdict in his favor. *Hurd v. Simonton*, 10 Minn. 423.

**317.** A complaint in replevin which avers that defendant has become possessed of, and *wrongfully detains*, etc., without averring a demand and refusal is aided by verdict in plaintiff's favor—distinguishing this case from *Stratton v. Allen & Chase*, 7 Minn. 505. *Ib.*

### PLEDGE OR PAWN.

(See BAILMENT, II.)



## POLYGAMY.

(See CRIMINAL LAW, 36, 139.)

## POSSESSION.

(See EVIDENCE, 151 *et seq.*)

## POWER OF ATTORNEY.

1. A power of attorney authorizing the attorney "to grant, bargain, and sell the same, or any part or parcel thereof, for such sum or price, and on such terms as to him shall seem meet, and for me and in my name to make, execute, acknowledge, and deliver good and sufficient deeds and conveyances for the same, either with or without covenants and warranty," will authorize a sale—1st. On reasonable credit. 2d. On condition that the vendee should open and keep a lumber yard as soon as practicable, in addition to the money consideration. 3d. Of an undivided interest. EMMETT, C. J., *dissents*. *Carson & Eaton v. Smith*, 5 Minn. 78.

2. Plaintiff appointed one R. his attorney in fact to sell and convey certain land "in lots, as surveyed by B. W. Bronson." R. sold and conveyed to G. a portion of the land by the "acre," where none of it had been surveyed into lots except about one-third of an acre, which had been surveyed into a "block," which "block" is in controversy. *Had*, R. was not authorized to sell any portion of the land not surveyed into lots, and could sell that only by the lot, and not by the "acre;" and the whole transaction being entire, the deed could not be sustained as to a part, and avoided as to the remainder. Plaintiff never having taken from R. any of the purchase money, has never ratified his acts so as to bind himself from disputing its validity. Nor is R. estopped by reason of having bounded another piece of land, in a deed, as lying

next to "land deeded by R. his attorney in fact, to G.,"—no confirmation of R.'s act. *Rice v. Tavernier*, 8 Minn. 248.

3. A power to use the principal's money "for the purchase of real estate or loaning," does not authorize the agent to borrow money, or use the credit of the principal. *Humphreys et al. v. Havens et al.*, 12 Minn. 298.

4. A power of attorney authorizing S. "for me, and in my name, to purchase all kinds of goods, wares, and merchandise, to execute all kinds of notes; also for me and in my name to sell goods and barter the same, and receive pay therefor; to collect, deposit, and draw for and exchange money; also to buy and sell real estate, and in my name to receive and execute all necessary contracts and conveyances therefor," \* \* does not authorize the attorney to sell real estate belonging to his principal at date of the execution of the power, but only such lands as he should buy under the power. *Greve v. Coffin*, 14 Minn. 345.

5. The record of a power of attorney so defectively executed as not to entitle it to record is inadmissible as evidence. *Lowry et al. v. Hurris et al.*, 12 Minn. 255.

6. It is the general rule of law, that a power to sell and convey real estate, does not confer the power to mortgage. *Morris et al. v. Watson et al.*, 15 Minn. 212.

## PRACTICE.

SCOPE NOTE.—With the exceptions of a few decisions, digested under the titles referred to in the cross notes, it is believed everything relating to the Practice in the Supreme and District Court, will be found here.

## I. PRACTICE BEFORE THE CODE IN EQUITY.

## II. PRACTICE UNDER THE CODE.

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- b. *Form and contents.*

- c. *Service how made.*
- d. *Service where made.*
- e. *Service on partnership.*
- f. *Service by publication.*
- g. *Proof of service.*
- h. *Exemption from service of army officers.*
- i. *Summons in partition.*
- 2. *The appearance.*
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- 7. *Injunctions.*
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- 10. *Commission to examine witnesses out of the State.*
  - a. *Who may be examined.*
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17. *Motions.*
18. *Orders.*
19. *Amendments.*

(See NEW TRIAL.)

(See MANDAMUS, V.)

(See PROHIBITION.)

(See CRIMINAL LAW, VI.)

(See CERTIORARI.)

(See RAILROADS, III.)

## I. PRACTICE BEFORE THE CODE, IN EQUITY.

**1. An interlocutory decree** or order is one made pending the cause, and before a final hearing on the merits. A final decree is one that disposes of the cause. *Choteau v. Rice*, 1 Minn. 24.

**2.** It is not error for the Chancellor to hear and allow *exceptions* to a bill in Chancery, without a reference to a *master*. *Goodrich v. Rodney et al.*, 1 Minn. 196.

## II. PRACTICE UNDER THE CODE.

### 1. *The summons.*

#### *a. Action how commenced.*

**3. Against non-resident with property within this State.** An action may be commenced against a non-resident who has property within the State, by summons only, as well as by issuing an attachment—following *Stone v. Myers et al.*, 9 Minn. 309. *Cleland v. Tavernier*, 11 Minn. 194.

#### *b. Form and contents.*

**4. Its style.** The “summons” commenced “you are hereby summoned and required in the name of the State of Minnesota, to answer,” etc. *Held*, sufficient under Sec. 14, Art. 6, of State Constitution. *Ib.*

**5. Entitling of summons.** Summons described the court as of the “3d judicial district,” the action was brought in the Fourth District. *Held*, not such error as to avoid the summons, those words being surplusage, and could in no way mislead or prejudice the defendant. *Hanna et al. v. Russell et al.*, 12 Minn. 80.

**6.**—Summons is not process, within

Sec. 14, Art. 6, Constitution of State, hence a summons is not void by reason of not being styled in the State of Minnesota—distinguished from *Hinckley v. St. Anthony Water Power Co.*, 9 Minn. 55, and *Dorman v. Bailey*, 10 Minn. 383. *Ib.* *Lowry et al. v. Harris et al.*, 12 Minn. 255.

**7. Notice as to who will apply on default for judgment.** Summons stated that on failure to answer, “application will be made to the court for the relief demanded in the complaint.” *Held*, sufficiently shows that the *plaintiff* will make such application, and satisfies the statute and confers jurisdiction. *Hotchkiss v. Cutting*, 14 Minn. 537.

**8. Subscription of summons.** Sec. 49, Chap. 60, Comp. St. 537, requiring the summons to be “subscribed by the plaintiff or his attorney,” is not complied with by *printing* the name of the attorney—under Sub. 15, Sec. 1, p. 114, Comp. St. *Ames v. Schurmeir*, 9 Minn. 221.

**9.**—A written signature to a summons signed by the agent of the plaintiff, in his presence, and by his express direction, is valid. *Hotchkiss v. Cutting*, 14 Minn. 537.

**10. Notice of subscriber's office.** A summons subscribed by plaintiff required defendant to serve a copy of his answer upon “the subscriber at his office in the city of Rochester, Minn.” *Held*, sufficiently certain, and if regular in other respects, confers jurisdiction. If plaintiff had no office at specified place, advantage could be taken of that fact, *in the action*, on proper showing, but not collaterally. *Ib.*

**11. Notice as to service or filing of complaint.** Copy of the complaint was left with defendant on May 10th, 1858. On June 10, following, a summons was served on him, containing a notice that unless he answered the complaint, etc., a copy of which was *therewith* served upon him, etc., the plaintiff would, etc. No copy of complaint accompanied the summons. *Held*, the action was not properly commenced. *Tullis v. Caldwell et al.*, 3 Minn. 117.

*c. Service, how made.*

**12. Reading of the summons** in presence of the defendants, is no service. *Fallmans v. Gilman*, 1 Minn. 182.

*d. Service, where made.*

**13. At common law**, process can only be served on a defendant, whether a natural person or a body corporate, within the State in which the action is commenced. *Sullivan v. La Crosse & Minnesota Packet Co.*, 10 Minn. 386.

**14.**—At common law, the service of process on the president or principal officer of a corporation must be within the jurisdiction of the sovereignty where the artificial body exists, and a corporation can have no legal existence out of the boundaries of the sovereignty that created it. *Id.*

**15. Personal service of summons, within this State, on a general agent of a foreign insurance company**, temporarily within this State, will give jurisdiction over the company, under the act relating to the service of mesne process upon foreign corporations, on p. 494, G. S., said act controlling Sec. 48 and 56, Chap. 66, G. S. WILSON, C. J., *dissents. Guernsey v. American Insurance Co.*, 13 Minn. 278.

*e. Service on partnership.*

**16. Service on one partner binds partnership property.** Under Sec. 38, Chap. 60, Comp. St., suits may be commenced against partners by firm name, and service upon one will bind the joint property of the firm—so a garnishee summons may be served upon and service accepted by one of a firm, and bind the firm. *Hinckley et al. v. St. Anthony Falls Water Power Co.*, 9 Minn. 55.

*f. Service by publication.*

**17. The affidavit must state facts showing that the defendant, after due dil-**

**igence, cannot be found within the State.**

The statute allowing service of summons by publication, "where defendant, after due diligence, cannot be found within Territory (State), and where *that fact appears by affidavit*," etc., is not satisfied by an affidavit setting forth that defendant "cannot be found, etc., *with due diligence*," etc. To make the necessary facts *appear by affidavit*, a statement of facts and circumstances must be made, from which the officer can find that the facts exist, and it must appear what has been done towards finding him in the State—following *Curtis v. Moore*, 3 Minn. 29. *Mackubin & Edgerton v. Smith*, 5 Minn. 367.

**18.**—**what is such showing.** An affidavit for publication of summons against a foreign corporation alleged that "the defendant is a corporation or company established and doing business under and by virtue of the laws of the State of Illinois." *Held*, shows, the defendant to be a foreign corporation, within the meaning of Sec. 54, Comp. St., and not to be found within the State, and summons against them may be published in cases provided by statute. *Broome et al. v. The G. D. D. & M. Packet Co.*, 9 Minn. 239.

**19. Service on foreign corporation can only be by publication.** Service of summons on a foreign corporation, under Sec. 52, 53 and 54, Comp. St., Chap. 60, can only be made by publication. *Sullivan v. La Crosse & Minn. Steam Packet Co.*, 10 Minn. 386.

**20. Insufficient affidavit.** To authorize the publication of a summons, under the law in force in August, 1859, (Sec. 54, Comp. St., p. 538,) affidavits stating facts which are not inconsistent with the defendant's residence or presence in the State at date of the affidavit, are insufficient—following *McKubin & Edgerton v. Smith*, 5 Minn. 317. *Harrington v. Loomis et al.*, 10 Minn. 366.

**21. Mailing copy of summons and complaint.** Order for publication of summons was dated on 18th January, and copies of the summons and complaint were

deposited in the post-office on the 20th (the 19th being Sunday), and prior to the first legal publication of summons. *Held*, substantial compliance with the order requiring copy to be mailed *forthwith*. *Cleland v. Tavernier*, 11 Minn. 194.

**22. Time of publication.** A summons was first published on Sunday, but afterward inserted on a week day, and regularly published thereafter the requisite time. *Held*, service good. *Ib*.

*g. Proof of service.*

**23. By admission.** The following admission of service—"Due service, by copy, of within order, is hereby admitted, this — day of — 1866,"—estops the signer from denying the validity of the service. *The Aetna Insurance Co. v. Swift et al.*, 12 Minn. 437.

*h. Exemption from service of army officers.*

**24. Can be waived.** The exemption from service of process of certain military officers during their period of service, as provided by act of March 2, 1865, etc., is a personal privilege, and should be taken advantage of by motion to set aside the service; by answering the privilege is waived, and the court acquires jurisdiction. *Williams v. McGrade*, 13 Minn. 174.

*i. Summons in partition.*

**25. What is a sufficient address to all the owners and lien holders who are known, etc.** A complaint in partition of real estate, under Chap. 74, G. S., set forth the interest of all the parties joined, cash value of the property, and an allegation that "the above named are the only persons having or claiming any interest in or to said premises, or any part thereof." The summons, in the title, gave the names of all the defendants, and was addressed "to the above named defendants," without repeating them. *Held*, sufficient compliance with Sec. 2 of said chapter, which re-

quires "the summons to be addressed by name to all the owners and lien holders who are known, and generally to all persons unknown, having or claiming an interest in the property,"—the complaint showing that no others not joined had or claimed any interest therein. *Martin and wife v. Parker and wife*, 14 Minn. 13.

*2. The appearance.*

**26. An application for an extension of time to answer**—pending the decision of a motion to set aside the summons—is a recognition of the jurisdiction of the court over the person, and requires a general appearance. *Yale v. Edgerton*, 11 Minn. 271.

**27. Written admission of service, endorsed on the back of a summons**, is not an appearance in the action—Sec. 27, G. S., p. 458. *First National Bank of Hastings v. Rogers, impl., etc.*, 12 Minn. 529.

**28. An appearance waives, what.** An appearance in court having jurisdiction of subject matter, is a waiver of any irregularity in service of process—by which parties are brought into court. *Choteau v. Rice*, 1 Minn. 192.

**29.**—A general appearance is a waiver of defects in the service of summons, or the return of the officer thereon. *Johnson v. Knoblauch et al.*, 14 Minn. 16.

**30.**—A general appearance in an action of replevin and plea of property by defendant, is not a waiver of the illegality of the taking on account of the invalidity of the writ. *Castle et al. v. Thomas et al.*, 16 Minn. 490.

*3. Removal of actions to U. S. Courts.*

**31. A non-resident, when entitled to a removal.** A non-resident defendant in an action embraced within Sec. 12 of the U. S. judiciary act of 1789, is entitled to a removal of the action from the State court to the Circuit Court of the United States, upon complying with the requirements of said section; and such section is not re-

pealed or changed by "an act for the removal of causes in certain cases from State courts," approved July 27, 1866, nor by the act amending the latter act, approved March 2, 1867. *Butlerfield v. The Home Ins. Co.*, 14 Minn. 410.

#### 4. *Place of bringing the action.*

**32. Requisites of an affidavit on ground of interest, etc., of judge.** An affidavit for a change of venue on the ground that the judge is interested or prejudiced therein, drawn in the language of the statute simply, is insufficient,—the grounds of belief should be stated. *Ex parte, Gold T. Curtis*, 3 Minn. 274.

**33. Action may be brought on note anywhere, but on application will be changed to the proper county.** Sec. 41, R. S. (1851), p. 334, providing that "the action must be tried in the county in which the parties, or one of them, reside at the commencement of the action, \* \* subject, however, to the power of the court to change the place of trial, as provided in Section 43," is not *mandatory*. This action (on a promissory note) may be brought in any county, but "on application of all the defendants answering, the court may change the place of trial to the proper county," as provided in Sec. 43. A defendant, if he has no answer, cannot be prejudiced by such a proceeding—if he wishes to defend, the proper practice is to apply for an order changing the place of trial. *Merrill, Coules & Co., v. Shaw & Bro.*, 5 Minn. 148.

**34. On application for change of place of trial, requisites of affidavit.** Under Sec. 44 and 45, Comp. St., p. 537, the verified petition must contain a statement of facts, and general charges of prejudice and antipathy, or erroneous decision on the part of the judge, are insufficient to warrant a change of venue. *Burke v. Mayall et al.*, 10 Minn. 287.

**35. Right to certain place of trial may be waived.** The statute which makes actions against officers, for their official

acts, triable in the county where the cause of action or some part thereof arose, is a personal privilege, and may be waived by the officer. Such objection cannot be raised for the first time in the Supreme Court. *Tullis v. Brawley*, 3 Minn. 277.

#### 5. *Attachment.*

(See title ATTACHMENTS.)

##### *a. Generally.*

**36. Requisite proof.** Under the provision of Comp. St., the same proof is not required to issue an attachment in a Justice's Court as in the District Court. *Curtis v. Moore*, 3 Minn. 29.

**37. Immaterial errors.** A writ of attachment was irregularly issued in an action in which the summons was published, and afterwards judgment was regularly entered, and the same property levied upon under execution, and sold. *Held*, the error in the issue of the attachment was immaterial. *Cleland v. Tavernier*, 11 Minn. 194.

##### *b. Contents of the writ.*

**38. Need not show what officer issued it.** It is not necessary that it should appear from a warrant of attachment, by what officer it was allowed. *Shaubhut v. Hilton et al.*, 7 Minn. 506.

##### *c. The officer's return.*

**39. To what property, etc., the return is confined.** Plaintiffs sued D. as surviving partner of the old firm of D. & D.; and the officer's return on the writ of attachment shows that a debt due from one M. to the old firm of D. & D., was levied upon. But it appears that M. was never indebted to the old firm, but is indebted to the new firm of D. & D., composed of defendant and one S. *Held*, the return of the officer cannot be extended to cover the indebtedness of M. to the new firm, nor the interest of either of the partners therein. *Allis v. Day*, 13 Minn. 199.

**40.**—A return on a writ of attachment issued in an action against the defendant as surviving member of the *old* firm of D. & D. as follows, viz.: "I certify that I have attached \* \* \* all debts and indebtedness due or owing from said M. to said defendants, or to said D., defendant," will not embrace the interest of said D., defendant, in an indebtedness due from said M. to the *new* firm of D. & D., composed of defendant and one S. *Ib.*

*d. Vacation of the writ.*

**41. Who may move to vacate.** An assignor for the benefit of creditors may move to dismiss an attachment against the assigned property any time before a return of *nulla bona*, on the simple ground that it is not against his property. *Richards et al. v. White*, 7 Minn. 345.

**42. Notice of motion.** *A ten days' notice of motion to vacate* an attachment, is sufficient where the statute is silent as to the time to be allowed—Sec. 140, p. 469, G. S. *Blake v. Sherman*, 12 Minn. 420.

**43.**—A notice of motion to vacate an attachment at the "next *special or adjourned* term" of the District Court, for, etc., to be held at, etc., on a specified day, is sufficient, especially where the other party appeared at the hearing. *Ib.*

**44. Grounds for vacating.** Writ of attachment cannot be vacated on the ground that the property attached is not subject to attachment—it is a writ improperly allowed that will be vacated, the question being as to its validity, if properly issued it cannot be vitiated by any irregularity of the officer executing it. *Davidson v. Owen et al.*, 5 Minn. 69.

**45.**—former adjudication of the same subject matter, is proper to be set up in an answer, but cannot be passed upon on a motion to vacate a writ of attachment. *Ib.*

*6. Claim and delivery of personal property.*

**46. Writ, when void ab initio.** Plaintiff, in an action for the recovery of per-

sonal property, filed an affidavit under Sec. 112 to 116, Chap. 66, G. S., and indorsed thereon an order to the *clerk of court to issue a writ* to the sheriff, etc., as in that statute provided. *Held*, these proceedings having been had, under the amendment of 1868, (G. Laws 1868, Chap. 76), which provided the plaintiff might indorse upon the affidavit a *requisition to the sheriff* to take the property, instead of to the *clerk to issue the writ*, and providing that the sheriff, upon receipt of such affidavit, so indorsed and a specified bond, should take the property, etc., the writ actually issued was in no sense a process of the Court, but void on its face, and the sheriff in taking the property was a mere trespasser, liable to defendant in damages, or replevin for the property. *Castle et al. v. Thomas et al.*, 16 Minn. 490.

**47. Vacation of writ.** There is no room for an order to vacate a writ of replevin which is void *ab initio*, and on its face. *Ib.*

*7. Injunctions.*

*a. When it will issue.*

**48. Time.** An injunction could issue "on complaint" before the service of summons under Sec. 21, Chap. 57, Comp. St., and would bind the defendant until dissolved; but if the injunction was served without service of a subpoena (summons) the injunction would, on motion, be dissolved, but they are not void, and until dissolved, are obligatory. *Lash v. McCormick*, 14 Minn. 482.

**49. Where the averments in a complaint are in form positive**, and not on information and belief—although the verification is in the ordinary form, it satisfies the requirements of the statute in regard to applications for injunctions; and an affidavit in which the other party swears to facts on information and belief will not suffice to restrain the issuing of the writ, where the complaint shows a proper case. *McRoberts v. Washburn et al.*, 10 Minn. 23.

**50. To restrain motion to set aside**



**mortgage sale.** Where the purchaser at foreclosure sale under decree of court, brings an action to foreclose the equities of junior incumbrancers, who were not made parties to the former action, and a sale in this second action, which the junior mortgagee moves to set aside for alleged irregularities, the fact that the sheriff has not made his report of sale, will not authorize the issue of a temporary injunction restraining the motion to set aside the sale. *Rogers v. Holyoke*, 14 Minn. 220.

**51. Averments on information and belief.** An injunction will not issue on facts stated on information and belief only. *Armstrong v. Sanford*, 7 Minn. 49.

*b. Against whom it will issue.*

**52. Stranger to the proceedings.** Injunction will not issue against one not a party to the proceedings. *Chamblin et al. v. Slichter et al.*, 12 Minn. 276.

*c. Dissolution of injunction.*

**53. Motion therefor.** Where a bill has been taken *pro confesso* and an injunction granted, it is better practice to make a motion to dissolve the injunction *after* the answer is put in, but where the answer was exhibited and injunction not discovered till after the time to plead, *held*, an order, granted on a proper showing, dissolving the injunction, was discretionary with the court below. *Perrin v. Oliver*, 1 Minn. 202.

**54. When an answer fully denies and puts in issue the equities of the bill,** an injunction will be dissolved—as a general rule. *Moss v. Pettingale*, 3 Minn. 217.

**55.—**When the answer fully denies the averments in the complaint, the injunction will be dissolved—following *Moss v. Pettingale*, 3 Minn. 217. *Armstrong v. Sanford*, 7 Minn. 49.

**56. When complaint fails to show that plaintiff will suffer injury.** The complaint having failed to show that plaintiff will suffer any pecuniary damage, or even if suffered, that he has no adequate remedy at law, his preliminary injunction was

properly dissolved. *Goodrich v. Moore*, 2 Minn. 64.

**57. Complaint should not be dismissed** on the hearing of a motion to dissolve an injunction, unless complainant assents. *Id.*

**58. Where the answer sets up new matter by way of counter claim.** Where an injunction has been granted on the complaint, it *will be dissolved* if the answer denies and puts in issue the equities of the complaint—but it *will not be dissolved* if the answer presents matter of defense by way of counter claim only, thus admitting the equities of the complaint and endeavoring to avoid them; and will be continued until the hearing, unless the plaintiff in his reply, or by an omission to reply, admits the truth of the new matter. The court ought not to entertain a motion for a temporary injunction where the answer sets up new matter by way of counter claim, until a reply has been served, or the time for so doing has elapsed. *Id.*

**59. Restraining mortgage foreclosure.** Action to cancel a mortgage which complaint charged had been satisfied; the answer denied satisfaction of the same, but asked no affirmative relief. Pending the suit defendant commenced foreclosure of the mortgage by advertisement, whereupon plaintiff, on petition, stating that such foreclosure, before the determination of the action, would “materially embarrass and injure your petitioner, and complicate the case and petitioner’s just rights and interests,” obtained an injunction restraining the foreclosure. *Held*, injunction should be dissolved, because: 1st, the answer put the plaintiff’s equities in issue; 2d, defendant was not compelled to ask a foreclosure of the mortgage by decree of court in the action, since the statute allowed a foreclosure either by action or advertisement. He may simply defend the action, and being successful, he may then proceed to foreclose by advertisement, at least, and probably by action, since in such case he might wish to make others parties thereto; 3d, the petition shows no facts from which the court can find that injury will result, much

less such injury as will warrant an injunction, for even if the foreclosure cast a cloud on plaintiff's title, a writ of injunction will not issue—following *Armstrong v. Sanford*, 7 Minn. 53; qualifying *Bidwell v. Whitney*, 4 Minn. 76. *Montgomery v. McEwen*, 9 Minn. 103.

**60. Revoking order dissolving an injunction.** The District Court has discretion to grant an order vacating a previous order allowing a bill to be taken *pro confesso*, and dissolving an injunction. Such an order cannot be reviewed since it is in the discretion of the Court. *Perrin v. Oliver*, 1 Minn. 202.

### 8. *Dismissal or discontinuance of action.*

**61. Plaintiff may dismiss without leave of Court, when.** In the absence of any provisional remedy or any pleadings on part of the defendant below, the plaintiff below had the absolute and statutory right to dismiss the action without leave of Court, or the other party. Rev. St. 349, Chap. 70, Sec. 162, Sub. Div. 1. *Fullman v. Gilman*, 1 Minn 182.

**62. What amounts to dismissal.** The following entry in the clerk's register under the title of the action, "This action is dismissed and discontinued by the above named plaintiffs." Signed, "Henry J. Horn, attorney for plaintiffs"—where notice of such dismissal had also been served upon the defendant, operates as a dismissal under Sec. 242, p. 484, G. S., no provisional remedy having been allowed, or counter claim made, and this without the payment of costs, and though signed, not by the clerk, but by the attorney. *Blandy et al. v. Raguet*, 14 Minn. 491.

**63. Dismissal for want of prosecution.** Plaintiff cannot be compelled to proceed in an action and enter judgment, but if he neglects to prosecute unreasonably, defendant may have an order of dismissal, under Sec. 162, (sub. div. 2) Chap. 70, R.S., as amended—see Sec. 10 of amendments. FLANDRAU, J., thinks the Court can com-

pel performance of any act which it is the duty of a party or attorney to perform in the progress of a suit, but concurs in this decision, as the order appealed from authorized defendants to enter the plaintiff's judgment or required the plaintiff to enter a judgment different from the one he was entitled to by law. *Deuel v. Hawke*, 2 Minn. 50.

**64. In replevin**, where the sheriff has returned the writ showing that summons had been served, but he had not taken possession of the property, *held*, no such issuing of a provisional remedy as to prevent plaintiff discontinuing the action on his own motion—under Sec. 242, p. 484, G. S. *Blandy et al. v. Raguet*, 14 Minn. 491.

### 9. *Stay of proceedings.*

**65. For non-payment of costs of prior action for same cause, in which judgment was rendered on the pleadings.** On motion for judgment on the pleadings, judgment was given for defendant, a second action being brought on same cause of action, *Held*, the second action would have been stayed, on motion, until first judgment was paid. *Gerrish & Brewster v. Pratt & Bunker*, 6 Minn. 53.

### 10. *Commission to examine witnesses out of the State.*

#### a. *Who may be examined.*

**66. Parties to suits may be examined.** Testimony of a party to a suit may be taken by commission. *Clafin v. Lawler*, 1 Minn. 299.

**67.**—Under the statute, Sec. 8, p. 675, and Sec. 25, p. 677-8, Comp. St., a party may be examined as a witness by commission in his own behalf. *Hart et al. v. Eastman et al.*, 7 Minn. 74.

#### b. *Deposition taken by stipulation.*

**68.** A deposition taken under stipulation between the attorneys, which reserved the right "to object to the admissibility of

the interrogatories and the testimony elicited thereby, in like manner and with the same effect *only* as if the same were delivered orally in the Court, upon the trial of said action," cuts off the right to object that: 1st, the witness examined was a party to the action; 2d, the commissioner has not endorsed, on the deposition, the time and place of taking it; 3d, the commissioner has not dated the certificate appended to the deposition of each witness. *Tyson & Co. v. Kane & Co.*, 3 Minn. 287.

*c. Commissioner's return.*

**69. When on the "back of the commission."** The return of a commissioner is on the "back of a commission," when it is on the "second leaf of the same sheet." *Id.*

**70. Where two or more commissioners were appointed.** Under Rule 12, District Court, where two or more commissioners are appointed to take a deposition, it must appear from the return attached, that all the commissioners were present, or that those not attending had notice of the time and place of taking the deposition. *Mair v. January et al.*, 4 Minn. 239.

**71. As to whether witness was sworn "before the commissioners."** A commission, which in other respects is sufficient, is not fatally defective in omitting to state in express terms, that the witness was sworn *before the commissioners*, it appearing from the certificate that he was actually sworn. As to immaterial variations from Rule 13, of the District Court, see further this case. *Cooper v. Stinson*, 5 Minn. 201.

**72. Must be "endorsed upon," not "annexed to," the commission.** The certificate of commissioners appointed to take testimony, "annexed to the deposition," is not sufficient under Rule XIII., 1 Minn. 457, which requires the same to be "endorsed upon the commission." *Beatty & Stedman v. Amb & Wittman*, 11 Minn. 331.

**73. What sufficient, under stipulation waiving requisite forms and notices.**

Where two stipulations waived "any and all notices and prerequisite forms required by law or rule of court for the taking of depositions," and the commissioner took the depositions of two different witnesses, and attached them together. *Held*, a single certificate and return is sufficient, if it appears therefrom that the depositions were taken in pursuance of the stipulations, and upon interrogatories and cross interrogatories to which they are attached, and that in other respects the terms of the stipulations were substantially complied with. *Day et al. v. Raguet et al.*, 14 Minn. 273.

*d. Suppression of deposition.*

**74. When to apply for its suppression.** The New York rule that a motion for suppression or re-execution of a deposition which has been opened so that its contents, with reasonable diligence, might have been known before the trial, should be made at chambers, and not be entertained by the judge upon the trial—approved. But a deposition filed March 16th, next preceding an April term, is not within the rule. *Walker v. Barron*, 4 Minn. 253.

*e. Deposition as evidence.*

**75. When particular answer inadmissible.** In a commission to take testimony, where an interrogatory is to be put, if a previous question is answered in a particular way, and that question *is not so answered*, the interrogatory should not be put, and if put, the answer should not be admitted. *Selden, Withers & Co. v. Bank of Commerce*, 3 Minn. 166.

**76. Where one of the parties had an attorney present at taking of deposition.** A deposition was taken by stipulation, which concluded as follows, viz.: "And we hereby waive the issuing of a commission, and all other formalities, and requisitions of the statute in relation to the taking of depositions." It appeared from the commissioner's return, that one "Henry C. Gilbert was present at the taking of said deposition on the part of the plaintiff,

and that no one appeared on behalf of the defendant." *Held*, the deposition should not have been received in evidence. **EMMETT, C. J., dissents.** *Walker v. Barron*, 4 Minn. 253.

**77. The withdrawal of clearly incompetent interrogatories** without objection, is no ground for excluding the whole deposition. *Lowry et al. v. Harris et al.*, 12 Minn. 255.

**78. The fact that an interrogatory and answer are excluded** for any sufficient reason, as a rule, is no ground for excluding the whole deposition. *Ib.*

**79. Parties introducing the deposition may adopt and introduce the cross interrogatories, on default of the other side.** Where the chief interrogatories and their answers in a deposition have been put in evidence, and the other side decline to introduce any of the cross interrogatories and answers thereto, the party introducing the deposition may adopt and read them in evidence. *Ib.*

**80. Answers to cross interrogatories must be full and fair.** When evidence of a witness is presented to the Court in the form of a deposition, it must appear that the answers to the cross interrogatories are fully and fairly given, without the suppression of any fact, material to the case, and that must be determined by reference to the interrogatory, if that is general the answer may be general—if the answer is as full and minute as the interrogatory naturally and fairly interpreted, calls for, it is sufficient. *McMahon v. Davidson, impl'd, etc.*, 12 Minn. 357.

**81. Part of answer admissible when the other part objectionable.** An objection to an entire answer in a deposition, where a portion thereof is admissible, will not be sustained. *Day et al. v. Raguet et al.* 14 Minn. 273.

**82. Not admissible if witness can be procured.** Where no efforts have been made to procure the attendance of a witness, and it does not appear that his attendance could not have been procured, or that he is without the State, or beyond the ju-

risdiction of the court, his deposition is not admissible. *State v. Gut*, 13 Minn. 341.

**83. As evidence, on subsequent trials.** Sec. 21, R. S., p. 474, allows depositions used on a trial to be used on any subsequent trial of same cause, between same parties or their representatives—or on appeal. *Choteau, Jr., v. Parker*, 2 Minn. 118.

## II. *The trial.*

### A. *Generally.*

#### a. *Notice of trial.*

**84. Amendment of pleading does not make new notice necessary.** After a cause is regularly noticed for trial, and placed upon the calendar, an amendment of the pleadings does not render a new notice of trial necessary. *Stevens v. Curry*, 10 Minn. 316.

**85. Premature notice.** Judgment affirming an order, appealed from, on the necessary undertaking to stay proceedings, was entered in the Supreme Court on Nov. 7, 1865, and same day transmitted to the District Court. On Oct. 29, notice of trial for the Nov. 9th, was served. *Held*, premature, and there being no appearance on the other side, the trial on that day was irregular. *Starbuck v. Dunklee*, 12 Minn. 161.

#### b. *Continuance.*

**86. What should be stated in an affidavit for continuance.** In an affidavit of continuance, the least that can be required is, that the party should state that he has stated the facts which he expects to prove by an absent witness to his counsel, and that he is advised by said counsel that he cannot safely proceed to trial without the testimony of such witness. The better and correct practice is to set forth the facts in the affidavit, that the court may be advised as to whether the testimony is necessary or otherwise. *Mackubin v. Clarkson*, 5 Minn. 247.

**87. No continuance on ground of ab-**

seuce of a witness not subpoenaed, but who had promised to attend. If a party chooses to rely upon the promise of a witness to be in attendance, without subpoenaing him, he does so at his own risk, and cannot, on that ground, claim a continuance if the witness does not keep his agreement—following *Beaulieu v. Parsons*, 2 Minn. 37. *Ib.*

### B. Trial by jury.

#### a. Drawing jurors.

**88.** On calling a jury, defendant challenged the regular panel, which challenge was allowed, whereupon the court directed the clerk to draw a jury from among jurors who had previously been summoned to serve during the term upon two special venires issued, to supply a deficiency in the regular panel—declining to issue a special venire for this particular case. *Held*, correct practice. *Dayton et al. v. Warren*, 10 Minn. 233.

#### b. Challenging jurors.

**89. Decision of court as to actual bias, conclusive.** Where the question of actual bias of a juror challenged is submitted to the court, its decision is conclusive. *Morrison et al. v. Lovejoy et al.*, 6 Minn. 319.

**90. Where challenge is admitted—withdrawal.** Where a party challenges a juror, and the same is admitted by the other side, he cannot then examine him, for there is nothing left to try, and it is discretionary with the judge to permit the withdrawal of the challenge or not. *Ib.*

#### c. Examination of witnesses.

**91. Leading questions discretionary with the court.** It is a matter of discretion with a court to permit leading questions to be put to party's own witness, and though this is perhaps a legal discretion which may be reviewed, this court will not interfere except in a clear case of abuse or prejudice. *State v. Staley*, 14 Minn. 105.

**92. Criminating questions.** Sec. 72, R. S., (1851,) p. 481, declaring that a witness shall not be required to answer questions "which have a tendency to accuse himself of any crime or misdemeanor, or expose him to any penalty or forfeiture," is but declaratory of the law as it then existed. Although this privilege appertains solely to the witness, yet it is the duty of the court to inform the witness of his privilege; and after it appears with sufficient clearness that he designs to avail himself of the privilege, the court has the right thereafter to allow similar questions to be put, and if they are afterwards put without the interference of the court and objected to by opposite counsel, the court may rule them out, without submitting them in each case to the decision of the witness. *State of Minnesota v. Anne Bilansky*, 3 Minn. 246.

**93.** It is improper on cross-examination, to assume facts to have been proved, which have not been; especially when it is for the purpose of getting the opinion of an expert on a mere hypothesis, not to test his skill or accuracy, but to obtain evidence in support of the defense. *State v. Stokely*, 16 Minn. 282.

#### d. Re-examination of witnesses.

**94. It is discretionary with a court to allow a re-examination of a witness in chief after he has been once dismissed, and not reviewable except in case of abuse.** *Lynn v. Pickett et al.* 7 Minn. 184.

#### e. Admitting testimony after parties rest.

**95. Not allowed when due diligence would have rendered it unnecessary, or for impeaching purposes.** When defendant had partially argued the case to the jury, he applied for permission to recall one of plaintiff's witnesses to correct his testimony in this, that a consideration on which he had been examined, and previously testified as being in money, was actually an antecedent indebtedness—permission refused. *Held*, no error, as with due dili-

gence that fact could have been discovered before, on 'a proper cross-examination, and equally objectionable as tending to impeach the witness, although the witness himself so stated after leaving the stand, for it must have appeared to the court that the fact could be proved. *Baze v. Arper*, 6 Minn. 220.

**96 Where the pistol with which the offense had been committed, had not been formally introduced.** On the trial of an indictment for murder, defendant's counsel on the argument claimed the pistol, with which the offense was charged to have been committed, was not in evidence, whereupon the court allowed the State to formally introduce it, it having been examined by the jury before, and treated as in evidence, offering to allow the defendant time to introduce and procure any other testimony thereby rendered necessary, at the expense of the State. *Held*, proper exercise of judicial discretion. *State v. Staley*, 14 Minn. 105.

**97. Where evidence by previons consent was so introduced, no rebutting evidence allowed—the question being in issue by the pleadings.** On the trial, plaintiff rested his case, reserving—with the consent of the defendant, and permission of court—the right to examine an absent witness on the question of damages, in case he arrived. Defendant proceeded and rested; plaintiff then examined his witness as agreed, whereupon defendant proposed to introduce rebutting testimony as to the damages, and court refused permission. *Held*, no error, since defendant should have offered his evidence before closing, the question of damages being in issue by the pleadings, and the court having notified counsel at the commencement of trial, that neither would be allowed to recall witnesses after having been once examined. *Beaujeau v. Parsons*, 2 Minn. 37.

**98. Decision of the court not reviewable.** The admission of testimony after a party has closed his case is discretionary with the court, and not subject to review in the Supreme Court. *Ib.*

#### *f. Variance.*

**99.** The word "*installment*" cannot be presumed to mean "groceries, liquors, and provisions," when the *scilicet* which is used to explain the averment says the demand was for a "large sum of money, to wit: the sum of \$200." Hence to receive evidence of a demand for groceries under such an averment would be error. *Snow et al. v. Johnson*, 1 Minn. 46.

**100. Proof of promissory note under seal.** Proof of a promissory note under seal to support a complaint on a negotiable promissory note, is a fatal variance, it not being negotiable. *Helper, v. Alden, Cutler & Hall*, 3 Minn. 332.

**101. In debt on foreign judgment,** the declaration varied from the transcript, both as to amount and names of parties, held, fatal. *Laurence v. Willoughby*, 1 Minn. 87.

**102. Complaint for work and labor.** There is no variance between a complaint for work and labor, and proof that defendant directed plaintiff to go on and perform the labor until his partner returned, and then if the arrangement was not satisfactory to the partner, he might fix it to suit himself. *Short v. McRea & Register*, 4 Minn. 119.

**103. Instrument in writing executed by one R.** Plaintiff claimed under an "instrument in writing executed by one Rothmund;" on the trial offered in evidence an assignment executed by Rothmund and wife. *Held*, no variance, as the wife's signature (it being an assignment of chattels only) was mere surplusage. *Caldwell v. Bruggeman*, 4 Minn. 270.

**104. Complaint charged that R. W. Latham drew and delivered to plaintiffs his check, and that defendants (S. W. & Co.) accepted.** *Held*, that proof that S. W. & Co. were makers as well as acceptors, was inadmissible. *Bank of Commerce v. Selden, Withers & Co.*, 3 Minn. 155.

**105. When defendant justifies taking under execution against L.** In "claim and delivery of personal property," defendant

justified under an execution against one L., who had fraudulently assigned the property to plaintiff. *Held*, defendant could not show in evidence an assignment to another than plaintiff, one F., inasmuch as defendant's rights depended on L. being the owner. *McClung v. Bergfeld*, 4 Minn. 148.

**106. "Pay, lay out and expend."** Assault and battery, complaint charged that plaintiff has been compelled to, and necessarily did "pay, lay out, and expend," a large sum of money, etc. *Held*, evidence that he had "incurred" indebtedness for medical attendance, not admissible. *Wartl v. Huws*, 5 Minn. 440.

**107. That certain property belonged to W.** Defendants, who claimed in their answer, that certain property belonged to Wood, cannot prove that it was jointly owned by Wood and another—variance. *Derby et al. v. Gallup*, 5 Minn. 119.

**108. Wrongful acts of plaintiffs—husband and wife.** Where the answer set up in justification certain wrongful acts of the "plaintiffs" (husband and wife). *Held*, evidence of wrongful acts of husband alone not admissible. *Jacobs v. Hoover et al.*, 9 Minn. 204.

**109. Total want of consideration for the note.** In an action on a promissory note by a holder against the maker, the latter claimed a total want of consideration for the note, in defense. *Held*, that a partial want or partial failure of consideration proved on the trial, could not avail under the pleading. *Whitaere v. Culver*, 9 Minn. 295.

**110. Slander.** In slander, an allegation of words in the second person is not proved by evidence of words spoken in the third person. *McCarthy v. Barrett*, 12 Minn. 494.

**111. Variance, when to be urged.** Under Sec. 86, R. S. (1851), p. 3.0, a variance must not be alleged simply, but proved to the satisfaction of the court, and should be urged before the case is submitted to a jury, and verdict rendered, so that the court may allow the amendment con-

templated by the statute. *Short v. McRea et al.*, 4 Minn. 119.

**112. Variance, when fatal.** It is only when the allegation to which the proof is directed is unproved, not in some particular only, but in its general scope and meaning, that a variance become fatal. *Ib.*

**113. Malicious prosecution.** Complaint in malicious prosecution alleged, *inter alia*, the making of a complaint for larceny by defendant against plaintiff, and an arrest of plaintiff upon a warrant issued upon such complaint. *Held*, that plaintiff under such an averment could, without a substantial variance, show from the docket of the justice the institution of a prosecution by complainant against plaintiff for larceny, and that defendant made another complaint against plaintiff in the same proceeding, reciting the original complaint, and alleging that the property was concealed, etc., and that thereupon a search warrant was issued, and returned by the officer with the property and plaintiff's body, into court, for the two latter steps were in aid of the prosecution for larceny, and part of the proceedings in that prosecution, and for all that appears, plaintiff was arrested and held to answer on the original complaint. The docket showed also that defendant participated in the examination, and any irregularity in issuing the search warrant in aid of another prosecution, rather than in an independent proceeding, if irregular, could not be taken advantage of by the defendant. *Cole v. Curtis et al.*, 16 Minn. 182.

**114. Materiality of, must be proved.** A variance between causes of action alleged and proved, will not be deemed material, nor regarded by the Supreme Court, unless the party alleging error prove to the satisfaction of the court below, that he had been misled by it, and shown wherein. *Washburn v. Winslow*, 16 Minn. 33.

**115. Immaterial matters.** Variance between pleading and proof, concerning immaterial matters, no ground of error. *Sonnenburg v. Reidel*, 16 Minn. 83.

g. *Objections.*

**116. How to be made.** A party objecting to the introduction of evidence must state his point so definitely that the court may intelligently rule upon it, and the opposite party may, if the case will admit of it, remove the objection by other evidence. *Gilbert et al. v. Thompson*, 14 Minn. 544.

**117. Objections to a writ of attachment,** on the ground that it is *void*, are not waived by proceeding to trial. *Merritt v. City of St. Paul*, 11 Minn. 223.

**118. Objection embodied in a request to charge, in time.** Where a party objected to certain evidence, but on the wrong ground, and it being admitted, he afterwards, in his request to charge, objected to it on a good ground. *Held*, the objection was in time, it being made before the case was submitted to the jury. It was discretionary in the court to present the objection at that time. *Russell v. Schurmeir*, 9 Minn. 23.

**119. Waived by consent to reference.** Objections that a cause was not properly on the calendar, and to a refusal to grant a motion for continuance, are waived by a subsequent consent to a reference. *Allis v. Day*, 14 Minn. 516.

**120. Afterwards introducing the objectionable evidence—waives former objection thereto.** A party loses the benefit of an objection to the improper introduction of parol evidence of the contents of a written instrument, by afterwards introducing the instrument himself. *Cooper v. Breckenridge*, 11 Minn. 341.

**121. Simple objection, without stating grounds, ineffectual.** A simple objection to the introduction of evidence, without stating any grounds therefor, is ineffectual. *Weide et al. v. Davidson et al.*, 15 Minn. 327; *Tozer et al. v. Hershey*, 15 Minn. 257.

**122. If evidence is competent for any purpose,** or for any of the defendants, a general objection will not exclude it. *Schell v. The Second National Bank, St. Paul*, 14 Minn. 43.

**123. General objection.** The admission of books as evidence of the payment of money, would, under the Comp. St., p. 685, have been error, had they been objected to *on that ground*; but as the objection was general, and did not point out to the referee the particular ground on which it was taken, the appellant cannot avail himself of it here. *Califf v. Hillhouse*, 3 Minn. 311.

**124.** An objection that a question is incompetent and irrelevant, does not raise the point that it is too leading and general. *Clague v. Hodgson*, 16 Minn. 329.

h. *Exceptions.*

**125. How to be taken—should show what it is proposed to prove.** Where a question is asked which is objected to, and the objection sustained, in taking an exception it should appear what it was proposed to prove, which must be something material, and the rejection of which as evidence would be prejudicial to the party excepting. *State v. Staley*, 14 Minn. 105.

**126. Must be to some particular point of law.** An exception can only be taken to some particular point of law; a mere general exception to a charge, as "to all of which defendant excepted," amounts to nothing, where a part of the charge is admitted to be correct. *Id.*

**127.**—A general exception to an instruction containing two distinct propositions, raises no question for review—the party must put his finger on the point of which he complains. *Baldwin et al. v. Blanchard*, 15 Minn. 489.

**128. Further participation in suit, no waiver.** A party, after making the necessary preliminary objections, as by motion to dismiss on ground of irregularity, may, on being overruled, discuss the merits, without losing his right to raise the objection in the appellate court. *Bunday v. Dunbar*, 5 Minn. 444.

**129. A general exception to a general charge,** in these words: "The defendant, by the counsel, duly excepted to the fore-



going charges, and to each and every part or particular thereof," amounts to nothing, and the case stands as if no such exception had been taken. *Judson v. Reardon*, 16 Minn. 431.

**130. Exception by two co-defendants.**

Where defendants answer jointly and except jointly and generally to an instruction, and it is correct as to one of them, the joint exception cannot be sustained. *Cole v. Curtis et al.*, 16 Minn. 182.

**131.**—After an exception duly taken, a party loses no rights by proceeding in the cause. *Curtis v. Moore*, 3 Minn. 29.

**132. Waived by afterwards introducing the same testimony.** A party waives and defeats his exception founded on the absence or erroneous admission of evidence of a fact against him, if he afterwards, in his own behalf, prove the same fact, or produce and insist upon proper evidence to prove it. *Coit v. Waples et al.*, 1 Minn. 134.

**133.**—The benefit of an exception to the erroneous admission of evidence, lost by afterwards introducing the same evidence. *Weide et al. v. Davidson et al.*, 15 Minn. 327.

**134. Evidence must be offered, and ruling of court obtained, on all points.** The defense rested on proving a fraudulent sale to plaintiff, or no sale whatever. The judge ruled out evidence of a fraud—the defendant not being in a position to raise that question. *Held*, defendant was not thereby relieved from offering proof, if any they had, to show that no sale was ever made to plaintiff, and such ruling cannot be assigned as error on the ground that it was so made as to exclude evidence concerning the sale—where no evidence concerning the sale was offered. The evidence should be distinctly offered upon all points, and a ruling of the court obtained. *Zimmerman v. Lamb et al.*, 7 Minn. 421.

*i. Striking out evidence on motion.*

**135. Where the facts making evidence incompetent were known at time of its**

**admission, a failure to then object was a waiver.** Where evidence has been admitted concerning an agreement between the witness and plaintiff's deceased assignor, it is too late to object to the same, under the statute, (Gen. Laws, 1861, p. 146, 147, amended in 1862, p. 96, 97,); nor can the same be stricken out on motion, for the facts making the evidence incompetent, at time it was offered, being known, a failure to object at that time amounted to a waiver of the right. *Levering et al. v. Langley et al.*, 8 Minn. 107.

*j. Non suit.*

**136. Where only a conjecture is raised as to a material fact.** Where evidence as to the existence of a material fact can only raise a bare conjecture, the case should not be submitted to the jury. *Locke v. First Div. St. Paul & P. R. R. Co.*, 15 Minn. 350.

**137. No proof of consideration of the contract in issue.** An action should be dismissed where no proof is offered of the consideration of a contract which forms the cause of action, when the same is put in issue. *Becker v. Sweetzer*, 15 Minn. 427.

**138. Failure of evidence on material point.** Complaint charged that defendant had contracted to collect a judgment in favor of plaintiff, and against one F., on shares; "that on or about, etc., defendant acknowledged the receipt of payment of the full amount due plaintiff on said judgment," and requested plaintiff's attorneys to satisfy the same of record, and that the same was, upon such request, "satisfied" of record. The answer put these allegations in issue. On the trial, plaintiff failed to prove the satisfaction of record, and put in evidence defendant's letter requesting satisfaction to be entered, and acknowledging full payment to him. On motion to dismiss by defendant's counsel, after plaintiff rested on ground of no averment of payment in complaint, or that the money had been collected by defendant, plaintiff asked to amend by averring that "defendant collected the amount of said judg-

ment." Motion to amend denied. *Held*, complaint was properly dismissed. The averment of acknowledgment of payment was an averment of mere evidence, not traversable or issuable, and the complaint omitting to allege payment to defendant, and no proof having been offered of the satisfaction of judgment, it was a case of failure of evidence, within Sec. 94, p. 544, Comp. St., and there was no such abuse of discretion as to authorize an appellate court to interfere. *White & Marks v. Culver*, 10 Minn. 102.

*k. Arguments of counsel.*

**139. Verdict given in former suit—waiver of objection.** If it is error (?) for counsel in his argument to refer to and urge in support of his case the amount of a verdict given on another trial, such error is waived by not taking exception at the time. *St. Martin v. Desnoyer*, 1 Minn. 156.

*l. Questions of fact, law, and law and fact.*

**140. Delivery under an assignment by a failing debtor.** Plaintiff's possession under an assignment for the benefit of creditors was in issue; and the evidence as to delivery to plaintiff was conflicting. The court took the determination of this question from the jury, and directed them to find for the plaintiff. *Held*, erroneous. *Caldwell v. Bruggeman*, 4 Minn. 270.

**141. Assault, whether it was justified.** In an action against G. for assault and battery on B., and G. justifies by reason of an assault by B., it is for the jury to say whether the degree of force used by G. was justified by the circumstances. *Galagher v. State of Minn.*, 3 Minn. 270.

**142. As to fraudulent intent of an assignor.** Whether or not an assignment was made in trust for the assignor, with a fraudulent intent on part of assignee, is a question of fact for a jury, under Sec. 198, Chap. 66, G. S. *Blackman v. Wheaton*, 13 Minn. 326.

**143. Grant of perpetual easement.**

Where the evidence shows that it was necessary or convenient for the alleged dedicatory to have the alleged street open as a way to his house and place of business, it would be for the jury to say whether his permission of its use by the public, under such circumstances, was any evidence of an intention to grant a perpetual easement. *Wilder v. City of St. Paul*, 12 Minn. 192.

**144. Taking partnership accounts.** The taking of partnership accounts should never be submitted to a jury, although Sec. 199, Chap. 66, G. S., authorizes the court to order the whole issue so to be tried. This authority should only be exercised where the whole issue is such as to make a proper case for a jury trial; it does not change the rule as to what are proper issues for that mode of trial. *Berkey v. Judd et al.*, 14 Minn. 394.

**145. Negligence.** In actions for injuries arising from negligence or unskillfulness of defendant, the question of negligence is a question of fact, or of mixed law and fact, to be left to the jury. *Chamberlain v. Porter*, 9 Minn. 260.

**146.** Whether a party acts in good faith under the advice of counsel in an alleged malicious prosecution, is a question of fact for the jury. *Cole v. Curtis et al.*, 16 Minn. 182.

**147.** When the facts in respect to an arrangement, or accord, have been ascertained, their effect is purely a question of law, and is not to be submitted to the jury. *Washburn v. Winslow*, 16 Minn. 33.

**148.** What fact evidence tends to prove, where it has any legal effect, is for the jury. Whether evidence tends to prove anything pertinent to the issue, is a question for the court. *State v. Tuunt*, 16 Minn. 109.

**149. Probable cause.** What facts and circumstances amount to probable cause, is a pure question of law. Whether they exist or not in any particular case, is a pure question of fact. The former is exclusively for the court, the latter for the jury. This subject must necessarily be submitted to the jury when the facts are in controversy, the court instructing them what the

law is. *Cole v. Curtis et al.*, 16 Minn. 182.

**150.** The referee having found that the city was bound to maintain a sidewalk, and the question being whether it had erected a safe one—or constructed an unsafe one, and negligently allowed it to remain so. *Held*, question for the jury to determine on the facts whether the city was negligent—no rule of law that arbitrarily determines it from any given state of facts. So as to negligence of plaintiff. *The City of Saint Paul v. Kuby*, 8 Minn. 154.

**151. Probable cause for an imprisonment.** In an action for false imprisonment, without warrant, defendant justified on ground that he had probable cause to believe plaintiff had committed a felony, from representations made by one who pretended to be an officer of another State, hand-bills, photographs, etc. *Held*, question of fact for the jury to determine, whether defendants had reasonable ground to believe that the plaintiff had committed such an offense. *Cochrane v. Toher et al.*, 14 Minn. 385.

*m. Requests to charge the jury.*

**152. Request must not be too broad.** Counsel must, in asking court to charge jury, put his finger on the precise point he wants decided, and take good care that his request is not too large, or his proposition too broad; and if the decision is against him, he must object to it specifically. *Castner v. Steamboat Franklin*, 1 Minn. 78.

**153.** Where parties believe their evidence establishes a state of facts, which together constitute another fact in issue, they should enunciate such facts from the evidence, and request the court to charge that if the jury found such a state of facts to be proved, they constitute the fact in issue. *Cole v. Curtis et al.*, 16 Minn. 182.

**154. Must be wholly correct.** When counsel submit propositions to the court to be charged to jury the judge is bound to look into them only so far as to see if they contain anything improper for a charge, and if they do, may refuse the whole. *Castner v. Steamboat Franklin*, 1 Minn. 78.

**155.**—Where a party embraces several propositions in a general request to charge, some of which are well stated and some not, the court may decline to charge as requested, and it will not be error. *Bond v. Corbett*, 2 Minn. 257.

**156. Should be submitted to opposite counsel.** A request to the court to charge should be submitted to the opposite counsel, as it may be assented to, and thus authorize the court to give it to the jury without question. *Roehl et al. v. Baasen*, 8 Minn. 26.

**157. An objection to a refusal to charge, when sufficiently specific.** When counsel requested the court to charge several distinct propositions, separately numbered—and the court took up each proposition separately—denying or qualifying each, an objection on the part of counsel by which he “excepted to said refusals and modifications and to said instructions as given,” is sufficiently specific to point out the error complained of. *Schurmeier v. Johnson et al.*, 10 Minn. 319.

**158. When several propositions are combined and are erroneous.** When a court is requested to charge the jury on a number of propositions collectively, and the court refuses to so charge, or so give the charge, and any of the propositions are incorrect, no error lies unless special exceptions are taken at the time—no general exception will do—following *Castner v. Steamboat Dr. Franklin*, 1 Minn. 73. *Foster v. Berkey et al.*, 8 Minn. 351.

*n. Charging the jury.*

**159. Court may decline to give instructions not wholly correct.** When counsel submits several propositions to the judge, with the request that he so charge the jury, and those propositions contain several subordinate propositions, principles and abstract rules of law—if the whole lot so submitted contain any error, it is not error for the judge to refuse to charge them. *Castner v. Steamboat Dr. Franklin*, 1 Minn. 78.

**160. Time for entertaining requests to charge.** District court rule 34, requiring "The points on which a party desires the jury to be instructed, must furnish them in writing to the court before he commences his argument to the jury, or the same may be disregarded," is permissive only, and the court may refuse, if not so furnished; but if the points are entertained, it is a waiver of the rule, and it becomes the duty of the court to charge upon the propositions submitted. *Sanborn v. School Dist. No. 10, Rice Co.*, 12 Minn. 17.

**161. All the different instructions must be construed together.** Where the defense was that defendant acted as agent for a known, responsible principal, and the verdict was for the plaintiff, it will not be set aside because the court charged the jury that if from the evidence they found that plaintiff gave the credit and looked to defendant for his pay, they must find for the plaintiff, etc., where they had already been instructed, that it was not sufficient that plaintiff alone, knowing the work to be for the principal, should do it on defendant's credit, but that it must have been mutually understood between the parties that he should look to defendant individually. The whole of a charge must be taken together. *Spencer v. Tozer*, 15 Minn. 146.

**162. Province of the judge as to facts in issue—delivery.** Sec. 22, Comp. Stat. 559, authorizing a judge in charging a jury to "present the facts of a case," does not authorize him to use such language as the following: "That he knew nothing in the case that went to show that the delivery from Galusha to the plaintiff was not valid, under the circumstances, so far as it was within the business of the court to determine the question." *EMMETT, C. J., dissents. Caldwell v. Kennison*, 4 Minn. 47.

**163.**—A judge should carefully refrain from stating any opinion he may have formed as to what facts have been proved or what credit may be due to witnesses; but where the jury could not have found differently, it is an error which does

no prejudice, and not ground of new trial. *Derby & Day v. Gallup*, 5 Minn. 119.

**164.**—**assuming existence of a disputed fact.** Where defendant attempted to recover judgment in his own favor, by way of recoupment, in an action for the balance of purchase money, on goods sold him, on ground of breach of warranty and non-delivery of all the goods purchased (and for which the notes were given), and issue is joined on those defenses, it was error for the court to assume in its charge that there was a *warranty* or that goods were of a certain value, and direct the jury to find damage for the difference. *Smith v. Dukes*, 5 Minn. 373.

**165.** Where the facts are in controversy, a charge that "if the jury believe the testimony and evidence produced by the defendants, the facts thereby proved show" such and such a state of fact, takes the question from the jury, and is error. *Cole v. Curtis et al.*, 16 Minn. 182.

**166.** Where there is competent evidence in the case tending to show that money charged to have been stolen, was in whole or in part either treasury or bank notes, it was not an encroachment on the province of the jury for the court to charge that, "if the jury believed the evidence of the witnesses, the prosecution had produced evidence of the description of the money alleged to have been stolen, sufficient to sustain a conviction under the indictment, if the jury were satisfied beyond a reasonable doubt that the defendant took the said money with the intent to steal it." *State v. Twunt*, 16 Minn. 109.

**167. When the law, as applicable to different states of facts, should be given.** Where the complaint was drawn in view of recovering for a false warranty or deceit in the sale, as the evidence seemed to justify, the measure of damages not being the same in both cases, the jury should have been instructed as to the law governing both cases. *Marsh v. Webber*, 13 Minn. 109.

**168. Charge confined to one issue, not objectionable as ignoring other issues in the cause.** Complaint sought to recover

damages for alleged mal-practice of defendant in treating a broken limb. On the question of damages, court charged the jury that "they must take into consideration all the pain and suffering" sustained by plaintiff, "which resulted from the injury" in excess of what would have resulted had he "been treated with ordinary surgical skill;" also such "further damages as the plaintiff may sustain by reason of his future disability to use said limb, and that in estimating the damages, they are to take into consideration the present and future condition of plaintiff compared with what his condition would have been if the limb had been treated with ordinary skill." *Held*, the charge, confined as it is to the question of damages, does not ignore the question of contributory negligence, which was in issue in the case, for the defense of contributory negligence was in bar of the action, and must have been decided against the defendant, before the question of damages could be considered. *Chamberlain v. Porter*, 9 Minn. 260.

**169. Defective arrangement, no error.** If the whole charge taken together, contain a correct statement of the law, though defective in its arrangement, it is sufficient. *Guerin v. Hunt et al.*, 6 Minn. 375.

**170. Substantial compliance with request, sufficient.** Where the court charges substantially in the language of the request, although not in exact words, it is a sufficient compliance. *Dodge v. Rogers*, 9 Minn. 223.

**171. If charge tends to mislead, party must request more definite instructions.** If a charge as given, tended to mislead a jury, the party aggrieved must ask to have it made more specific; otherwise he will be concluded from raising such point on appeal. *Hunter v. Jones*, 13 Minn. 307.

**172. Court not bound to charge, unless requested.** An omission to charge on a particular point, in the absence of a request from counsel, is not error. *Chamberlain v. Porter*, 9 Minn. 260.

**173. Modification should follow the refusal to charge as requested.** A party

has a right to insist that his legal propositions be submitted to the jury in his own terms; the judge may refuse absolutely, or modify them. In the latter case it should be explicit and *follow the refusal*—otherwise the jury may consider it as an absolute refusal. *Selden, Withers & Co. v. Bank of Commerce*, 3 Minn. 166.

**174. Modifications need not be stated in same connection.** All the exceptions or modifications of a legal proposition given to the jury in a charge, need not necessarily be stated in the same sentence or connection. If the proper modifications and exceptions to the general rule are made, there is no ground for reversal of judgment, unless there is something in the charge so obscure or contrary as to mislead or confuse the jury. *Gules v. Mowry et al.*, 14 Minn. 21.

**175. Abstract principles of law.** The refusal of the judge to charge the jury on abstract propositions of law, having no relation to the case on trial—no error. *Derby & Day v. Gallup*, 5 Minn. 119.

**176.**—It is not error for a court to refuse to charge a proposition of law in itself correct, but not applicable to the case. *Marcotte v. Beaupre*, 15 Minn. 152.

**177. Instructing jury to consider all the testimony, when none was objected to.** Where no exception is taken to the introduction of testimony, it is not error for the court to charge that the jury in estimating damages are to take into consideration all the facts and circumstances of the case. *Chamberlain v. Porter*, 9 Minn. 260.

**178. Instructions in particular cases—warranty as to soundness.** Where complaint was broad enough to cover any unsoundness rendering the horse of no value, although glanders was specially alleged to exist, and evidence was introduced tending to show that he was warranted sound and free from disease, it was correct to instruct the jury that if he was not, but had disease which rendered him worthless, they should find for plaintiff for his value. *Johnson v. Wallower et al.*, 15 Minn. 472.

**179.**—counter claim. Where defend-

ant set up a counter claim for livery bill, and the reply admitted its contraction, but averred ignorance as to its amount, and then alleged payment, and the evidence, as to whether anything was due, conflicted. *Held*, error to charge that defendant is entitled in any event to all the counter claim the jury find from the evidence to be proved, with interest, etc., for the instruction implies that plaintiff had paid nothing upon it. *Conehan v. Crosby*, 15 Minn. 13.

**180. Bill of exceptions to instructions, what evidence should it contain.** Where a court undertakes to instruct a jury as to the law arising from a given state of facts—all those facts, as detailed by each witness, must be set out in a bill excepting to such ruling. *Desnoyer v. Hereux*, 1 Minn. 17.

*u. Retirement of the jury.*

**181. Communication by judge, with the jury.** Where, on the trial, both parties consent that the jury may take the minutes of the testimony, and after four hours judge recalls them, and reads a deposition which was introduced in evidence—it is not error, especially where no specific objection was taken and the evidence was irrelevant. *Cott v. Waples et al.*, 1 Minn. 134.

**182.**—A judge can have no communication with the jury, or give them any, the least, information, except in open court, in presence of, or after due notice to the District Attorney, and the prisoner or his counsel, and this though he visited and had communication with the jury only to inform them that if they wanted any information on matters of law, they should come into court and ask for it. It is irregular—fatal. *Hoberg v. State*, 3 Minn. 262.

*p. Polling the jury.*

**183. Not affected by agreement to seal verdict.** In a proper case for a sealed verdict, the right of the parties to poll the jury is not affected by an agreement that

the jury may seal their verdict. *Steele et al. v. Etheridge*, 15 Minn. 501.

**184. After a verdict is recorded, neither party has a right to poll the jury.** *Ib.*

*q. Verdict.*

**185. Juror cannot make up his verdict apart from his fellows.** A jury that had permission to seal up their verdict, stood ten for defendant, and two for plaintiff; they sealed a verdict, and were permitted to separate. Next morning the two jurors stated “they voted for the verdict under protest,” but one of them yielded, and assented to the verdict. *Held*, irregular, as the one who had yielded had made up his verdict from his own reflections, unaided by his fellows, or from improper influences, neither of which is the decision contemplated by law—no juror having the right to make up his verdict apart from and unaided by the others. *Aetna Ins. Co. v. Grube*, 6 Minn. 82.

**186. Receiving verdict, in absence of the parties, erroneous.** A jury went out to deliberate, Wednesday evening, and court at once adjourned till Friday morning, without any stipulation as to the disposition of the verdict, if the jury agreed in the meantime. At half-past eleven, Wednesday night, the jury agreed, came into the court room, where the judge received their verdict in absence of both parties, and discharged them. On Friday morning the judge announced their verdict, without presence of the jury. *Held*, erroneous practice. *Kennedy v. Raught*, 6 Minn. 235.

**187. Correction of verdict—by court, where intention is obvious.** In replevin, a verdict of jury in these words: “The jury find and return a verdict for the plaintiffs, and against defendant, and costs of suit,” is correct in substance, and the intention being obvious, the court will give it effect. The clause, “and costs,” is void, for uncertainty, even if the jury had power under the statute to award costs. *Cott v. Waples et al.*, 1 Minn. 134.

**188.—cannot be made by the clerk.** A special verdict found that a notice of foreclosure sale originally stated day of sale on the 23d May, 1861, and that the mortgagee had it changed to the 25th of May, 1860, and that "the notice of sale was published for six weeks successively before sale," without stating which notice—the one for the 23d or 25th May. *Held*, the verdict could not be amended or corrected in any way by the court—it must stand alone. *Dana & Broome v. Farrington and wife*, 4 Minn. 433.

**189.—by jury, of a sealed verdict.** A jury sealed their verdict, and separated, but on coming into court next morning, stated that they had made a mistake in their figuring—the court, without opening the verdict, directed them to return to their jury room and correct the mistake. *Held*, in absence of prejudice, no error. *Nininger v. Knox et al.*, 8 Minn. 140.

**190. When all the issues are not determined by a special verdict, it is void.** Where several distinct issues are made by the pleadings, and the jury find a special verdict only on one of the issues, and no general verdict under which the other issues can be included, it is wholly insufficient to authorize an entry of judgment. *Armstrong v. Hinds*, 9 Minn. 356.

**191. Special verdict must be requested.** If a party wishes a special verdict, he must request the court to so instruct the jury, under Sec. 35, p. 561, Comp. Statutes. *Board County Comm'rs, Dakota Co., v. Parker*, 7 Minn. 267.

**192. Special verdict on one issue only, insufficient.** Where there were several issues joined in a case, and a jury, sworn to "try the issues joined between the parties," find a special verdict which passed upon but one issue. *Held*, judgment was erroneously entered on such verdict. *Meighen v. Strong*, 6 Minn. 177.

**193. Special verdict discretionary with the judge.** It is discretionary with the court whether it will direct the jury to find specially upon any particular question of fact or not, under Sec. 218, p. 480, G.

*S. McLean, admin., v. Burbank et al.*, 12 Minn. 530.

**194. General verdict in actions for money.** Under Sec. 35, p. 561, Comp. St., the jury, in an action for money only, may find a general verdict. *Board County Comm'rs, Dakota Co., v. Parker*, 7 Minn. 267.

**195. Majority verdict, void.** Judgment rendered on verdict of a part of the jury, (majority verdict,) cannot be sustained, unless the express consent of both parties is shown. *Snow v. Hardy*, 3 Minn. 77.

**196. Average verdict, void.** It is error for a jury to make up their verdict by agreeing to specify each a sum as due to the plaintiff, and divide the aggregate of the sums so specified, by 12, and take the quotient as the result. *St. Martin v. Desnoyer*, 1 Minn. 156.

**197. Motion to set aside verdict must be made before judgment.** A motion to set aside a verdict cannot be entertained after judgment is entered—for it is then merged in the judgment. The motion should be to set aside the judgment, for the reason that the verdict did not authorize it. *Eaton v. Caldwell*, 3 Minn. 134.

(See note in ERRATA, 3 Minn. explaining this case.)

**198. Form of, against part of joint defendants.** Where several defendants were joined, and plaintiff notified the jury that two of the defendants, Jenkins and Moody, had been dismissed, a verdict in this form was regular—viz., title of cause: "The jury in the above case return a verdict for the plaintiff, in the sum of \$1,000. N. B.—O. F. Jenkins and Joseph Moody excepted in the above action." (Signed) O. ROGERS, Foreman. *Desnoyer v. McDonald, Geisse & Co.*, 4 Minn. 515.

**199. Claim and delivery.** In claim and delivery of personal property, the jury may assess the value of property in gross; although the court should, at plaintiff's request, direct them to assess the value of specific articles, so that if only a part of the articles can be returned, he can

have judgment for the return of such portion, and judgment for the value of the residue. *Caldwell v. Bruggerman*, 4 Minn. 270.

**200. Nuisance—special verdict.** In an action for the recovery of damages sustained by a nuisance, and for the abatement thereof, and an injunction against the same, where certain questions are submitted to the jury by the court, with a view of ascertaining whether the equitable relief shall be granted, a failure on the part of the jury to answer in whole or in part one of those questions, was a matter of which the court could complain, but not the subject of exception by the parties, under the circumstances of this case. *Finch v. Green*, 16 Minn. 355.

**201. Replevin.** The statute of Wisconsin which provides that the jury shall assess the value of property in replevin, is *directory* only in such actions as do not involve the title, but *wrongful taking* only. *Coit v. Waples et al.*, 1 Minn. 134.

*v. Nullities.*

**202. What is—relief against.** An order of a court commissioner which he had no power to make, (setting aside a summons,) is a *nullity*, and application to purge the record of the same, should be made to the District Court, and not to the Supreme Court. *Pulver v. Grooves*, 3 Minn. 359.

**203. Case to be made on appeal from trial by jury, only.** Sec. 63, Comp. St., p. 565, requiring the preparation of a “*case*” on appeal, only applies to cases tried by a jury, and not to a trial by the court, where the decision may be filed out of term, as well as in term. *Morrison et al. v. March*, 4 Minn. 422.

**204. Judge cannot amend after settlement, on his own motion.** Where the judge of the District Court has, on hearing the parties, settled a case and entertained a motion on such case, and then ascertains that the record is not made up according to the facts, he cannot amend of his own mo-

tion, but must call in the parties and let them be heard as to the proposed alterations. *State v. Laliyer*, 4 Minn. 379.

*s. Trials of issues under order of court.*

**205. Form of the order.** Where a court directs certain issues to be tried by a jury, the order therefor provided for in Sec. 199, Chap. 66, G. S., should be a formal order, and as the statute is silent as to what such order shall contain, it will be governed by the former rule in equity, and specify the particular issues of fact to be tried. *Berkey v. Judd et al.*, 14 Minn. 394.

**206. Consent of parties.** In an action for the recovery of damages for the overflowing of plaintiff's land, by means of defendant's dam, and for an abatement of said dam, and a perpetual injunction against its maintenance, the issues were tried by a jury, without any formal consent of the parties, or formal order of the court, but without objection, and at the close of the trial, the jury were instructed to return a general verdict on the question of damages, which they did, assessing the same at \$50. *Held*, that under Sec. 198 and 199, Chap. 66, G. S., the issues in this case were triable by the court, “subject to the right of the parties to consent, or of the court to order that the whole issue, or any specific question of fact involved therein, be tried by a jury, or referred.” And though the proceeding was not strictly regular, still there was a substantial consent of the parties to the trial by jury of the issue as to the existence of the nuisance, and *quantum* of damages, and the verdict was a sufficient foundation for a money judgment. *Finch v. Green*, 16 Minn. 355.

*C. Trial by the court.*

*a. What is a trial.*

**207. Assessment of damages by consent.** After issue joined, and the case was called for trial in its regular order on the calendar, defendant withdrew his answer



and submitted to an assessment of damages by the court. *Held*, that there was such an actual passing upon the question by the court below, as would authorize this court to review it. *Kent v. Brown*, 3 Minn. 347.

*b. Findings.*

**208. Need not find on demurrer, facts admitted by pleadings.** On trial of an issue of law, raised on demurrer to answer, it is unnecessary for the court to find facts that are admitted in the pleadings—such facts must be governed by the pleading itself, and cannot be added to or taken from by any finding of the court. *Dickenson v. Kinney*, 5 Minn. 409.

**209. Immaterial issues.** Upon a trial by the court, all material issues should be passed upon, but immaterial issues may be disregarded. *Lowell v. North & Carl*, 4 Minn. 32.

**210. Facts and conclusions of law, separately.** A judge trying a cause without a jury should render his decision in writing, stating the facts found, and conclusions of law separately; and a judgment entered, without a compliance with these statutory regulations, is irregular. (R. S., 1851, p. 356, Sec. 41.)—*Ullman v. Bazille*, 2 Minn. followed. *Baldwin v. Allison*, 3 Minn. 83.

**211. Omission to find on all issues, remedy.** When the court in a trial before it fails to find upon a material question of fact, a motion for an amendment of such findings, so as to show that such fact either did or did not exist, is the proper remedy. *Conklin v. Hinds*, 16 Minn. 457.

**212. Striking out supplemental findings of court.** The court failed to find on a material issue of fact, and on motion amended its finding in that respect. Afterward defendant moved, on a case made, for a new trial, whereupon plaintiff moved to strike out the supplemental finding aforesaid as unauthorized and void. *Held*, that judgment had been entered before the amendment of the findings, made no difference, as the amendment did not change

the conclusion of law, upon which said judgment was entered. Nor was it material that a case had been previously settled, for the new finding was not made upon new evidence, there being no presumption that any evidence was introduced subsequently to sustain the new finding, for the court could not receive such evidence, and this motion made, after the allowance of the amendment without objection, and after the argument of a motion for a new trial below, without being raised, comes too late. *Id.*

*c. Filing decision.*

**213. Time.** Sec. 41, p. 562, Comp. St., which requires the Judge, before whom a case is tried without the aid of a jury, to file his decision within twenty days after the term at which it was tried, is directory only. *Vogle v. Grace*, 5 Minn. 297.

*d. Order for judgment.*

**214. Form, when sufficient.** The court, after finding the facts, concluded his decision as follows: "Ordered, that the plaintiff herein have judgment as prayed for in his complaint," without any other conclusion of law. *Heid*, a substantial compliance with requirements of the statute. *Von Glahn v. Sommer*, 11 Minn. 203.

*D. Trial by reference.*

*a. Generally.*

**215. Appointment of a referee is constitutional.** The appointment of a referee under Comp. St., p. 563, is not a diversion of the judicial power of the State from its legitimate channels, and a location of it in hands unauthorized by Sec. 1, Art. 6, Constitution of State. *Curson & Eaton v. Smith*, 5 Minn. 78.

**216. Order appointing.** An order in an action made in open court, referring a cause and appointing a referee, if entered upon the minutes of the court, need not

be signed by the Judge. *Leyde v. Martin et al.*, 16 Minn. 38.

*b. Referee's power.*

**217. On reference to take disclosure of garnishee—jurisdiction over garnishee's person.** A referee appointed to take the disclosure and examination of a garnishee, has no power to determine questions of jurisdiction over the garnishee's person, by reason of the insufficiency of the affidavit—such objections should be presented to the court on the coming in of the report. *Prince v. Hendy*, 5 Minn. 347.

**218. Admitting testimony after close of trial.** A referee has power, on a proper foundation being laid by affidavit, to let in further evidence in a cause, after the testimony in the action is closed, and the findings of fact and conclusions of law found, but before the report has been delivered to the prevailing attorney. *Cooper v. Stinson*, 5 Minn. 201.

*c. The report.*

**219. Effect of.** A referee's report is conclusive, unless there are facts in his report, or in the pleadings, inconsistent with such finding. *Russell v. Minn. Outfit*, 1 Minn. 162.

**220. That referee was sworn.** When the report of a referee is silent, as to whether the referee was sworn or not, in the absence of evidence to the contrary, the presumption is that the referee was sworn. *Leyde v. Martin et al.*, 16 Minn. 38.

**221. Remedy when not sufficiently specific.** Where a referee's report is not sufficiently specific, the proper remedy is by motion in the District Court, for an order sending the report back to the referee for correction. *Englebrecht v. Rickert*, 14 Minn. 140.

*d. Findings.*

**222. Admission in the pleadings.** A referee should find on all material issues,

but need not pass on matters admitted by the pleadings. *Brainard v. Hastings*, 3 Minn. 45.

**223. All material issues, whether any evidence was introduced or not.** The referee should in all cases pass upon all the material issues, and when no evidence is given in support of a defense, he should find it against the defendant, and not overlook it entirely. *Bazille v. Ulman*, 2 Minn. 138.

**224. Facts and conclusions of law, remedy for omissions.** A referee under our statute should find the facts and conclusions of law separately, as is required of the court in like cases, and when there are omissions in his report, the correct practice is to apply to the court to send it back to him for correction. *Id.*

**225.**—Where a referee does not report his finding of fact and conclusions of law separately, the practice is to apply for an order sending the report back for correction. *Califf v. Hillhouse*, 3 Minn. 311.

**226.**—how construed in Supreme Court. Where a referee's report did not state the findings of fact and conclusions of law separately, and no application was made in the court below to have the same corrected, and it was there treated as a general finding for the respondent, the Supreme Court considered the report in the light of a general finding for the prevailing party below, of all the material facts in issue—and considered the case on other points only. *Id.*

*e. Judgment on report.*

**227. Irregular for defeated party to move for judgment, notwithstanding the report.** Where a referee has directed judgment, it seems, under Sec. 4, Comp. St., p. 564, to be irregular for a party to move for judgment in his own favor, notwithstanding the referee's order. It appears that he should perfect the judgment of record, when either party may appeal from the same. *Ames v. The Mississippi Boom Co.*, 8 Minn. 487.

12. *The Judgment.*

(See ASSIGNMENT, I., 3.)

(See EVIDENCE, 131, *et seq.*)

(See ARBITRATION, II.)

a. *Arresting judgment.*

**228. Power to arrest judgment preserved by statute.** The power of arresting judgment after verdict on motion, has always been exercised by common law courts, as uniformly appurtenant to their control over causes, and Sec. 65, p. 337; Sec. 67 and 68, p. 360, and Sec. 39, p. 35-6, Rev. St., as amended on p. 11 of amendments, confers such powers in express terms. *Wentworth v. Wentworth*, 2 Minn. 282.

**229. When judgment will be arrested.**

*It seems*, that when a complaint omits to allege any substantial fact which is essential to a right of action, and which is not implied in, and inferable from the finding of those which are alleged, a verdict for the plaintiff will not cure the defect, and judgment will be arrested. *Lee v. Emery et al.*, 10 Minn. 187.

**230.**—Where complaint claimed to recover damages from defendant, for injuries sustained for up-setting plaintiff's carriage—but failed to aver that defendant was the cause of the up-setting, judgment will be arrested, on motion, after verdict for plaintiff—such an averment being the gist of the action, and not helped by verdict. *Ib.*

b. *What relief can be granted.*

**231.** Where defendant was in default in not paying rent under a lease of a grist mill, as well as in not performing other special covenants in the same instrument, relating to repairs and improvements. *Held*, court could render judgment *absolute* for the plaintiffs for the rent; and judgment *conditional* for the possession of the premises and forfeiture of defendant's rights under the lease, if defendant failed to pay rent due at commencement of the

action, with interest and costs, or if defendant failed to perform his obligations under the special covenants within a reasonable and specified time after notice of the judgment herein. *Hall v. Smith*, 16 Minn. 58.

**232. Judgment in favor of some, and against other joint defendants** in assumpsit, could not be given prior to the Revised Statutes. *Carlton et al. v. Choteau et al.*, 1 Minn. 103.

**233. Defendant may recover judgment** in his own favor by way of recoupment under our statute. Comp. St., p. 481, Sec. 24. *Smith v. Dukes*, 5 Minn. 373.

**234. Judgment on contract against part of defendants, where they are not jointly liable.** Sec. 172. Comp. St., p. 554, allows judgment against less than whole number of defendants joined, in all cases where the same allegations, or contract as alleged, would constitute a cause of action against a portion only of those sued, or against defendants severally, but does not extend to cases where the action is on a joint contract, where a recovery must be had against all or none. *Fetz v. Clark & Co.*, 7 Minn. 217.

c. *Form and contents of judgments.*

**235. Where portion of claim, as appears by the complaint, is barred by lapse of time.** Where a complaint shows that the right of action on two of three installments accrued more than six years prior to commencement of action, and nothing in the pleadings or evidence to show the contrary, plaintiff is entitled to judgment for the last installment only. *Wood v. Cullen, impl'd, etc.*, 13 Minn. 394.

**236. When judgment covers claims on contract, and tort.** A complaint contained four causes of action, three on contract and one on tort. On default, the clerk entered up judgment for all the causes of action. *Held*, the last cause of action arising from tort was erroneously included in assessing damages, it being improperly joined with the remaining causes of action. *Rey-*

*nolds v. La Crosse & Minn. Packet Co.*, 10 Minn. 178.

**237. Judgment terminating equities under bond for a deed.** When the Court is asked to terminate defendant's interest in land, under a bond for a deed, where part payment has been made, on the ground of failure to complete the whole payment, it would seem equitable, that defendant, if the amount paid is large, and amount due inconsiderable, should have more time granted to complete performance than where he has advanced but a small sum on the agreed price; and perhaps some regard may be had to the financial embarrassments of the country. *Yoss v. DeFruedenrich et al.*, 6 Minn. 95.

**238. Claim and delivery.** Under Sec. 70, Comp. St., p. 566, in an action for the claim and delivery of personal property, a bare demand of the return of the property in an answer, will not warrant a judgment for the return thereof, such demand to warrant such judgment must be based upon facts showing the right of possession in defendant, and the court must adjudge such facts sufficient to entitle defendant in law to the possession. Defendant may have judgment for costs without return of the property, as where he disavows all connection with the property, and makes no claim to it, as in plea of *non cepit*. *Lewis v. Buck*, 7 Minn. 104.

**239.**—In an action for "claim and delivery of personal property," the jury did not assess the value of the property, but assessed the damages at \$75.00—\$50.00 only being claimed. *Held*, judgment entered on such verdict for the return of the property, or in default thereof, a recovery of \$75.00 as the value of the property was erroneous. *Eaton v. Caldwell*, 3 Minn. 134.

**240.**—A judgment in replevin, though in the usual form of a simple money judgment, is irregular and not void, and not open to attack in a collateral action on the undertaking given in such action. *Robertson v. Davidson*, 14 Minn. 554.

*d. Offer of judgment.*

**241. When insufficient.** In "claim

and delivery," after answering, defendant delivered the property to the plaintiff, and offered to allow judgment to be entered up by plaintiff for a certain sum besides costs. *Held*, the plaintiff was entitled to judgment declaring the title of the property to be in him, and the offer was insufficient in that regard; that, though the property had been returned, still plaintiff was entitled to judgment for at least nominal damages, and of ownership of the property. *Oleson v. Newell*, 12 Minn. 186.

*e. Judgment on default.*

**242. Where plea of defendant's answering, shows no cause of action.** In actions of tort, as trespass, etc., where the wrong is joint and several, and the plea of one of the defendants is such as shows the plaintiff could have no cause of action against any of them, if the plea be found against the plaintiff, it shall operate to the benefit of all the defendants, and the plaintiff cannot have judgment against those who let judgment go by default. *Williams v. McGrade et al.*, 13 Minn. 46.

**243. Statute allowing clerk to enter judgment on default, constitutional.** Sec. 192, Chap. 66, G.S., Sub. Div. 1, as amended by G. L. 1868, p. 123, which allows judgment on default to be entered by the clerk in actions arising on contract for the payment of money only, where the summons has been personally served, and the plaintiff shall file with the clerk proof of the service of the summons, and that no answer has been received within the time allowed by law, does not contravene Sec. 1, Art. 6 of the State Constitution, which vests the judicial power in the courts; for a judgment, though entered by the clerk without the knowledge of the judge, is in contemplation of law the judgment of the court—following *Reynolds v. La Crosse & Minn. Packet Co.*, 10 Minn. 186. *Skallman v. Greenwood*, 15 Minn. 192.

**244. Writ of inquiry to assess damages.** The proper practice to correct irregularities in the execution of writs of inquiry, for the assessment of damages, etc.,

is by motion to set aside or vacate, and for a re-assessment. *Babeock et al. v. Sanborn et al.* 3 Minn. 141.

*f. Judgment "non obstante veredicto".*

**245. When granted.** A judgment "*non obstante veredicto*" is never granted except in a very clear case, as where it is apparent that from defendant's own plea he can have no merits. Where the answer put in issue, the contract on which action was brought, and set up matters showing a full defense, if it existed, a simple finding by the jury that the contract existed, but verdict for defendant will not authorize a judgment for plaintiff, notwithstanding the verdict; for the defense set up in the answer was undoubtedly found true. *Williams v. Anderson*, 9 Minn. 50.

*g. Judgment by confession.*

**246. Signature of the statement, what a sufficient.** On entry of judgment by confession, the statement required by Comp. St., p. 642, Sec. 2, was not signed, but the verification of the same was signed by the debtor. *Held*, sufficient. *Kent v. Chalfant*, 7 Minn. 487.

**247. What a sufficient statement.** On entering judgment by confession, the statement showed: "This confession is for a debt justly due to the plaintiff, arising upon the following facts: twenty-eight hundred dollars for money loaned by the plaintiff to the defendant, and now due the plaintiff." *Held*, sufficient. *Id.*

**248. What an insufficient statement.** On entry of judgment by confession, the statement showed: "This confession is for seven hundred dollars for a liability incurred by plaintiff in endorsing a bond for defendant, which bond is for that amount." *Held*, insufficient to sustain the judgment. *Id.*

**249. Judgment will be partly upheld and partly cancelled.** On entry of judgment by confession, where the statement showed that the amount is composed of two items, one of which is good, the other in-

sufficient, the judgment will be upheld as to the former, and cancelled as to the latter—no fraud in its entry appearing. *Id.*

*h. Entry and notice of judgment.*

*1. The notice.*

**250. Notice of entry of judgment on verdict, not necessary.** A prevailing party can enter up judgment on the verdict of a jury, without notice to the adverse party. *Whitaker v. McClung et al.*, 14 Minn. 170.

**251.** Judgment may be entered by the successful party upon the report of a referee, without notice to the adverse party. *Leyde v. Martin et al.*, 16 Minn. 38.

**252. Clerk may enter, without notice or order of Court.** Under the provision of statute and rules of court, the clerk can enter judgment on a verdict, decree of court, or report of referee, without any special order of the court to that effect, and without notice to the other party—both in equitable and legal actions. *Piper v. Johnson et al.*, 12 Minn. 60.

**253. Waiver of notice, what is.** A stipulation provided "that in consideration of such extension of the time to answer herein, the plaintiff shall have judgment in this cause for the amount claimed in the complaint herein, without further notice," etc., is not a contract which prohibits defendant from moving to have judgment set aside for his mistake, surprise, etc., under the statute—it merely waives the notice of judgment to which he was entitled by his appearance. *Barker v. Keith*, 11 Minn. 65.

**254.** Until the actual entry of the amount of costs in the judgment, it is unaffected by the taxation of the costs. *Leyde v. Martin et al.*, 16 Minn. 38.

**255. What a sufficient service of notice.** Where the party had by stipulation thirty days in which to amend his complaint, but prior to its expiration his attorney requested the defendant's counsel to enter judgment immediately, as his client did not wish to amend his complaint, but desired to appeal from the judgment, whereupon defendant noticed entry of

judgment and taxation of costs before the expiration of the time allowed by the stipulation for the amended complaint. *Held*, the request was a waiver of the right to file an amended complaint under the stipulation, and the notice was properly served—notwithstanding the admission of service endorsed on the notice of taxation and entry of judgment concludes the plaintiff from questioning its regularity—and the judgment entered on such notice after thirty days extension, was regular. *The Aetna Ins. Co. v. Swift et al.*, 12 Minn. 437.

**256.** As between the parties to a judgment, the plaintiff being entitled to damages and costs, if the judgment is entered specifying the amount of the damages, but leaving the amount of costs blank, the omission to tax the costs until after the entry of judgment, does not affect the right of the clerk to tax the costs; nor is the regularity of the judgment affected by the insertion therein by the clerk, after its entry, of the amount of the costs regularly taxed. *Leyde v. Martin et al.*, 16 Minn. 38.

## 2. The entry.

**257. Clerk should sign.** A judgment is properly signed by the clerk, no other signature is required. *Cathcart v. Peck et al.*, 11 Minn. 45.

**258. The omission of the clerk to sign the judgment,** is at most an irregularity, and does not vitiate the judgment. *Hotchkiss v. Cutting*, 14 Minn. 537.

**259.**—In the absence of statute, the omission of the clerk to sign the judgment entered in the judgment book is at most an irregularity, and does not invalidate the judgment; and Rule 19, Dist. Ct., 1 Minn. 458, requiring it, is directory only. *Jorgensen v. Griffin*, 14 Minn. 468.

**260. Entry in a book kept for two purposes, sufficient.** Where the statute required the clerk of court to keep among the records a register of actions, and a book for the entry of judgments, without requiring them to be in separate books. Comp. St., Sec. 40, p. 630. *Ib.* Sec. 72-3,

p. 566. *Held*, where one book is kept by the clerk as a register of actions and a judgment book, a judgment entered therein is valid. *Ib.*

**261. Judgment complete, when entered in the judgment book.** In this State, the entry of the judgment in the judgment book precedes the making and filing of the roll, and the judgment is complete when entered in the judgment book—and when so entered, it is the original record, and therefore evidence of the judgment; and a transcript of the same is competent evidence by statute. Sec. 68, ch. 73, G. S. *Williams et al. v. McGrade et al.*, 13 Minn. 46.

**262. What requisite proof of service of summons, on entry by default.** Plaintiff entered judgment by default on filing the summons, with the following endorsement on the back thereof: "Due service of the within summons, by copy of the same, is hereby admitted, this 11th day of April, A. D. 1859, by each of us, the undersigned.

(Signed)

H. F. MASTERSON,  
ALBERT S. HOYT,

by H. F. MASTERSON, his attorney."

No other proof of service was made. *Held*, the proof of service was defective, as to both defendants. The court will not judicially recognize the signature of Masterson (an attorney of the court), because it is in connection with a matter that does not concern his official character. It was a purely private act. Proof should have been made of Masterson's authority to admit service for Hoyt, and also as to Masterson's handwriting. *Musterson & Hoyt v. Le Claire*, 4 Minn. 163.

**263. An erroneous order for judgment, may be corrected in the entry.** The answer put plaintiff's first cause of action in issue, but admitted the second, a claim of \$12.60. On the trial, the court nonsuited plaintiff, ordering a dismissal of the action and that defendant recover his costs and disbursements. Afterwards, defendant entered up judgment for his costs and disbursements *less the amount admitted to be*

*due plaintiff*, which entry was afterwards confirmed as the judgment of the court. *Held*, the court having erred in ordering judgment, might correct it in the subsequent entry thereof—especially since plaintiff could not review the oral order for judgment. *Hodgins et al. v. Heaney*, 15 Minn. 185.

*i. Lien of the judgment.*

**264. Lien is subject to an existing parol contract to convey, vendee being in possession.** Where land of a judgment debtor is in possession of another under a parol contract to convey, the judgment creditor takes such an interest in the land as the judgment debtor has, and no more. If the lien attached since the vendee in possession had performed, the judgment creditor is bound by such performance, if, before performance, but during the possession, he may be compelled to satisfy his judgment out of other property. *Seager v. Burns*, 4 Minn. 141.

**265. Covers only debtor's interest.** The lien of a judgment is limited to the actual interest which the judgment debtor has in the estate. *Banning et al. v. Edes*, 6 Minn. 402.

**266. When deed and mortgage, though executed at different dates, were the same transaction, a prior judgment lien did not take precedence of the mortgage.** P. contracted for the sale of land to B., against whom an unsatisfied judgment stood docketed, in the same county in which the land lay. P.'s deed was dated June 6th, delivered to E. to hold in escrow until B. executed and delivered back a mortgage on the land, to secure the amount of unpaid purchase money. Ten days afterwards B. executed the mortgage, took the deed (both being delivered at the same time, though of different dates), and the mortgage was recorded fifteen minutes after the deed. *Held*, the giving of the deed and mortgage was the same transaction and the prior judgment against B., would not take precedence to the mortgage. *Id.*

**267.**—When the vendor's deed was made out, though not delivered on a given day, and ten days afterwards the vendee took the deed, giving back on that date a mortgage, and the mortgage was recorded within fifteen minutes after the deed, a docketed judgment against the vendee did not attach as against the mortgage. *Id.*

**268. Effect of judgment against non-resident, where summons was published.**

The judgment in an action in which the summons against the defendant (non-resident) is served by publication, reaches the property which he has in the State, and is of no further use when that is exhausted. It binds or concludes the defendant in nothing. It could not be sued on in any other court, here or elsewhere: nor, *it seems*, would the judgment creditor be precluded from bringing another action on the original consideration, for any balance that might be due to him, after exhausting the property which was in the State at the time the jurisdiction attached. *Stone v. Myers*, 9 Minn. 303.

**269. No lien after five years, where no execution has been returned unsatisfied.** At the time the judgment was rendered, the statute made the same a lien on the homestead when docketed with the clerk (Sec. 77, p. 566, Comp. St.)—following *Millard v. Tillotson*, 7 Minn. 513, and *Folsom v. Carli*, 5 Minn. 333—by Sec. 1, Chap. 95, Laws 1860, the homestead was released from liability of sale on execution, and all judgment liens thereafter rendered (*Millard v. Tillotson, ante*), by Laws 1862, Sec. 8, Comp. St., p. 567, which made a judgment a lien on all the land of a debtor, was amended so as to determine such lien, and discharge the property therefrom "When no execution shall have been issued and levied, or returned, no property found, within five years from the time of the entry of judgment"—postponing its operation for nine months after its passage. *Held*, the amendment of 1862 operates retroactively, and is constitutional—hence the land is discharged from the lien. *Burwell v. Tullis et al.*, 12 Minn. 572; *Wetherill v.*

*Stone v. et al.*, 12 Minn. 579; *Davidson v. Gaston*, 16 Minn. 230; *Lamprey v. Davidson et al.*, 16 Minn. 480.

**270.** The lien of a judgment on real estate terminates under Chap. 27, Laws 1862, when five years have elapsed, without the return, as unsatisfied, of an execution thereon—following *Burwell v. Tullis*, 12 Minn. 572. *Dana et al. v. Porter et al.*, 14 Minn. 478.

**271. Lien preserved on writ of error for original amount only.** The lien on a debtor's land, by virtue of a docketed judgment, is preserved on writ of error to this court, to the extent of the original lien, but will not extend to the additional damages and costs given on an affirmance in this court; and to secure a lien for such increased amount, the judgment in this court must be docketed in the District Court, and it will become a lien for that additional amount from the time of such docketing only. *Daniels v. Winslow*, 4 Minn. 318.

**272. Lien not limited to ten years, when.** Where execution had issued and been levied within five years after the docketing of a judgment, under Chap. 28, p. 82, G. L. 1862. *Held*, neither the repeal of the act of 1862 (by Chap. 122, R. S.), nor the enactment of the revised statutes, affected any proceeding under the act of 1862, and viewing Sec. 4, Chap. 121, G. S., with Sec. 254, Chap. 66, R. S., the latter section was not intended to embrace such a judgment, and that the lien of such a judgment is not thereby limited to ten years. *Davidson v. Gaston*, 16 Minn. 230.

**273.**—The provision of Sec. 254, Chap. 66, Gen. St., limiting the lien of judgments to ten years, does not apply to judgments entered and docketed prior to the time it took effect, the lien of which has been preserved under the act of 1862, G. L., Chap. 27—following *Davidson v. Gaston*, 16 Minn. 230. *Lamprey v. Davidson et al.*, 16 Minn. 480.

**274. Prospective operation of G. S.** That portion of Sec. 254, Chap. 76, Gen. Stat., as follows: "Said judgment shall survive, and the lien thereof continue for

the period of ten years, and no longer; *provided*, that in any action upon such judgment, the judgment therein shall not be a lien upon the real property of the original judgment debtor," in connection with the other portion of the section, of which it forms a part, may be construed to apply only to judgments docketed after its passage. *Davidson v. Gaston*, 16 Minn. 230.

**275. Limitation of G. S., not retrospective.** The ten year limitation of a judgment lien, prescribed by Sec. 254, Chap. 66, G. S., does not extend, by force of Sec. 7, Chap. 121, G. S., to judgments the lien of which has been preserved under the law of 1862, for the limitation of such judgments under the latter law was conditional, on the performance of an act by the judgment creditor, and by which performance the lien remains unimpaired; but the limitation in the former law is one of time only, and absolute—hence the two limitations are not the same, or similar, within the meaning of Sec. 7, Chap. 121, R. S. *Ib.*

**276.** In the case of judgments, within the operation of Chap. 27, G. Laws 1862, where executions were issued and levied upon real estate belonging to one or more of the judgment debtors, the property duly advertised for sale, and for want of bidders no sale made, and the executions returned wholly unsatisfied, within five years from the entry of the judgments—the provisions of said act were complied with, and the lien of the judgments preserved. *Lamprey v. Davidson et al.*, 16 Minn. 480.

**277.** When an execution is issued and levied or returned, no property found, within five years from the docketing thereof, the terms of Chap. 27, p. 982, G. L. 1862, were complied with, and the lien of the judgment remained. *Davidson v. Gaston*, 16 Minn. 230.

**278. Lien unlimited as to time.** A levy upon personal property of the judgment debtor and a subsequent sale of, and application of, the proceeds therefrom upon said judgment—though insufficient to satisfy the judgment—and subsequent re-



turn of the execution. within five years after entry of judgment, into the court with consent of the plaintiff, is a sufficient compliance with the terms of Chap. 27, p. 82, G. L. 1862, to preserve the lien of said judgment, which lien was unlimited as to time. *Id.*

**279. Execution must issue, when.**

Under Sec. 262, Chap. 66, G. S., it is required only that execution should be issued upon a judgment within ten years—following *Davidson v. Gaston*, 16 Minn. 230. *Lamprey v. Davidson et al.*, 16 Minn. 480.

**280. Lien on homestead prior to act of 1860.** A judgment filed under Sec. 77, Comp. St., p. 566, became a lien on *all* a debtor's real estate, including his homestead, then owned and afterward acquired, and the homestead can be sold if unoccupied by the debtor or his family; and the act of March 10, 1860, (G. L. 1860, p. 286,) which allowed a debtor and his family to remove from their homestead, or sell and convey the same, and without exposing it to sale, and relieving the same from all lien of judgment whatever, does not apply to judgment liens docketed and in force previous to its passage. *Tillotson v. Mil-lard et al.*, 7 Minn. 513.

**281. How affected by repealing act of 1851.** The repealing act of 1851, (Sec. 4, Chap. 137, R. S. 1851,) affected only such parts of the old statutes as were not retained in the new. The lien of judgments then existing was not thereby destroyed; and if it were otherwise, the repeal would affect only such as were not docketed, and as to those it would attach again, by complying with the new law from the time of docketing. *Marshall v. Hart*, 4 Minn. 450.

**282. Repeal of a statute terminating a lien, does not restore it.** The repeal by the General Statutes of the act of Feb. 3, 1862, which determined the lien on real estate of judgments on which execution had not been issued within five years, etc., did not restore said liens. *Grace v. Donovan*, 12 Minn. 580.

**283. Lien does not extend to personal property, until after levy of execution.**

Sec. 91, Chap. 71, R. S., (1851,) which provides that "all property liable to attachment is liable to execution; it must be levied upon in the same manner as similar property is attached; *until a levy, property is not affected by the execution;*" refers to *personal property*, (the last clause,) or such property as is not subject to the lien of a judgment—the object being to take from the debtor the power of disposing of property to the prejudice of the judgment creditor—whereas the *real estate* of the debtor is thus bound, without a levy of an execution, by the entry of a judgment. *Tallis v. Brawley*, 3 Minn. 277.

*j. Vacating judgment.*

**284. Where assignor, after assignment pendente lite, and before the assignee was substituted, allowed judgment to be entered for less than was due.** Under Sec. 36, Chap. 66, G. S., in case of voluntary transfer of interest *pendente lite*, the assignee must prosecute, but may do so in name of the assignor, but until such transfer is brought to the notice of the court, the parties to the record are entitled *prima facie* to proceed. Hence the assignee in such case must establish the transfer, and obtain leave of court to continue the action in name of the assignor or to be substituted as a party. And if the original party has taken any steps in the action after the assignment, unless the rights of others intervene, such proceedings may be set aside. But an assignee cannot move to set aside such proceedings until he has first been admitted to continue the action—(distinguishing this from *Whitacre v. Culver*, 9 Minn. 295). Hence, where subsequent to an assignment *pendente lite*, the assignor stipulated with the defendant, by which judgment was entered for less than the whole relief demanded in the complaint, prior to any notice on part of defendant of such assignment, the assignee was bound by such action as to defendant, and the judgment so entered cannot be set aside. *Chisholm v. Clitherall et al.*, 12 Minn. 375.

**285. More than a reasonable presumption against its validity, must be shown.** Plaintiff sought to vacate a judgment rendered some six years before, against his grantor, on the ground that the summons was served by publication, and the affidavit therefor, as appeared from the judgment roll, was insufficient. The record also showed that an attorney of the court, one G., acting as attorney for plaintiff's grantor, served a certain notice on defendant's attorneys during the progress of the action, and signed a stipulation waiving certain forms as conditions precedent to the entry of judgment on part of defendants. *Held*, the presumption is in favor of the regularity of the proceedings of a court of general jurisdiction, as in this case, but the record shows that the plaintiff's grantor had full notice of the proceedings as they transpired, and was not prejudiced by the proceedings; these matters, together with the fact that it was not uncommon for more than one affidavit to be submitted on application for an order of publication, and that often a summons would be personally served after having been published, raises such a presumption as to its regularity as to require the plaintiff to do more than show the affidavit to be insufficient, for that raises only a reasonable presumption against the record, which is insufficient in this case; the affirmative lies on him—distinguished from *McKubin & Edgerton v. Smith*, 5 Minn. 367, and *Harrington v. Loomis et al.*, 10 Minn. 366. *Gemmell v. Rice and wife*, 13 Minn. 400.

*k. Opening judgments.*

**286. Time allowed not to be given, absolutely.** Sec. 94, Comp. St., p. 544, limits the time to one year in which a party can apply to amend a judgment, and only relieves from "a judgment order or other proceeding," when taken against a party "through his mistake, inadvertence, surprise, or excusable neglect," and a party must be diligent—it does not follow that

because a party may make a motion within a year, that he has a year to make it in. *Gerrish et al. v. Johnson*, 5 Minn. 23.

**287. When limitation begins to run.** The year within which a non-resident defendant may be allowed to appear and defend, after entry of judgment on default, under Sec. 51, Chap. 66, G. S., commences to run from the time of entry of judgment by the clerk, and the limitation refers to the date of application for permission to answer, and not to the date of the decision on such application. *Washburn et al. v. Sharpe et al.*, 15 Minn. 63.

**288. Will not be opened for parties in default for years, without excuse.** The court will not open a judgment, and grant a new trial, in favor of parties who have been in default for several years, and offer no excuse. *Humphreys et al. v. Havens et al.*, 13 Minn. 150.

**289. Motion denied where made three years afterwards, for irregularity not affecting the merits.** A motion to set aside a judgment and execution issued thereon, and subsequent proceedings, in an action in which defendant had appeared, made more than three years after the last proceedings terminated, on grounds not affecting the validity or merits, but going only to the regularity of the proceedings, in the absence of any excuse for, or explanation of the delay, will be denied. *Jorgensen v. Griffin*, 14 Minn. 468.

**290. Failure of counsel to notify his client of notice for trial, no excuse.** Motion to open a judgment, and for leave to serve an amended answer, on the ground that defendants' counsel did not notify the defendant that the cause had been noticed for trial, was denied in court below. *Held*, the facts did not show inadvertence, surprise, or excusable neglect, within Sec. 94, p. 544, Comp. St., and further, that the matter was discretionary with the court below,—following *Myrick v. Pierce*, 5 Minn. 65. *Merritt v. Putnam et al.*, 7 Minn. 493.

**291. Order made after judgment, allowing defendant to answer, operates as**

**an opening of the judgment.** An order, made after the entry of judgment, allowing the defendant to file and serve an answer to the plaintiffs' amended complaint, although failing to set aside the judgment, operates both in law and fact to suspend and supersede the judgment to the extent necessary to permit the defendant to put in issue the allegations of the complaint, or interpose other equities and defenses by answer. *Holmes et al. v. Campbell*, 13 Minn. 66.

*l. Correcting judgments.*

**292. Clerical error, mis-stating date of lien, corrected as to defendant only.** By a clerical error, a lien on specific land, under the lien law, was declared to date from June 15th, 1858, whereas in fact he was entitled to have it date back from June 10, 1857. On motion, in 1860, the judgment was ordered to be corrected—and the lien declared to date from June 10, 1857, *as against the defendant only*, the court not desiring to affect the interest of third parties not in court. *Mason & Craig v. Heyward*, 5 Minn. 74.

*m. Remitting damages.*

**293. Party may remit excess of damages found by jury, over the amount claimed.** Defendant admitted value of goods to be \$1,500. Plaintiff, without proving any value, obtained judgment for the wrongful taking, etc., of \$2,500 worth. *Held*, erroneous, but plaintiff might remit the excess, and thus avoid a new trial. *Stickney v. Bronson*, 5 Minn. 215.

**294.**—In an action for claim and delivery of personal property, where the jury assess the damages at more than were claimed, and make no assessment of the value of the property, if the party wishes a return of property and damages, he should remit the excess and take judgment for amount claimed and a return. If he wants an alternative judgment for value of property, he should insist on the

jury assessing the value. *Eaton v. Caldwell*, 3 Minn. 134.

*n. Setting off of judgments.*

**295. When should be set off.** Judgments should always be offset against each other when they are final between the parties, and their rights fixed under them. *Irvine et al. v. Myers*, 6 Minn. 562.

**296. Set off on motion.** Judgments will be set off on motion—not necessary to file a bill. *Ib.*

**297. Set off of judgment not dependent on right of set off in the action.** Judgments may be set off against each other without regard to whether the *causes of action* in which they were recovered could be set off against each other. *Temple et al. v. Scott*, 3 Minn. 419.

**298. Judgment for value of exempt property, liable to set off.** T. & B. obtained judgment against S., who had no property exempt from execution. They levied upon and sold property exempt from execution. S. obtained judgment against T. & B. for the value of the property so unlawfully sold. *Held*, that T. & B. could have the latter judgment set off against their judgment, because S. should have recovered the *specific property*—the law not exempting the *value of specific property in money*, but the property itself. *Ib.*

**299. Assignee takes subject to right of set off.** I. obtained judgment for costs against M. & Co. in the Supreme Court, the case being re-tried, when M. & Co. obtained judgments, on the merits, against I., when the latter assigned his judgment to H. *Held*, H. took the assignment with notice of the judgment in favor of M. & Co., it being matter of record in the same action, and held it subject to the equitable right of Myers & Co. to have it set off against their judgment. *Irvine et al. v. Myers*, 6 Minn. 562.

**300.**—Where N. and K. had judgments against each other, they were entitled to have them set off against each other.

er, and the purchaser of K.'s judgment was bound to set off N.'s judgment. *Brisbin et al. v. Newhall et al.*, 5 Minn. 273.

*o. Satisfaction of judgment.*

**301. A levy upon sufficient personal property** to satisfy a judgment, is a satisfaction *sub modo* thereof, and must be fairly tried; and until that is exhausted, he cannot proceed further. *First National Bank of Hastings v. Rogers et al.*, 13 Minn. 407.

**302. By whom may be made.** Where the county has bid in real estate of its judgment debtor, on an execution sale against him, though such sale is void for want of capacity in the county to purchase, still if a trustee of the judgment debtor, or any person for him, pay the amount of the judgment either as a redemption without protest, or as payment of the judgment, and no claim was ever made for the return thereof, such payment was a satisfaction of the judgment, and constituted a good consideration for the payment. *Shelley et al. v. Lash*, 14 Minn. 498.

**303. What is a satisfaction.** Where the owner of a judgment for costs agrees to "pay" such costs, to cancel such judgment, and cause the same to be cancelled, and entered as fully satisfied, the effect of such agreement is to satisfy such judgment in fact. *Ives v. Phelps et al.*, 16 Minn. 451.

**304. A levy upon real estate** is not a satisfaction of a judgment. *Davidson v. Gaston*, 16 Minn. 230.

**305. Compelling satisfaction of record.** To enable a judgment debtor to move for the satisfaction of a judgment—satisfied in fact, otherwise than upon execution, under Sec. 255, Chap. 66, G. S.,—where the creditor had agreed to satisfy it, it is not necessary that the consideration of such agreement on the part of the owner of the judgment should move from such judgment debtor. If the judgment has been satisfied *in fact*, no matter by whom, the statute gives the judgment debtor the right to have the same satisfied of record. *Trs v. Phelps et al.*, 16 Minn. 451.

*p. Impeaching judgments.*

**306. When liable to attack collaterally.** Although a judgment rendered by a superior court in a proceeding within its general jurisdiction, cannot be attacked collaterally, yet where the jurisdiction is conferred by statute, (as in proceedings to discharge an insolvent debtor,) any express violation of the condition imposed on its action, may be shown in a collateral proceeding. *Ullman v. Lion*, 8 Minn. 381.

**307. When not liable to attack collaterally.** Judgment was entered on default by the clerk, upon filing with him the summons, and complaint upon which was endorsed the following: "Due service admitted of a true copy of the within summons and complaint this 30th Nov., 1859.

(Signed.)

J. MENDELSON,  
W. FULLER."

In a collateral proceeding between the judgment creditors and third parties, the former offered this judgment in evidence of title to property; on being objected to as not appearing from judgment roll that necessary proof of service was filed with the clerk, the judgment was ruled out below. *Held*, the entry of judgment by the clerk was a judicial determination of the sufficiency of the proof of service—the act of the court, and the judgment entered thereupon is valid until set aside or reversed by direct proceedings in that action, and it cannot be questioned in a collateral proceeding. *Kipp v. Fullerton*, 4 Minn. 473.

**308.—whether non-resident defendant had property in the State.** Whether a defendant (non-resident) had property in the State to give the court jurisdiction, where the summons was served by publication, is a question that can be determined by proceedings in the action only, and not in a collateral way in another action. *Stone v. Myers et al.*, 9 Minn. 303.

**309.—irregularity.** Where the record shows the jurisdiction of the court, both of the person and the subject matter, the judgment cannot be attacked collateral-

ly for any irregularity in the proceedings. *Hotchkiss v. Cutting*, 14 Minn. 537.

**310.**—whether defendant was in default. A judicial determination of the default of defendant, on plaintiff's affidavit, is binding on the parties until reversed in such action by a direct proceeding. *Id.*

**311.** Requisites to impeach: it must appear not only that essentials are wanting, but that they were never there. Where the paper-book showed a judgment rendered in the District Court against plaintiff in error, every intendment will be made in favor of its regularity, and the same will not be reversed at the instance of the plaintiff in error, on the ground that neither summons, process or other proceeding, nor pleadings showing any issue between the parties, appear. The presumption is in favor of the regularity of the judgment in a court of general jurisdiction, and the party complaining must show affirmatively by the record, that essentials are wanting—this case does not show that these are all the proceedings had below. *Davidson v. Farrell*, 8 Minn. 258.

**312.**—defective proof of service on the record, insufficient. The presumption in favor of a judgment of a court of general jurisdiction cannot be impeached on the ground that proof of service of summons contained in the record, where it was entered on default of defendant, is defective. It must be affirmatively shown that service was not *in fact* made. *Skiltman v. Greenwood*, 15 Minn. 102.

**313.**—failure of judgment roll to show filing of required security, where summons was published—insufficient. Where there was no personal service of summons, and the judgment roll failed to disclose the fact that security was filed before judgment entered. *Held*, judgment valid notwithstanding. *Shaubhut v. Hilton et al.*, 7 Minn. 506.

**314.** Taking of preliminary proofs, presumed. Where a judgment has been entered in an action in which the taking of proofs were first necessary, the presump-

tion is, such proofs were taken. *Hotchkiss v. Cutting*, 14 Minn. 537.

### 13. The execution.

(See PLEADINGS, 36.)

(See EVIDENCE, 110, 111.)

(See SHERIFF, VI, VII.)

#### a. What is subject to execution.

**315.** Promissory notes under our statute are property, and when they can be reached, are subject to attachment, and execution as any other property. *Mower v. Stickney*, 5 Minn. 397.

**316.** Where a person holds goods of another to sell on commission, he has no interest which can be taken in execution. *Vose & Co., v. Stickney*, 8 Minn. 75.

**317.** Where an indebtedness is payable out of a particular fund, a judgment therefor must be satisfied out of the same. *Robbins v. School Dist. No. 1, Anoka County*, 10 Minn 340.

**318.** Personal property liable, after five years, by leave of court. Sec. 85, p. 568, Comp. St., provided that "after lapse of five years from entry of judgment, if no execution has already been issued, an execution can only be issued by leave of court, on motion and notice," etc. Chap. 27, Laws 1862, provided that a judgment creditor may, within five years after entry of judgment, enforce the same as provided by statute, but where no execution shall have been issued and levied, or returned, no property found, the lien of the judgment shall be determined, and property of the judgment debtor discharged therefrom. *Held*, the latter does not repeal the former, they stand together. The lien of the judgment, which by the last act is determined in certain cases, extended only to real estate; personal property, never being subject to the lien of a judgment remains liable to execution after five years, by leave of court first obtained, etc. *Entrop v. Williams*, 11 Minn. 381.

**319. Interest of bailee not subject to levy.** When W. held sheep of B.'s under a contract of bailment—paying consideration for their use—the general property being in B., W. had no leviable interest therein, the bailment being to W. *personally*. *Williams v. McGrade*, 13 Minn. 174.

**320. Redemption money in the hands of the sheriff,** which has on tender been refused by the party entitled thereto, on the ground that the party redeeming was not entitled to redeem, remains in his hands as an official custodian, until the rights of the parties are fully determined, and the same is paid by him to the party entitled to receive it, and is not subject to levy. *Davis v. Seymour*, 16 Minn. 210.

**321.**—No levy can be made on redemption money in the hands of the sheriff, where the judgment creditor has declined to receive it, on the ground that the party redeeming was not entitled to redeem. *Ib.*

**322. Lost mortgage.** No effectual levy and sale under an execution can be made on a lost mortgage of real estate, which has never been recorded and was unaccompanied by any bond or other evidence of indebtedness or personal liability. *Gale v. Battin et al.*, 16 Minn. 148.

*b. When it issues.*

**323.** Execution cannot issue to any county until judgment is docketed therein. *Dodge v. Chandler*, 9 Minn. 97.

**324.** An execution issued under the Gen. St., Chap. 64, is not void, though taken from the clerk's office before the judgment is docketed in the county to which it runs, where it is levied upon personal property only, and not delivered to the sheriff until after the judgment is docketed. *Mollison v. Eaton*, 16 Minn. 426.

**325.** Where judgment was entered on Nov. 27th, 1857, and execution was issued on Nov. 27th, 1867. *Held*, under Sec. 262, Chap. 66, G. S., which provides that, "the party, in whose favor judgment is given, may, at any time within ten years after en-

try thereof, *proceed* to enforce the same, as prescribed by statute," it is sufficient on a judgment of this kind—one entered under the law in force prior to the enactment of the G. S.,—if the execution issues within that time—the judgment need not be *satisfied* within that time. What would be the rule in the case of a judgment to which all the provisions of the G. S. apply, no opinion is expressed. *Davidson v. Gaston*, 16 Minn. 230.

**326.** Judgment was rendered on Nov. 15th, 1857, execution issued on 15th Nov., 1867. *Held*, excluding the first day and including the last day within Sec. 69, Chap. G. S., the execution was issued within ten years. *Ib.*

*c. Date and, time of docketing.*

**327. Date.** Under Sec. 13, Chap. 64, G. S., an execution should be dated as of the day on which it is taken out of the clerk's office. *Mollison v. Eaton*, 16 Minn. 426.

**328. Time of docketing.** An execution levied upon personal property exclusively, is not void, because it omits to state the true date of docketing the judgment in the county to which said execution runs. *Ib.*

*d. To whom issued.*

**329. Counties judicially attached.** Where the county in which a judgment debtor resides is attached to another, for judicial purposes, under Sec. 33, Chap. 64, G. S., the execution required to be issued under Sec. 299, Chap. 66, G. S., as preliminary to supplementary proceedings, may properly be issued to the sheriff of the county to which that in which the debtor resides is attached. *Beebe v. Fridley*, 16 Minn. 518.

*e. The levy.*

**330. Levy does not divest debtor's title.** In the interval between levy and sale, the debtor is not divested of his own-

ership in the property levied upon; only his right to use, possess and dispose of the property is suspended. *Banker v. Caldwell*, 3 Minn. 94.

**331. Levy not affected by irregularities in subsequent proceedings.** Under our statutes the *notice of sale* forms no part of a levy; the levy must be complete before the advertisement of sale is made, and an omission of proceedings subsequent to the levy will not invalidate it where the interest of a *bona fide* purchaser is not concerned. *Castner et al. v. Symonds*, 1 Minn. 432.

**332. Levy on real estate, must follow the statute.** The statutes concerning the levy on real property by execution, changed the common law rule, and the acts required by the statute must be fulfilled. Sec. 91, p. 363, R. S., and Sec. 140, p. 346. *Ib.*

**333.—no formal levy necessary.** The doctrine that no formal levy on real estate is necessary, as laid down in *Folsom v. Carli*, 5 Minn. 333, followed. *Bidwell v. Coleman*, 11 Minn. 78.

**334. No formal levy on real property is necessary under G. S. Chap. 66, Sec. 270.** That statute does not make the validity of an execution sale depend upon "a minute by the officer on the execution, of the time when the said execution was delivered to him, stating that at such time he levied upon the property, \* \*"—it gives to such recital the effect of a formal levy. *Hutchins v. Commissioners of Carver Co.*, 16 Minn. 13.

**335.—A levy on real estate, under an execution, is not necessary in this State.** *Lockwood v. Bigelow*, 11 Minn. 113.

**336. Levy on undivided interest, how made.** Where an officer has an execution against one part owner of a chattel, he must seize the whole chattel, though he can sell only the interest of the defendant in the execution. *Caldwell v. Auger & Herbert*, 4 Minn. 217.

**337. Property levied on, to be retained during review in Supreme Court.** Under Sec. 25, p. 623-4, Comp. St., the issuing of a writ of error, filing bond, and service of clerk's certificate on sheriff holding an ex-

ecution, stays all further proceedings, but does not annul what has been done so as to require the officer to return property already levied upon. *The Northwestern Express Co. v. Peter Landes*, 6 Minn. 564.

**338. Abandonment of levy, when justifiable.** When one has levied upon partnership property, of which partnership debtor was a member, if he ascertains that the partnership liabilities will consume all of the property, he need not pursue the levy until it is demonstrated that it will not avail him anything, but may abandon it, but thereby taking upon himself the burden of showing the propriety and good faith of the act against sureties, and all parties claiming to be prejudiced thereby. *Moss v. Pettingale*, 3 Minn. 217.

*f. Exempt property.*

**339. Exemption laws to be strictly construed.** Exemption statutes are in derogation of the common law, and must be strictly construed. See *Grimes v. Bryne*, 2 Minn. 106. EMMETT, C. J., *dissenting*. *Temple & Beaupre v. Scott*, 3 Minn. 419.

**340. The law of August, 1858, operated retrospectively.** Sec. 8, G. L., of August 12, 1858, granting an exemption from all process, issued from any court in this State, to certain property specified, was intended to include process issued upon antecedent as well as subsequent demands. It has a retroactive affect. *Grimes v. Byrne*, 2 Minn. 95.

**341. What mechanics, miners, etc., referred to by law of August, 1858.** Sec. 8, Sub. Div. 8, of the law of August 12, 1858, concerning exemptions, was intended to comprehend a class of citizens who earn their livelihood by the use of tools and instruments, in whole or in part—and the Sub. Div. should be read, "the tools and instruments (implements) of every mechanic, minor (miner), or other persons, to the exercise of whose trade or business, tools or implements are necessary, used or kept for the purpose of carrying on his business or trade," etc.; the next clause concerning

stock in trade not exceeding \$400.00, applies to same persons, and not to merchants. *Id.*

**342. Action for purchase money.** D. sold to H. a cook-stove and fixtures, taking H.'s note for the purchase money, which note D. sold and endorsed to T., who recovered judgment thereon against H. and D. for principal, interest and costs. D. paid the judgment and brought an action against H. to recover the amount so paid, in which action he procured to be issued a writ of attachment, by virtue of which one of defendants attached the stove and fixtures which were in the possession and use of H. and his family, and were the only stove and furniture owned by him. *Held*, H.'s contract as maker of the note, as well as his original indebtedness, and D.'s contract as endorser, were merged in T.'s judgment, hence D.'s suit against H. is not an action for the purchase money of the stove and fixtures, so as to render the same subject to attachment. *Harley v. Davis et al.*, 16 Minn. 487.

**343. Exempt property may be levied on.** Under Sec. 103, Comp. St., p. 571, an officer holding an execution has the right to levy upon property exempt from execution, and take the same into his possession. Such possession, therefore, is lawful, and can only become wrongful by doing some act unauthorized, or failing to discharge some duty enjoined by statute. After taking possession, the officer has a *reasonable time* in which to take an inventory and appraise the property; after which time the debtor may select the amount exempt by law. *Tullis et al. v. Orthwein*, 5 Minn. 377.

**344. Exemption may be waived—is personal privilege.** The exemption given by statute is a personal right and privilege given to the debtor, which may be waived, and if claimed by him, must be asserted and maintained in legal form, and cannot be claimed for him by another. *Howland v. Fuller*, 8 Minn. 50.

*g. Satisfaction of execution.*

**345. Valid levy on sufficient personal**

**property, prima facie satisfaction.** A valid levy upon sufficient personal property of the defendants in an execution is *prima facie* satisfaction thereof, but the plaintiff may rebut this presumption and show that the execution or judgment is unsatisfied. *Bennett v. McGrade et al.*, 15 Minn. 132; *First National Bank of Hastings v. Rogers et al.*, 15 Minn. 381.

**346.—where benefit of the levy has been lost by defendant's act, no satisfaction.** On an execution, issued on a judgment for money, the sheriff levied upon personal property of defendant sufficient to satisfy it, leaving it—with consent of all the parties, in hands of the defendant; after which defendant appealed from the judgment, filing bond to stay proceedings pending appeal, and during pendency of the appeal defendant, without plaintiff's consent, disposed of the property. *Held*, the levy was no satisfaction of the execution as against defendant or his sureties in the bond, and the plaintiff could pursue his remedy on the bond. *Bennett v. McGrade et al.*, 15 Minn. 132.

**347.—**Plaintiff issued execution on a judgment against defendant, and the sheriff levied upon flour enough to satisfy it. At defendant's request, the sheriff, on his own responsibility, released to defendant the flour and took a check on Chicago, drawn by a firm of which defendant was a member. After an appeal bond had been filed, said firm, with consent of defendant and sheriff, procured the custodian of said check to hold it without presentation, afterwards defendant persuaded the sheriff to deliver up the draft, and take a bond of indemnity. In all these matters the plaintiff took no part. *Held*, the levy upon the flour was not a satisfaction of the judgment, either as to the defendant or his sureties. See *Bennett v. McGrade*, 15 Minn. 132. *First National Bank of Hastings v. Rogers et al.*, 15 Minn. 381.

**348.—**If a debtor has not been deprived of his property by reason of a levy, if it has been returned to him, or released from the levy and delivered up to a person



upon the debtor's request, the presumption that the judgment was satisfied, ceases. *Ib.*

**349.**—Where property levied upon is released from the levy, at the instance and with the consent of the judgment debtor, and delivered to a firm of which he is a member, the effect is the same as if delivered to the debtor himself. *Ib.*

#### *h. The sale.*

**350. Sale of real property, though not made in distinct parcels.** Where the statutes, R.S. p. 386, Sec. 111, provided that where a sale upon execution, "is real estate which consists of several known lots or parcels, they must be sold separately," etc., the officer sold distinct lots of land together in violation of the statute. *Held*, that such error of the officer did not violate the sale as the statute was directory only. And if the debtor was injured by the sale, his remedy was against the officer. *Tillman et al. v. Jackson*, 1 Minn. 189.

**351. Certificate of sale—execution thereof.** The law of 1856 did not require sheriff's certificate of sale to be witnessed, nor executed under sale, nor that the Register on filing should endorse a certificate thereof, on the back, or index the same. *Bidwell v. Coleman*, 11 Minn. 78.

**352. Evidence of sale.** The proper evidence of a sale of real estate upon execution, is prescribed by the statute upon that subject, and no note or memorandum other than the certificate of sale is required. *Armstrong v. Vroman*, 11 Minn. 220.

**353. Sale, when to be made.** A sheriff must serve an execution within its life, but may complete the same by sale, after the return day. *Pettingill v. Moss*, 3 Minn. 223.

**354. Passes what interest to the purchaser—whole estate.** Under Sec. 109 to 121, Comp. St., p. 572-574, the sale of property, real or personal, under an execution, passes the whole estate to the purchaser, the redemption privilege simply creating a defeasance by which the debtor or others claiming under him, may be restored

to the estate. *Dickinson v. Kinney*, 5 Minn. 409.

**355.**—N. purchased, on his own execution sale, the debtor's land; received the usual certificate from the sheriff, then quit-claimed to K. When the period of redemption expired, the sheriff gave a deed to N., instead of K.. the quit-claim previously being recorded, D., a judgment creditor of the purchaser N., after the execution of sheriff's deed, levied upon and sold the property covered by the sheriff's deed, as the property of N. claiming that the legal estate passed to N. by the deed, and not by the certificate. *Held*, that although under the statute judgment creditors were placed on the same footing with *bona fide* purchasers, still D. took nothing by his levy and sale, for the original certificate to N. passed all the debtor's interest, except right of redemption, and the quit-claim passed the same to K., which being recorded, left no estate "of record" in N. at date of D.'s levy—the sheriff's deed not being on record. *Query*, if the sheriff's deed had been on record, whether its recitals would not have shown title out of N., and in K. *Ib.*

**356.**—such as defendant could convey. Purchasers at sheriff's sale on execution, take the estate subject to all claims that exist against the judgment debtor, and take no other estate than such as he could convey. *Banning et al. v. Edes*, 6 Minn. 402.

#### *i. The return.*

(See SHERIFF.)

#### *j. Vacating return.*

(See SHERIFF.)

#### *k. Setting aside the sale and re-sale.*

**357. Court can vacate sale.** *Semble*, that it is not an objectionable exercise of the power of the District Court to set aside a sale on execution from said court, vacate the sheriff's return, and issue an alias execution—where the exigencies of the case demand it. *Tillman et al. v. Jackson*, 1 Minn. 185.

**358. Sheriff sold wrong land by mistake.** B. had an attachment lien on land prior to A.'s deed. The sheriff intended to sell the land, but through a mistaken description, sold other land on the attachment, and returned the execution satisfied. *Held*, equity could cancel the sale and order a resale, and replace B.'s lien as senior to A.'s deed—the latter having done nothing on the faith of the sheriff's return. *Shaubhut v. Hilton et al.*, 7 Minn. 506.

#### l. Redemption.

**359. Effect, as to second incumbrance, of redemption by debtor's grantee.** The grantee of land on which a mortgage lien rested as a first incumbrance, and which had been sold on an execution, constituting a second incumbrance, may redeem from the sale without paying off the prior lien—and the redemption restores the estate discharged of the lien of the execution, but with the mortgage lien intact. He did not take, on the redemption, the rights of the purchasers subject to be defeated only by other redemptions. *Warren et al. v. Fish*, 7 Minn. 422.

**360. Requisites to redemption.** On redemption, under Sec. 117, R. S., p. 367, where a party furnishes the sheriff with all the papers required by statute, it is sufficient, he is not obliged to notify any one else of his redemption, and where the sheriff, after a redemption, delivers sheriff's deed to the purchaser, who conveys to a *bona fide* purchaser without notice of the redemption, the latter takes no title, although the record shows a clear title in his grantor through the sheriff's deed. The defect of statute in not requiring some evidence of redemption to be recorded, cannot injure the redemptioner, who has complied with the statute. *Warren et al. v. Fish*, 7 Minn. 432.

**361. In what capacity, redemption money received by officer.** A sheriff, in receiving the money paid by an execution debtor for the redemption of land sold on execution, acts in his official capacity,

as the officer of the law, with whom a party redeeming may deposit the money, instead of paying it to the party entitled to it, and does not act as the agent of the party entitled thereto. *Davis v. Seymour*, 16 Minn. 210.

#### 14. Supplemental proceedings.

**362. Creditor, when entitled to an order absolutely.** When an execution, issued against the property of a judgment debtor, and directed to the sheriff of the proper county, is returned by said officer unsatisfied in whole or in part, the judgment creditor is entitled (under Sec. 122, Chap. 61, Comp. St., p. 574,) to an order requiring the judgment debtor to answer concerning his property, upon that fact alone; and cannot legally be required to establish any other, as a condition upon which said order may be obtained. *Kay v. Vischers et al.*, 9 Minn. 270.

**363. When creditor would be left to another execution.** *It seems* that, under Sec. 129, Comp. St., p. 575, unless it appeared by the disclosure that the debtor has property in his own hands, which he unjustly refuses to apply on the judgment, or unless he shall have endeavored to keep his property out of the hands of the officer having the execution, the Judge would leave the creditors to reach the property by another execution—for he has a discretion. *Id.*

#### 15. Costs.

##### a. Generally.

**364. By what statute determined.** Judgment for costs must rest upon the statute in force at time of rendition of verdict. *Coit v. Waples et al.*, 1 Minn. 134.

##### b. In District Court.

##### 1. What may be taxed as costs.

**365. Fees of witnesses—where trial is delayed after witness appears.** Where witness appears on a particular day, and the cause is set down for a future day, it

depends on the circumstances of length of delay, distance of their homes, etc., whether fees for their attendance in the intervening time can be charged or not. *Andrews v. Cressy*, 2 Minn. 76.

**366.—when fee allowed defendant.**

A defendant is entitled to fees as a witness only when he attended solely as a witness for his co-defendant. *Barry v. McGrade et al.*, 14 Minn. 286.

**367. No fee is allowed an attorney or counsel** in a cause for attending as witness in such cause. Sec. 36, Chap. 70, G. S. *Ib.*

**368. The statutory costs, where several defendants unite in the same defense.** Where the defendants in whose favor a verdict is rendered, in an action of tort, rely upon the same defense, unite in the same answer, and appear by the same attorney, and there is but one trial as to all, under the statute, they are entitled jointly to ten dollars statutory costs, and not severally to that sum. *Ib.*

**369. Where same parties incur expense in obtaining documentary evidence, used in different actions.** Where the same persons are defendants in different actions, and incur a joint expense for documentary evidence necessary for their defense in several actions, and use the same in such actions, they may charge such expense as a disbursement in either action, at their election, provided such charge is made in one action only. *Ib.*

**370.** In a proceeding under Sec. 52, Chap. 1, G. S., to contest the result of the vote upon the removal of a county seat, as the same had been certified and declared by the board of canvassers. *Held*, the prevailing party in such contest is not entitled to judgment for disbursements in the District Court. *Bayard v. Klinge*, 16 Minn. 249.

2. *Adjustment of costs.*

**371. Requisites of an affidavit for taxation.** An affidavit to tax costs for witness fees should not only state the number of days of their attendance, but the date of

their attendance. *Andrews v. Cressy*, 2 Minn. 77.

**372.—**It is not enough in verifying a bill of costs for "expenses in procuring transcripts of judgment, etc.," to simply state that they have been "paid and incurred"—the party must, in the language of the statute, show that they were "necessary." So also for *witness fees*—their necessity must appear. *Ib.*

3. *Costs in particular cases.*

**373. In an action for injuries to real estate, and for an abatement of a nuisance,** the plaintiff may be allowed his disbursement and charges (under Sec. 5, Statute of 1850, p. 244) though he recover less than \$50—in the discretion of the court. *Turner et al. v. Holleran*, 8 Minn. 451.

**374. In trespass,** the plaintiff's title may be drawn in question so as to entitle him to cost on recovery of judgment, as a matter of course, under the statute, for although injury to plaintiff's possession is the gist of the action, yet inasmuch as a party not in actual possession has, by virtue of ownership, a constructive possession sufficient to support this action, an answer which puts his possession in issue, would necessarily draw in question his title. *Booth v. Sherwood, et al.*, 12 Minn. 246.

**375. In tort against several defendants,** where there is a verdict in favor of some of the defendants, and in favor of plaintiff as to the other defendants, the defendants prevailing are entitled to costs under Sec. 2, Chap. 67, G. S. *Barry v. McGrade et al.*, 14 Minn. 286.

**376. In an action to determine adverse claim to real property,** answer denied that defendant claimed any estate, or interest in, except as the holder of a certificate of purchase thereof, at a sale for delinquent taxes, which were claimed to be a lien on the land. *Held*, it being found true, it amounted to a disclaimer, and plaintiff not entitled to costs in District Court. Sec. 2, Chap. 75, G. S. *Brackett v. Gilmore*, 15 Minn. 245.

**377. On certiorari to justice's court.** Sec. 120, p. 315, R. S., regulating action of District Court in cases of *certiorari*, is silent as to costs, and also as to judgment against sureties, and this must be determined by Sec. 198, p. 325, of R. S., under head of "Miscellaneous Provisions in Criminal Cases." *Baker v. United States*, 1 Minn. 209.

**378.—on affirmance of judgment.** Sec. 198, p. 525, R. S., under head of "Miscellaneous provisions in Criminal Cases," providing for entry of costs, etc., in District Court, for both courts where judgment is affirmed, applies to cases taken up from justice's court by *certiorari* as well as by appeal. *Id.*

#### 4. Remedy against erroneous taxation.

**379. By motion to the judge.** If the adjustment of costs by the clerk of a district court is erroneous, the remedy of a party aggrieved is, by motion in that court in the nature of an appeal from the decision of the clerk, not by an appeal from the judgment of the court. *Andrews v. Cressy*, 2 Minn. 74.

**380. Discretionary costs, not recoverable unless awarded.** Where costs are discretionary, they are not recoverable unless specially awarded, but the time to make objection to the allowance of costs is at the time of the taxation, before the clerk, and if a party suffers it to be taxed by the clerk, without objection, he cannot object on appeal. *Myers & Co. v. Irvine & Co.*, 4 Minn. 553.

**381. After entry of judgment, remedy must be sought by correcting the judgment.** The verdict of the jury assessed plaintiff's damages at \$1.00. Judgment was rendered for the plaintiff for the amount of the verdict, and for his costs and disbursements. Thereupon the clerk taxed costs and disbursements, defendants excepting. On appeal, the District Court confirmed the clerk's taxation. From the order of confirmation defendant appealed to Supreme Court. *Held*, the objection that

plaintiff was not entitled to costs, etc., under the statute, goes to the judgment, and not the taxation, since the judgment awarded costs, etc., and it was consequently the clerk's duty to tax them; and the order of confirmation, appealed from, was correct. Appellant should have appealed from the judgment. *Piper v. Branham*, 14 Minn. 552.

#### c. In Supreme Court.

##### 1. Generally.

**382. Prevailing party entitled.** A party who succeeds in obtaining a modification of the judgment below, is the prevailing party on writ of error, and is entitled to costs in all cases. Sec. 26, p. 624, Comp. Stat. *Sanborn v. Webster*, 2 Minn. 328.

**383.** A party who is compelled to resort to the Supreme Court to correct an error, is entitled to costs, unless the appeal is vexatious, and not in good faith. *Allen v. Jones*, 8 Minn. 202.

**384. Double costs, when allowable.** Under the R. S., 416, Sec. 26 (1854), double costs can only be awarded by the Supreme Court to party prevailing on a writ of error—not appeal. *St. Martin v. Desnoyer*, 1 Minn. 156.

**385. On appeal from an order setting aside execution sale, etc.** Sec. 12, R. S., and Sec. 16 p. 372, (see p. 12, of amendments,) makes a distinction between *motions* and *special proceedings*. On an appeal from an order of District Court, setting aside a sale on execution, and issuing an alias execution, the appellant prevailing in the Supreme Court, cannot obtain costs as on a trial of an issue of law. Such motion, from which an appeal was taken, was one of the non-enumerated motions. *Tillman et al. v. Jackson*, 1 Minn. 190.

##### 2. What is taxable as costs, etc.

**386. Printing papers not necessary, not taxable.** Costs cannot be taxed for printing papers not required by the stat-

utes and the rules, viz.: paper books, and points and authorities; although counsel are not confined in their points to a statement of the point and the authorities, but will be encouraged in inserting matter necessary to place the case fully and clearly before the court. But cost for printing an argument of a party (he being an attorney), besides his counsel's points and authorities, disallowed. *Hart et al. v. Marshall*, 4 Minn. 552.

**387. Must be printed.** Comp. Stat., p. 578, Sec. 9, providing for printing papers on appeal, permits a party to recover for such papers *only* when printed. *Cooper v. Stinson*, 5 Minn. 522.

## 16. Practice on Review.

### A. IN DISTRICT COURT.

#### a. On appeal.

##### 1. Dismissal of appeal.

**388. Where no costs and fee for justice's return had been paid.** Under Sec. 150, Chap. 59, Comp. Stat., the payment of the costs and fee for the justice's return are essential conditions to the jurisdiction of the justice, to allow an appeal, and when facts appear from the return, showing no payment, the appeal will be dismissed. *Trigg v. Larson*, 10 Minn. 220.

**389. No affidavit of appeal.** On appeal from the justice court, under Sec. 136 and 139, p. 517, Comp. Stat., the return of the justice should contain the affidavit for an appeal; if it does not appear, the presumption is that it was not filed, and the District Court acquired no jurisdiction—and such an appeal is properly dismissed unless an amended return is directed. *McFarland v. Butler*, 11 Minn. 72.

**390. Simple errors below, the court having jurisdiction, insufficient.** Where a justice has jurisdiction of the subject matter of the prosecution, and the party is legally brought before him upon a proper complaint and warrant, so that he ac-

quired jurisdiction of his person, it is no ground for dismissing the proceedings and discharging the party, on appeal to the District Court, that errors occurred in the trial before the justice. *State v. Tiner et al.*, 13 Minn. 520.

**391. Void notice of appeal.** When the justice's return, on appeal, contains papers showing that the notice of appeal served is void, and his transcript states that notice was served and filed, the latter will be controlled by the former, and the appeal dismissed for want of jurisdiction in the justice to allow it. *Larrabee et al. v. Morrison*, 15 Minn. 196.

##### 2. Dismissal of the action.

#### 392. Party may dismiss before trial.

On an appeal from justice's court, the plaintiff can dismiss the action at any time before trial, the same and as fully as he could before the justice. *Fallmans v. Gilman*, 1 Minn. 182.

##### 3. Effect of appeal as waiver.

**393. Does not waive objections to jurisdiction.** An appeal from a justice court, on questions of law and fact, does not waive objections to the jurisdiction. *Rahilly v. Lane et al.*, 15 Minn. 447.

##### 4. Principles of determination.

**394. Defects in pleadings overlooked, when.** Courts will overlook defects, both of substance and form, in pleadings in justices' courts, when the parties go to trial in the same, without objection, and a good cause of action is proved; but when no cause of action was stated or proved, a judgment will not be sustained. *Holgate v. Brown*, 8 Minn. 243.

##### 5. The trial on appeal.

**395. Status of parties same as though suit commenced in district court.** When an appeal from the judgment of a Justice

of the Peace is taken properly, and a return thereto is made, the whole proceedings before the justice become mere *lis pendens* in the District Court. Rev. Stat. 316, Chap. 69, Sec. 127. Parties are in same relation as at the commencement of the suit before justice. *Fallmans v. Gilmore*, 1 Minn. 181.

**396. Defendant may and should set up equitable defenses.** On an appeal from the Justice Court to the District Court, the latter should allow the appellant to set up any equitable defense which he may have, but which the justice could not entertain; and if the District Court refuses such permission, the remedy is in the Supreme Court--and if not there pursued, *in that action*, no second action can be maintained. *Fowler et al. v. Atkinson*, 6 Minn 503.

**397. Same pleadings, unless amended.** A case brought into the District Court from a justice, must be tried on same pleadings, unless amended by consent of District Court. *Elfelt v. Smith*, 1 Minn. 125.

**398.** Under Art. 13, Sec. 5, act of the Territory concerning appeals from justice's court, the jury cannot find, according to evidence, without regard to the declaration in the cause. The plaintiff is controlled by his declaration, whether it had been amended or not. *Desnoyer v. Hereux*, 1 Minn. 17.

**399. All the issues and parties brought up.** An action was brought in a Justice's Court against H. and F., as co-partners; both were served with process, H. only appearing, and denying the co-partnership, which issue was determined in H.'s favor, and judgment is entered for the plaintiff against F., only, for whole of plaintiff's demand. Plaintiff appealed to District Court. *Held*, that the judgment of the justice did not dismiss the action as against H., and that the issue of joint liability as co-partners was to be tried in that court, as though the action had originally been brought in that court, under Comp. Stat., p. 517, Sec. 139, unless the issues were changed by order of court, under Comp.

Stat. 518, Sec. 140. *Hooper et al. v. Farwell & Co.*, 3 Minn. 106.

**400. Amended return.** The transcript of the justice, on appeal, showed that a bond was filed; a failure to send it up is not ground of dismissal of the appeal, but for an amended return. *Rahilly v. Lane et al.*, 15 Minn. 447.

#### 6. The judgment.

**401. In replevin—modification.** On appeal, on questions of law alone, from a justice's judgment for defendant, in replevin, for the value of the property, instead of its return or its value, the District Court should modify the judgment so it shall read in the alternative instead of reversing it. *Kates v. Thomas, impl'd, etc.*, 14 Minn. 460.

**402.**—In replevin, part only of the property in controversy was taken on the writ; the jury in the District Court found plaintiff entitled to possession, and assessed value of the whole property at \$156.50—that taken at \$80.50, that not taken at \$76.00. *Held*, the assessment of the value of the whole, and the part taken, was unwarranted, and to be regarded as surplusage (G. S., Chap. 66, Sec. 221); and, that judgment on the verdict, that plaintiff recover possession of the whole, or in default thereof the sum of \$156.50, was erroneous, and must be modified, in conformity to G. S., Chap. 66, Sec. 249, so as to authorize the recovery of that part not obtained, or, in default, its assessed value. *Hecklin v. Ess*, 16 Minn. 51.

**403. A joint judgment against surety and principal,** where on appeal from a justice's court, the judgment is affirmed under Sec. 134, p. 518, Comp. St., is not in conflict with Art. 1, Sec. 7, Const. of State. *Davidson v. Farrell*, 8 Minn. 258.

#### b. On certiorari.

##### 1. When it lies.

**404. Does not lie from decision of President of town of St. Paul.** Under the

act of 1849, incorporating the town of St. Paul, which provides that "*appeals* may be taken, etc., in the same *manner*" from the decision of the President as from a Justice of the Peace, a writ of *certiorari* does not lie. *Town of St. Paul v. Steamboat Dr. Franklin*, 1 Minn. 97.

**405. To justice's court, in assault.** Under the statute in force in 1860, *certiorari* lies, in cases of judgment for an assault in a Justice's Court to the District Court, in the first instance. *Tiernay et al. v. Dodge*, 9 Minn. 166.

### 2. Affidavit for the writ.

**406. Requisites of.** An affidavit, under Sec. 124, Comp. St., p. 515, as a ground for obtaining a writ of *certiorari* to a Justice's Court, which omits to state that the "application is made in good faith, and not for the purpose of delay," is fatally defective as a ground for issuing the writ. *Cunningham v. La Crosse and St. Paul Packet Co.*, 10 Minn. 299.

**407.** Where the statute required an affidavit on an application for a writ of *certiorari* to a Justice's Court to state that the application was made in good faith, and not for the purpose of delay. *Held*, an affidavit omitting such averment was substantially defective, and the court had no authority to allow an amendment by inserting such allegation. *Id.*

### 3. Service of the writ.

**408. Must be served within time specified by statute.** Sec. 128 Comp. St., p. 516, requiring a writ of *certiorari* to be served on the Justice within ten days after its allowance is *mandatory*, and must be observed. *Bunday v. Dunbar*, 5 Minn. 444.

### 4. The return.

**409. Conclusions of justice adverse to the verdict, will be disregarded.** On *certiorari* from a judgment on a verdict in a Justice's Court, conclusions of fact on the

part of the Justice adverse to the verdict of the jury, inserted by the justice, are no part of the return, and will be disregarded. *De Rochebrune v. Southeimer*, 12 Minn. 78.

### 5. Principles of determination.

**410. The return only can be examined.** The reviewing court is confined to the return of the Justice on *certiorari* for the facts, without reference to the affidavit of the party aggrieved. *Taylor v. Bissel*, 1 Minn. 225.

**411. Costs voluntarily paid.** At the time the appeal was taken, defendant paid the Justice's costs in full, as well as his fee for the return. *Held*, such payment was wholly voluntary, for the law required payment of the fee only, and not that, unless demanded by the Justice, hence its taxation cannot be objected to on appeal. *Clague v. Hodgson*, 16 Minn. 329.

**412. Where there is any testimony to sustain the findings** on the facts, the judgment of the Justice's Court will not be set aside on *certiorari*. *De Rochebrune v. Southeimer*, 12 Minn. 78.

### 6. The judgment.

**413. Misconduct of jury.** District Court has the right, on writ of *certiorari* from Justice's Court, to reverse a judgment on the ground of gross misconduct of a jury. *Snow v. Hardy*, 5 Minn. 77.

## B. IN SUPREME COURT.

### I. GENERALLY.

#### a. Methods of Review.

**414. Reserved case.** The Supreme Court cannot consider any *reserved* case brought up by agreement of counsel, on which no judgment or decree of the Court below has been made. *Ames v. Boland*, 1 Minn. 366.

**415. Writ of error or appeal.** The effect of Sec. 2, Chap. 81, R. S., is to allow

all *final* judgments (not *penal*) in the District Courts to be removed to the Supreme Court by writ of error or appeal, but not by both. *Moody et al. v. Stevenson*, 1 Minn. 403.

**416. Error and appeal do not both lie.** A party seeking relief in the Supreme Court from a judgment, etc., of the District Court, may do so by appeal or writ of error, but having elected to take one, he cannot afterwards take another, without a discontinuance of the one first chosen and a payment of costs. *Ib.*

**417. If both taken, last will be dismissed.** Where an appeal and writ of error were both taken in same cause, the writ of error (last taken) was dismissed, with costs to defendant in error. *Ib.*

**418. Stipulation cannot give jurisdiction.** Case was brought direct to the Supreme Court, from report of referee, without entry of Judgment and on stipulation of the parties. *Held*, that stipulation was not one of the means by which this court obtained appellate jurisdiction under the statutes; and although as an exercise of a discretion, it might entertain a cause so brought before them, there must be no objection as on this motion to dismiss. *Rathburn v. Moody*, 4 Minn. 364.

*b. The record.*

**419. Consists of what.** The record in a case before the Supreme Court, and to which it is confined, consists of the *pleadings*, the *decision* of the Judge, and the *judgment*. *Cloftin v. Lawler*, 1 Minn. 299.

**420.** When the *paper book* in a cause includes a *case* used on motion for new trial therein, containing a statement of the evidence upon the former trial, and settled by stipulation of the parties, and the opinion of the Judge on the motion for new trial, neither the *case* with its evidence nor the *opinion* form any portion of the *record*. Not being of record, the Supreme Court cannot look into them to see whether the judgment below on the motion was warranted by the law and evidence. *St. Anthony Mill Co. v. Vandall*, 1 Minn. 250.

**421.** When a "case" is attached to the judgment roll, it is sufficient evidence that it was attached at the request of one of the parties, which is all that is necessary, and will be examined as a part of the record on review. Comp. St., 566, Sec. 75. *Teick v. Board of Commissioners, Carver Co.*, 11 Minn. 292.

**422.**—An "extract from the evidence and proceedings before the referee, as reported to the court," in the absence of an agreement by the parties, and no case having been settled, was improperly embraced in the return, and was stricken from the record. *Robinson v. Bartlett et al.*, 11 Minn. 410.

**423. Cannot be contradicted by affidavits.** When the record shows that the verdict was recorded before the motion to poll the jury was made, affidavits are not admissible to *contradict* the record. *Steele et al., v. Etheridge*, 15 Minn. 501.

**424. Affidavits competent to show that papers were improperly included in the record.** This court will entertain a motion to purge a record of any matter or paper improperly included in it, and will receive affidavits of any facts *dehors* the record necessary to obtain a full knowledge of how the record was made up. *Daniels v. Winslow*, 2 Minn. 117.

**425. Matters improperly of record, will be struck out on motion.** Sufficient facts having been elicited on the motion to strike out a Bill of Exceptions, to induce the court to believe the counsel (opposite) had not received proper notice of the bill, it was struck out. *Ib.*

*c. The paper book.*

**426. What it should include.** Paper books should in all cases contain a statement of the case briefly, as well as every material paper which bears upon the questions to be decided. *Gerish & Brewster v. Johnson*, 5 Minn. 23.

**427.**—The *paper book* furnished the Supreme Court should not include the evidence in the case, but the judgment roll, which includes the decision of the court



below. And this is so as well whether the evidence is mostly *depositions* or oral. *Claflin et al. v. Lawler et al.*, 1 Minn. 299.

**428. Construction thereof.** A statement in a paper book that "testimony was introduced on either side for and against all the issues," cannot prevail against a positive statement to the contrary by the court, when, in his charge to the jury, he says, "there is no evidence of any outrage in this case," there being no such evidence in the paper book. *Day et al., v. Raguet et al.*, 14 Minn. 273.

*d. The calendar.*

**429. Case struck from the calendar, when not filed in time.** Where the return was not filed until after the opening of term, and the respondent had noticed the case for argument ten days before the first day of term, and placed it on the calendar for a hearing, the case was struck from the calendar on motion. *Reynolds v. Steamboat Favorite*, 9 Minn. 148.

*e. What is reviewable.*

*1. Discretionary matters.*

**430. Order granting a new trial.** An order of the District Court, granting a *new trial*, is discretionary, and not subject to review in the Supreme Court. *Dufolt v. Gorman*, 1 Minn. 307.

**431. The allowance of amendments in pleadings** at the trial is discretionary, and will not be reviewed, except in cases of abuse. *Morrison et al. v. Lovejoy*, 6 Minn. 319.

**432. Refusal to open judgment obtained by default**, where the party was in no default, is an error which may be reviewed in this court—if a default existed, then it is discretionary with the court and cannot be reviewed, except in case of abuse. *Swift v. Fletcher*, 6 Minn. 550.

**433. Orders allowing pleadings to be made more definite.** The court may, in its discretion, order a pleading to be made more definite and certain, and unless the

discretion is abused, the action of the court will not be disturbed. *Cathcart v. Peck et al.*, 11 Minn. 45.

**434. Opening judgment.** Where a judgment is set aside in order to grant relief to the defendant, under Sec. 94, Chap. 60, Comp. St., it is within the discretion of the court, and will only be reviewed in case of abuse of discretion. *Barker v. Keith* 11 Minn. 65.

**435.** Applications to open judgment, and be allowed to come in and answer, are addressed to the discretion of the court, and its decision will not be disturbed without manifest abuse. *Whitcomb v. Shaffer*, 11 Minn. 232.

**436.**—In applications for permission to appear and defend in an action where judgment has been taken by default, under Sec. 51, Chap. 66, G. S., the decision of the court below will not be reviewed, except in case of abuse of discretion. *Washburn et al. v. Sharpe et al.*, 15 Minn. 63.

**437. Opening judgment.** An order of the District Court, opening and setting aside a judgment entered on default, is the exercise of discretionary power and not reviewable, except in case of palpable abuse. *Woods v. Woods*, 16 Minn. 81.

**438. Change of venue.** The decision of a court below in disallowing an application for a change of venue, is not reviewable in the Supreme Court, except in case of abuse of its discretion. *State v. Stokely*, 16 Minn. 282.

**439. The admission of irrelevant or immaterial question**, whether for the purpose of criminating or disgracing a witness, is discretionary with the court, and its decision is not reviewable in absence of abuse. *McArdle v. McArdle*, 12 Minn. 98.

*2. Fictitious issues.*

**440. When subject matter is settled.** This court will not entertain a case and review a judgment rendered in the District Court, where it appears satisfactorily that the subject matter of the action has been settled by the parties and the judgment satisfied. *Babcock v. Banning*, 3 Minn. 191.

### 3. Only objections raised below.

**441. No new objections to testimony can be urged.** Where a question is asked generally of a witness, without any grounds, or its object being specially stated, and its admissibility is argued, upon a theory advanced by the party objecting, and answered by the party offering the evidence, and ruled upon by the court in reference to such theory, the party in the Supreme Court is estopped from urging its admissibility, on any grounds not presented at the offer. *Bend v. Corbett*, 2 Minn. 255.

**442.**—No grounds for the exclusion of testimony not urged in the court below, can be suggested in the Supreme Court. *Baldwin et al. v. Blanchard*, 15 Minn. 489.

**443. General objection to a charge.** Where it is objected generally that "the court erred in charging the jury upon the first point," etc., without any specifications to indicate what is relied on by the party as erroneous, we do not feel called upon to make a critical examination of the several instructions referred to, but simply consider such points as are discussed in the argument, and such palpable errors as are apparent on the face of the instructions. *Day et al. v. Raguet et al.*, 14 Minn. 272.

**444. Where no objections were raised below.** Where a party submits all the issues to a jury without objection, he can not claim in the Supreme Court that some of the issues being equitable in their nature should have been passed upon by the court, and assign that as ground of error. *Davis et al. v. Smith*, 7 Minn. 414.

**445.**—Where evidence has been received in the court below, without objection, it is too late to raise the question of its admissibility in this court. *Dixon v. Merritt*, 6 Minn. 160.

**446.**—It is too late to raise, in the Supreme Court, an objection on account of any mere error or informality which does not go to the sufficiency of the complaint, or the jurisdiction of the court; by failing to raise them in the court below, they are

waived. *Holmes et al. v. Campbell*, 12 Minn. 221.

**447.**—The Supreme Court can review only such errors in the taxation of costs as were excepted to by the party aggrieved. *Barry v. McGrade et al.*, 14 Minn. 286.

### 4. Only matters acted upon below.

**448. Assessment of damages by clerk of the District Court.** Where the plaintiff enters up judgment on default in the court below, and includes therein an assessment of damages authorized by the formal signature of the judge, without his actual examination, it is, constructively, the act of the court, (Comp. St., p. 566, Sec. 71), but it is not such an *actual decision* by the judge below as is required for the purposes of review directly by this court, unless the error complained of, is of such a character that the record will not support a judgment at all, or would not be aided by verdict—following *Karns v. Kunkle*, 2 Minn. and *Babcock & Hollinshead v. Sanborn & French*, 3 Minn. *Hawke et al. v. Banning et al.*, 3 Minn. 67.

**449. Only questions raised below.** The Supreme Court will not entertain questions which have not received the actual decision of the tribunal from which they have come, unless it is evident that substantial error has been committed. *Washburn v. Winslow*, 16 Minn. 33.

**450. Taxation of costs by clerk, without application to the court below.** Error committed by the Clerk of the District Court in taxation of costs, or assessment of damages, whether by miscalculation of the figures or erroneous application of principles of law, must be first corrected by court below, on motion. *EMMETT, C. J., dissenting*, holds that judgment entered by the clerk in accordance with the statute, is in contemplation of law, the *judgment of the court*, hence any error apparent ought to be inquired into in this court. *Babcock et al. v. Sanborn et al.* 3 Minn. 141.

**451. Appellate jurisdiction, only exercised.** This court is designed to exer-

cise appellate jurisdiction only, and will review the errors of courts alone, not those of the officers of courts. *Masterson & Hoyt v. Le Claire*, 4 Minn. 163.

**452. Court below must first actually pass on the assessment of damages.** This court will not entertain a motion to correct an assessment of damages made by the clerk of the district court, until the same has been actually passed upon by the court below. *EMMETT, C. J., dissents: Daniels v. Harris & Smith*, 4 Minn. 169; *Daniels v. Allen*, 4 Minn. 170; *Daniels v. Wain, imple'd*, 4 Minn. 171.

**453.—as to any omission from the record.** The objection that the record does not show an order referring the cause to a referee for trial, should be urged in the District Court; it cannot be urged in the Supreme Court for the first time. *Ames v. The Mississippi Boom Co.*, 8 Minn. 467.

**454.—as to taxation of costs.** Alleged errors of the clerk of the district court, in the taxation of costs, cannot be reviewed by the Supreme Court—until after they are passed upon by the District Court—following the rule heretofore laid down. *Hurd v. Simonton*, 10 Minn. 423.

**455. Errors of the clerk in assessing damages, will be reviewed, without any previous application to the District Court.** A judgment, though entered by the clerk, without the knowledge of even the judge, is in contemplation of law the judgment of the court, and any errors committed by the clerk in assessing damages for the entry of judgment, will be corrected by this court, though application has not been first made to the District Court—overruling *Babcock et al. v. Sanborn et al.*, 3 Minn. 141. *Reynolds v. La Crosse & Minn. Packet Co.*, 10 Minn. 178.

*f. Principles of determination.*

*1. Abstract propositions.*

**456. No ground for reversal of judgment.** An error of the court concerning an abstract proposition, having nothing to

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do with the matter in hand, is not sufficient ground for reversing a judgment: *State v. Shippey*, 10 Minn. 223.

*2. Harmless errors.*

**457. Where sufficient evidence was properly admitted.** Where there is evidence sufficient to sustain the verdict, aside from that to which an erroneous part of a charge refers, and especially where the evidence is of such a nature that it is scarcely possible the objectionable part of a charge could have had any impression on the finding, a verdict should not be disturbed on that ground. *Woodberry et al. v. Larned*, 5 Minn. 339.

**458.** Where a question was erroneously overruled, but the party afterwards testified to the same thing, and received the full benefit of his question, he cannot complain. *Lynd v. Picket et al.*, 7 Minn. 184.

**459.** A party cannot complain at the erroneous ruling of the court below, as to the admission of evidence, where the same thing was afterwards established by other means. *Irvine v. Marshall & Barton*, 7 Minn. 286.

**460.** The improper admission of certain kinds of evidence is no ground of error, where the same facts were otherwise established. *City of Winona v. Huff*, 11 Minn. 119.

**461.** Defendant cannot complain that a portion of his answer is stricken out, though improperly, where the portions remaining set up the same matter. *Cathcart v. Peck et al.*, 11 Minn. 45.

*3. Questions of fact.*

**462. Verdict is against evidence.** Where the case does not show that all the evidence taken on the trial is presented therein, the court cannot say the verdict is unsupported by any evidence. *Lynd v. Picket et al.*, 7 Minn. 184.

**463.—and the case must show that all the evidence is before the court.** Where the case does not purport to contain

all the evidence introduced in the court below, an objection that the verdict is unsupported by the evidence, cannot prevail in the Supreme Court. *Williams et al. v. McGrade et al.*, 13 Minn. 46.

**464.**—An objection that the verdict is against the weight of evidence, cannot prevail where there was conflicting testimony. *Davis et al. v. Smith*, 7 Minn. 414.

**465.**—The general doctrine that a verdict of a jury, supported by any evidence in the case, will not be revoked, followed in *Maxfield v. Bierbaur*, 7 Minn. 511.

**466. What is insufficiency of evidence.** To constitute an insufficiency of evidence to sustain a verdict, there must be such a want of evidence on some material point in issue, as satisfies the court that the jury in their finding were influenced by partiality or prejudice, or misled by some mistaken view of the case—following *St. Paul v. Kuby*, 8 Minn. 171. *Johnson v. Winona & St. Peter R. R. Co.*, 11 Minn. 296.

**467. Conflicting evidence.** Where the evidence is conflicting, the verdict of the jury will not be disturbed. *State v. Herlick*, 12 Minn. 136.

**468. All the evidence must be brought up to assail a verdict of a jury, on a question of fact.** Before an objection to a verdict, on the ground that it is contrary to the evidence, can be entertained by the Supreme Court, it must appear that all the evidence given upon the trial in the court below is presented in the paper-book, otherwise it will be presumed that evidence sufficient was given to support the verdict. *Dorman v. Ames & George*, 12 Minn. 421.

**469. Questions of facts not reviewable.** The Supreme Court will not undertake to revise or give judgment as to facts, but will take them as exhibited by the record. *Claflin v. Lawler*, 1 Minn. 298.

**470. Assessment of Damages.** The Supreme Court will not interfere with the assessment of damages by a jury, unless it be manifest that they were swayed by prejudice, passion, or corruption. *Beaulieu v. Parsons*, 2 Minn. 37.

**471.**—Where there is evidence tending

to establish the damages found by the verdict, such damages will not be reviewed here for the purpose of ascertaining whether they are excessive or not. *McClung v. Bergfield*, 4 Minn. 148.

**472.** The finding of a jury on a question of fact, will not be reviewed, where there is any evidence before the jury tending to show that fact. *State v. Taunt*, 16 Minn. 109.

**473.** Certain evidence considered, with reference to its sufficiency, to sustain a verdict, finding the disaffirmance of a mortgage by an infant, considered and determined insufficient. *Cogley v. Cushman*, 16 Minn. 397.

**474.** Evidence as to amount of damages, and ordinary care in management of property, considered and determined. *Marsh v. Webber*, 16 Minn. 418.

**475.** For evidence that will sustain a verdict of a jury, awarding damages for land taken by a railroad company, against the objection that it was excessive and the result of prejudice, see *The St. Paul & Sioux City R. R. Co. v. Matthews*, 16 Minn. 341.

**476. Assessment of damages by jury.** Where a jury have a discretion in awarding damages, the assessment will not be reviewed in the absence of passion, prejudice, or some improper motive. *DuLaurans v. First Div. St. P. & P. R. R. Co.*, 15 Minn. 49.

#### 4. Report of referee and findings of court.

**477.** The report of a referee may be sustained, even if improper evidence was admitted, if, on rejecting that, enough remains to support it. *Cooper v. Breckenridge*, 11 Minn. 341.

**478. Referee's report on facts.** If there is testimony in the case, upon which the findings of a referee upon questions of fact may be reasonably sustained, the court will not interfere with it. *City of Winona v. Huff*, 11 Minn. 119.

**479.**—when evidence was partly documentary. The findings of a referee on

questions of fact, where the testimony was all written or printed, stands like any other finding of fact, and this court will not examine the testimony for the purpose of determining its weight—overruling *Martin v. Brown*, 4 Minn. 282. *Humphrey et al. v. Havens et al.*, 12 Minn. 298.

**480. Will be reviewed without a "case."** The Supreme Court will inquire, on report of a referee or decision of a Judge, whether the conclusions of law are warranted by the findings of fact, without compelling the appellant to make up a "case"—although, if the respondent showed the court that the merits of his cause were not fairly presented by the report or decision—*i. e.*, that the judgment, although in his favor, cannot be supported on the findings of fact or *vice versa*, whereas an inquiry into the whole case would establish it, it will direct a case to be made. *Morri-son et al. v. March*, 4 Minn. 422.

**481. The weight, which a court will give to the decision of a single judge,** on a question of fact, depends on the nature of the evidence, whether written and documentary, or oral. In the latter case it is of equal weight with the verdict of a jury, in the former it will be reviewed as any other question. *Martin v. Brown et al.*, 4 Minn. 282.

### 5. Presumptions.

**482. Sufficiency of evidence to sustain a verdict.** Where the record fails to show that all the evidence taken below is before the court, it may well presume, if indeed it is not bound to presume, that there was evidence sufficient produced on the trial to sustain the verdict. *Eddy, Fenner & Co., v. Caldwell*, 7 Minn. 225.

**483—where all evidence not before the court.** Where it does not appear from the papers that the evidence presented was all there was offered on the trial, every reasonable intendment will be made in favor of the verdict. *Barnsback v. Reaney*, 8 Minn. 58.

**484.**—In the absence of all the testi-

mony in the paper book, the presumption is that there was testimony sufficient to sustain the verdict. *Cowley v. Davidson*, 13 Minn. 92.

**485. Amount of damages.** Where a referee omitted to find, in terms, the amount of damages which plaintiff sustained, but found facts from which the law implies damage, the damage actually found, and for which judgment was entered, will not be disturbed, unless the party complaining show affirmatively that he has erred in his rule of damages, or misapplied a correct rule. The court will presume the amount of damages found to be correct, unless the contrary is made to appear affirmatively. *Caldwell et al. v. Arnold*, 8 Minn. 265.

**486. Correctness of instructions.** If a bill of exceptions does not contain the facts as detailed by each witness, on which the court based its instructions, and those instructions are abstractly correct, a court of review will presume they were properly given. *Desnoyer v. Hereux*, 1 Minn. 17.

**487. Regularity of the proceedings.** Where the case comes up on a bill of exceptions, it is incumbent on the appellant to show specifically the existence of error, otherwise the presumption is in favor of the regularity of the proceedings. *Blackman v. Wheaton*, 13 Minn. 326.

**488. Date of execution.** It appeared from the case that an execution issued on or about Nov. 28, and transcript of judgment filed on Dec. 1—and no objection having been made to the introduction of the execution in evidence, it will be presumed that on being produced it was found dated after the docketing of the judgment. *Dodge v. Chandler*, 9 Minn. 97.

**489. Pleadings and issues.** When the paper book fails to show pleadings or an issue in the court below, but showed proceedings in the cause, which are the necessary consequents of the existence of pleadings and an issue, the court will presume that pleadings were had and an issue joined, so as to sustain the judgment. *Davidson v. Farrell*, 8 Minn. 258.

**490.** Where a defendant, by failure to

answer, admitted that (as alleged in the complaint) defendant "caused execution to be issued out of" the Supreme Court, and placed it in the hands of the Sheriff of Scott County, who "levied upon, etc.," certain real estate, situate, etc., and "duly in accordance with the provisions of the statute, etc., sold, etc.," it will be presumed that the judgment was docketed in Scott County, when the complaint is assailed in the Supreme Court, for insufficiency. *Holmes et al. v. Campbell*, 12 Minn. 221.

**491. Existence of particular evidence.**

When a certain instruction would be erroneous in a given case, and correct under certain circumstances, and a bill of exceptions fails to show the evidence upon that point, or any allegation that such testimony was not given on the trial, the court will presume the existence of such testimony in the case. *Day et al. v. Raguet*, 14 Minn. 273.

**492. Bill of exceptions, or case.**

Where there is no bill of exceptions or case stated, the Supreme Court will not inquire whether testimony upon which a judgment was based, was properly received or not. *Bartnell v. Davidson*, 16 Minn. 530.

**493. Res adjudicata.** When a question has once been decided in this court, and the cause remanded for a new trial, the same question will not be reviewed a second time, on an appeal from the judgment rendered, on the second trial below; unless a state of facts exists which would justify a re-argument. *Ayer v. Stewart*, 16 Minn. 89.

**494. Specific objections.** This court will consider, only, objections to the charge of the court below, which were specifically objected to on the trial. *Cole v. Curtis et al.*, 16 Minn. 182.

**495.**—Where an instruction is correct as a proposition of law, the objection that it is not so specific as it might be, should have been obviated, by a request for further instructions. *Warner v. Myrick*, 16 Minn. 91.

**496. Presumptions in favor of instruc-**

**tions.** Where the instructions are not all before the court, it cannot be objected that "if, under the charge, the jury found but part of the money described, that fact should have been stated in their verdict; that a general verdict is bad, where the testimony described but a part of the property charged; that there should have been a finding of value sufficient to determine the character of the offense," for the presumption is in favor of the instructions, especially as more specific instructions were not asked. *State v. Taunt*, 16 Minn. 109.

**497.** Error must be shown affirmatively, and where an instruction lays down a correct rule, if the facts in the case were such, that applied to them without qualification, it would mislead the jury, the party alleging error must show, by case or bill of exceptions, the existence of such facts. *Sheffield et al. v. Ladue*, 16 Minn. 388.

**498.**—Where the record does not purport to give the instructions of the court in full, it will be presumed that the court did, upon stating the facts of the case, inform the jury that they were the judges of all questions of fact, as prescribed by Sec. 12, Chap. 114, G. S. *State v. Taunt*, 16 Minn. 109.

**499.**—Where an instruction, given by request of counsel, is excepted to, and such instruction is unobjectionable, if the jury were properly instructed upon other questions connected with that involved in the instruction given, the Supreme Court will presume that the jury were properly instructed upon such other question, if there is nothing to show the contrary. *Cogley v. Cushman*, 16 Minn. 397.

**500. Conflicting instructions, if effect uncertain, fatal.** Where the court, in its general charge to the jury, gave a correct definition of probable cause, but afterwards, at request of a party, gave a definition not within the rule, but inconsistent therewith, and the court were unable to say by which rule the jury were governed, an exception to the latter in-

struction was sustained. *Colc v. Curtis et al.*, 16 Minn. 182.

**501. Error will not be anticipated by presuming, that an erroneous judgment will be entered in future.** Where the complaint prayed for damages sustained by a nuisance created by defendant, and for an abatement thereof, and injunction restraining its continuance, and the verdict of the jury found generally on the damages in favor of plaintiff, and specially on certain facts, but not with sufficient fullness to authorize an abatement or injunction, and before the entry of judgment defendant appealed from an order refusing to set aside the verdict and denying a new trial. *Held*, that no judgment having been entered in the action, there is no reason to suppose that the court below would, upon the verdict and special findings, render judgment for anything more than the damages, concerning which there was no dispute, and the presumption was that, as any other judgment would be improper, it will not be granted, hence the motions were properly denied. *Finch v. Green*, 16 Minn. 355.

**502. All testimony not before the court.** Where the record does not purport to give all the testimony, it cannot be objected: 1st. That the charge of the court assumes a fact which there was no testimony to prove. 2d. That the evidence does not support the verdict. *State v. Taunt*, 16 Minn. 109.

**503.**—Where it does not appear that the settled case contains all the evidence introduced upon the trial, no question can be raised as to its sufficiency to sustain the judgment. *Warner v. Myrick*, 16 Minn. 91.

**504. Motion for non-suit.** On an assignment of error in the Supreme Court, on the ground of a refusal of the court below to dismiss the action, at the close of plaintiff's evidence in chief, on the ground that the evidence did not make out the plaintiff's case, this court will not confine its attention to the testimony in chief, but will look to all the testimony in the case, and if it appears therefrom that there was

sufficient evidence in support of plaintiff's case to submit the cause to the jury, the ruling below will be sustained. *Cole v. Curtis et al.*, 16 Minn. 182.

#### 6. Defects in pleadings.

**505. Defects must be clear and substantial.** An appellate court will not, on appeal, set aside proceedings on account of the insufficiency of the complaint, unless it is clearly and substantially defective. *Piper v. Johnson et al.*, 12 Minn. 60.

**506.**—An objection that a complaint does not state facts sufficient to constitute a cause of action, made in the Supreme Court, will not reach indefiniteness or uncertainty, or any errors not substantial in their nature, and necessarily fatal. *Holmes et al. v. Campbell*, 12 Minn. 221.

**507.**—After judgment, a complaint will be sustained unless it is clearly and radically defective. *Rich v. Rich*, 12 Minn. 468.

**508.**—After judgment an objection that a complaint does not state facts enough to constitute a cause of action, will not be allowed if the pleading can be sustained by the most liberal intendment. *Phoenix et al. v. Gardner et al.*, 13 Minn. 430.

**509.** This court will not presume that a want of an allegation in the complaint of part performance, in an action for specific performance, is cured by verdict where the record shows that no proof was made of such performance. *Wentworth v. Wentworth*, 2 Minn. 285.

#### 7. Generally.

**510.** Views and impressions of the court on matters of fact, cannot be allowed to take the place of the verdict of a jury, except in flagrant cases. *Derby & Day v. Gallup*, 5 Minn. 119.

**511. Judicial notice of its records.** This case was before the court in 1860, and remanded to the District Court for a new trial. On being called for trial in that court, the plaintiff in error objected to its

trial on the ground that no judgment had been entered in this court, and the mandate was improperly issued; hence, the cause was in this court, but offered no proof except such as appeared from the mandate of this court. The court overruled the objection. *Held*, that the mandate did not show whether a judgment had been entered or not, but the presumption was that it was regularly issued, and as no other proof was offered, the objection was properly overruled; and this court must act, in reviewing the decision of the court below, upon what appears in the record brought up, and cannot take judicial notice of its own records—for that would be trying a question of fact. *Cuddwell v. Bruggerman*, 8 Minn. 286.

*g. Relief granted.*

**512. Modification of judgment.** A judgment can be modified in the Supreme Court, where the error committed goes to a part of the finding, and can be separated with certainty. *Sanborn et al. v. Webster*, 2 Minn. 328.

**513.—in replevin.** In replevin where the jury find for plaintiff, *with costs*, this court will so amend the verdict and judgment as to assess the damages at six cents, and limit costs to the same sum. *Coit v. Waples et al.* 1 Minn. 134.

**514.—by remitting excess of damages.** Where property, taken by an officer on execution against S., is replevied by D., and the officer has judgment on the ground that D. claims under a fraudulent sale from S., and the officer erroneously takes judgment for the value of the property, instead of the execution debt, interest and costs, if the officer will consent to fix the sum he is entitled to recover—if property cannot be returned—at the amount of the debt and interest, and such portions of the costs on the execution as are established by the record, and may be determined by computation, and remit the balance, his judgment will be so modified, without a new trial. *Dodge v. Chandler*, 13 Minn. 114.

**515. Reversal of judgment, when unsupported by findings of fact.** When judgment is not warranted by facts, found by the referee, it may be reversed in this court, though no exception was taken below, or case or bill of exceptions made. *Burpe v. Van Eman*, 11 Minn. 327.

**516. Opening judgment on default.** Where a party suffers a default in an action, and fails to take advantage of points which were open to him, this court will hold him to have waived the same, unless he can show a satisfactory excuse for his previous omission. Such waiver will not be presumed where a party neglects to make a defense, which two decisions of this court (since overruled) declared he had no right to make. He had a right to regard those decisions as binding, and now that a contrary rule is established, he may urge his defense. *Hollinshead v. Von Glahn*, 4 Minn. 190.

**517. New trial—excessive damages.** Where it is impossible to determine what the jury acted on, or how they made up their verdict in case of excessive damages, no offer to remit the excess will avail, for it is impossible to say how much the excess is. *Smith v. Dukes*, 5 Minn. 373.

**518. Remanding return for correction.** On appeal from an order allowing a new trial, the respondent being in default at the hearing below, the record did not show that the order to show cause why the case, proposed for a new trial, should not be allowed, settled, and signed by the Judge, was ever disposed of; or that the case was examined, allowed, or signed by the Judge; or that the new trial was granted on the case as proposed and presented. *Held*, an irregularity too important to be overlooked; but as the same could, perhaps, be readily corrected on application to the Judge granting the same, the case was remanded, with leave to apply for a correction in accordance with the facts. *Phoenix et al. v. Gardner et al.*, 13 Minn. 294.

**519.—**In some cases the findings of court, on a trial without a jury, may be corrected by the court below, without a re-



hearing—where material issues are not passed upon—but where eighteen months had elapsed since the trial, and the Judge had been almost constantly engaged in the trial of other causes during the interval, it was presumed that the evidence given, or facts proven, on the trial, were not sufficiently clear in his memory to enable him, satisfactorily, to determine the issue without a rehearing. *Rich v. Rich*, 12 Minn. 468.

*h. Setting off judgments.*

**520. Where one is undetermined, will stay the motion.** Where one of two judgments, which it is sought to offset against each other, is before the Supreme Court and undetermined, the court, if necessary, will retain the motion for offset undecided, until the final determination of the judgment appealed from. *Irvine et al. v. Myers*, 6 Minn. 562.

*i. Staying proceedings.*

**521. To enable unsuccessful party to sue out writ of error to Supreme Court of the United States.** The Supreme Court will not stay the proceedings of the prevailing party to enable the other to sue out a writ of error to the Supreme Court of the United States, where no facts are stated as a ground for such interposition—as insolvency of the party, or that he was proceeding to enforce the judgment, or that if the judgment was reversed in the latter court, the applicant would be unable to collect any judgment in his favor. *Bradley v. Gamelle*, 7 Minn. 331.

*j. Remittitur.*

**522. Definition.** To remit a cause is to send it back to the same court from which it had been removed, for the purpose of re-trying the cause, where judgment has been reversed, or of issuing execution when it has been affirmed. *Irvine v. Marshall & Barton*, 3 Minn. 73.

**523. Docketing a judgment in a county is not a remittitur.** The filing and

docketing of a transcript of a judgment of this court, in any county of this State, for the purpose of issuing an execution upon such judgment, under Rule XXIX, of this court, is not a remittitur. *The Lacrosse & Minn. Packet Co. v. Reynolds et al.*, 12 Minn. 213.

**524. When the court loses jurisdiction.** At the time of issuing a remittitur or mandate of this court, the decision of this court was on file with the clerk, but he had not entered up judgment in form. Held, the record, though commonly spoken of as the judgment, is more properly the evidence of it, and the issuing of the mandate before formal entry, though an irregularity, was not fatal to the proceedings, and the order took the case out of this court, it being a substantial compliance with Rule No. XXII, of this court, and the District Court acquired jurisdiction. *Caldwell v. Bruggeman*, 8 Minn. 286.

**525. Proceedings in the court below.** Where judgment in the court below, overruling a demurrer, is affirmed in the Supreme Court, the court below has no jurisdiction to allow an answer to be served, until a remittitur issues from the Supreme Court. *The Lacrosse & Minn. Packet Co., v. Reynolds et al.*, 12 Minn. 213.

*k. Re-argument.*

**526. Application for, must show, what.** Generally, an application for a re-argument must show some manifest error of fact into which counsel or the court have fallen in the argument or decision of the case—*e. g.*, that a statute decisive of the case has, by mistake, been overlooked by counsel and court; or perhaps that the case has been decided on a point not raised upon the argument, and there being strong reason to believe the court has erred; or, unless in a case where general public interests are involved, and the case either had not been fully argued, or strong additional reasons may be urged to show the court has erred in its ruling. But where a question of law has been once fully discussed on the argu-

ment, and considered by the court, a party is not entitled to a re-argument on ground that there is a manifest error in the decision. *Derby & Day v. Gallup*, 5 Minn. 119.

**527.**—Where the court has been led into an error in its decision, from the omission of the *paper book*, to state the facts correctly, the party whose duty it is to prepare such books, if not estopped from moving for a re-argument, to correct such error, would at least be required to present very strong equities to entitle him to a favor, which he is compelled to seek on account of his own neglect. *Fowler et al. v. Atkinson*, 6 Minn. 578.

**528.**—The rule governing the allowance of a re-argument as laid down in *Derby & Day v. Gallup*, 5 Minn. 140 followed. *Woodbury v. Dorman*, 15 Minn. 341.

**529. When not granted.** A re-argument will not be granted in this court on ground that, "owing to an intimation of a member of the court, counsel did not argue an important point in the case, supposing that the court did not desire an argument upon it. That, in the decision of the case, the court held against the opinion of counsel, and as he believes, the decision on that point (as well as others) was erroneous." *Derby et al. v. Gallup*, 5 Minn. 119.

**530.**—After judgment of this court has been perfected, and the cause properly remitted to the District Court, on due notice to the adverse party, it is too late to move for a re-argument of the case in this court. *Caldwell v. Bruggeman*, 8 Minn. 286.

**531.**—Where, on motion for re-argument, nothing new was presented, no mistake of fact alleged, no point overlooked, nothing presented to the court not before it on the first hearing—the motion was denied. *Williams v. Lash*, 8 Minn. 540.

**532.**—No re-argument will be granted to a party who has been in default for several years, and who never did argue or have the right to argue the same, he being in default. *Humphrey et al. v. Havens et al.* 13 Minn. 150.

**533.**—The rule as to a re-argument laid

down in *Woodbury v. Dorman*, 15 Minn. 341, followed. *Ayer v. Stewart*, 16 Minn. 89.

## II. ON APPEAL.

### a. Generally.

**534. Statutes regarding, act retrospectively.** The amendments to R. S. Chap. 5, Session Laws of 1856, p. 13, providing for appeals from an order granting a new trial, extend retrospectively to cases then pending. *Reporter's Note.*—The original act of March 1, 1856, above referred to, allows an appeal "from an order granting or refusing a new trial;" the words, "or refusing," are omitted in the published statutes. *Converse v. Burrows et al.*, 2 Minn. 240.

**535. Construction of certain statutes.** Sec. 1, of Chap. 86, G. S., relating to appeals, is a general declaration of the purposes of the chapter. Sec. 8 limits the general language of the first, and specifies the particular judgments and orders made appealable; it is to be read with Sec. 1, or in view of its language, and considered rather as a specification under it. The only exception being Sub. Div. 6, of Sec. 8, which in express terms applies to a final order affecting a substantial right in a *special proceeding*; appeals authorized by the remainder of the section are from *civil actions*. *McNamara v. Minnesota Central R. Co.*, 12 Minn. 388.

**536. Appeal depends on statute.** An appeal is a statutory provision, it may be granted or withheld in all or any class of cases, and the class may be determined by the character of the proceeding, or by the amount of the fine or judgment. *Tiernay et al. v. Dodge*, 9 Minn. 166.

**537. Prospective operation of Chap. 70, Laws 1869.** Chap. 70, Laws 1869, which amends Sec. 6, Chap. 86, G. S., relating to appeals as amended by Chap. 83, Laws 1868, is prospective in its operation, and does not repeal Chap. 83, Laws 1868, as to judgments rendered prior to its passage. *Kerlinger v. Barnes et al.*, 14 Minn. 526.

b. *Who can appeal.*

**538. Strangers cannot appeal.** Under Sec. 20 and 21, p. 442, or Sec. 29, p. 443, Comp. St., a stranger, who has no interest, either as executor, administrator, creditor, devisee, legatee, or heir, cannot appeal in the name of the "estate" of decedent from a judgment recovered against the estate in the District Court. In such case there is wanting a competent party on which the process of the court can act—the "estate" having no legal personality that can give it a status in court. *The Estate of John Columbus v. Monti*, 6 Minn. 568.

**539. Cross appeal by respondent.** If a defendant in error desires to have the judgment examined in his own behalf, on points not objected to by plaintiff in error, he must resort to a cross writ, and the same would appear to be true of the respondent on appeal, unless it may become necessary to look at those raised by the respondent. *Edgerton et al. v. Jones et al.*, 10 Minn. 427.

**540. Right to appeal, waived.** Defendant having moved for, and the court below having granted, a new trial, on condition that defendant pay \$10 costs, and fees of plaintiff's witnesses. *Held*, that the payment of said costs and fees by defendant to, and acceptance of the same by plaintiff, was a waiver of plaintiff's right to appeal from such order. *Lampfrey v. Henk*, 16 Minn. 405.

c. *Time to appeal.*

**541. When right to appeal begins to run.** The records of the court show an order of the court, dated May 18, 1862, denying a motion; on June 17, 1864, another order of the same effect is entered, signed by the clerk, it not appearing that the court acted in any manner since the first order. *Held*, the right to appeal commenced at date of first order, and the subsequent entry of same order could not reverse it. *Carli v. Jackman et al.*, 9 Minn. 249.

**542.**—The time allowed for suing out a writ of error, or taking an appeal from

a judgment (Comp. St., p. 621, Sec. 9, and p. 623, Sec. 22,) commences to run from the date of actual entry thereof—overruling *Griffin v. Furlong*, 3 Minn. 207. *Humphrey et al. v. Havens et al.*, 9 Minn. 318.

d. *Notice of appeal.*

**543. Sufficient address.** The notice of appeal to this court, specified in Sec. 5, Ch. 71, Comp. St. 621, required to be served on the Clerk of the District Court, is substantially complied with, though the notice is addressed to the attorney of the adverse party. *Baberick v. Wagner*, 9 Minn. 232.

e. *Effect of appeal.*

**544. Supersedas.** An appeal from an order, striking out portions of the answer, properly effected, operates as a *supersedas*, and stays all proceedings, and saves all rights in the same manner as if no order had been made by the court below, *Starbuck v. Dunklee*, 12 Minn. 161.

**545. An appeal from a judgment does not supersede proceedings taken prior to such appeal;** but only suspends such proceedings in the condition they exist at the time of appeal, and prevents any further steps during its pendency. *Robertson v. Davidson*, 14 Minn. 554.

**546.—in replevin.** An appeal from a judgment in replevin does not defeat an action which had been commenced on the replevin undertaking; nor does a judgment of the Supreme Court on such appeal, which modified the former judgment only, operate to defeat such action. *Ib.*

f. *Dismissal of appeal.*

**547. Where the return to an appeal is filed too late to admit of giving ten days' notice of argument,** as required by the rules, respondent may move to dismiss the appeal any time during the term, on eight days' notice, and Rule XV., requiring motions to be noticed first day of

term does, not apply. *The Commonwealth Insurance Co. v. Pierro*, 6 Minn. 569.

*g. Papers on appeal.*

**548. An order complained of, must be of record.** When the appellant's right to the relief demanded depends on an order which is in dispute between the parties, the production of the order is incumbent on the appellant. *Phoenix et al. v. Gardner et al.*, 13 Minn. 294.

**549. Case, when necessary.** Under Sec. 63, p. 565, Comp. Stat., a case is only necessary on appeal from trial by jury. Sec. 60, *ib.*, makes provision for a trial by the court or a referee, and provides for the preparation of a case within five days after trial, and the trial in such cases must be considered pending until the filing of the decision. *Irvine v. Myers*, 6 Minn. 558.

**550. Paper book should contain, what.** When an appeal is taken, the *paper book* should always show whether it is from an order or a judgment. *Fowler et al. v. Atkinson*, 6 Minn. 578.

**551. Papers improperly of record, struck off on motion.** The District Court, on a motion for change of venue, struck out all the moving papers, on which the application was based, as being drawn in contempt of court, and directed the clerk not to receive them on the file. On appeal from the order, the clerk appended to his return the papers so struck off by order of court, whereupon the Supreme Court directed them to be struck out, as not properly of record. *Mayall et al. v. Burke et al.*, 10 Minn. 285.

**552. An unauthenticated deposition.** When, upon an appeal from a judgment, it appears from the settled case that upon the trial below certain depositions were offered and received in evidence, to the reception of which an exception was taken, but the depositions are not set forth in the case settled, nor embraced or referred to in it as exhibits, nor contained in the return on appeal, but copies of such depositions wholly unauthenticated, which do not ap-

pear to be a part of the record in the court below, and which are not of record in this court, are furnished with the paper books, such unauthenticated copies, upon the objection of the adverse party, will be excluded from the consideration of the appellate court in the determination of the appeal; and the exceptions taken to reception of the depositions offered on the trial will be overruled. *Wintermute v. Stinson*, 16 Minn. 458.

**553. Settled case, on appeal from R. R. (commissioners' report.** To determine the questions submitted to and passed upon by a jury, the only portion of the record which can be referred to are the written pleadings or settlement of the issues in the action; but on a general appeal to the district court from the report of commissioners to assess damages for the appropriation of land by a railroad company, and injury occasioned thereby, where the statute, under which the proceedings are had, prescribes no pleading or written allegation other than the petition of the company for the appointment of commissioners, and no issues are formally settled by the court or parties, but the issues submitted to the jury are raised upon the trial, by the proofs of the parties, and a case is settled in the district court embodying the proceedings on the trial, which may constitute a part of the judgment roll under Sub div. 2, Sec. 252, Ch. 66 G. S., and upon which case a motion is based to set aside the verdict as contrary to law, *such settled case* may be referred to for the purpose of determining the issues, and in support of the verdict. *The St. Paul and Sioux City R. Co. v. Matthews*, 16 Minn. 341.

*h. When an appeal lies.*

**554. When its allowance is clearly intended by the statute.** When an appeal was not expressly allowed, but from the whole act it was clearly the intention that an appeal should be allowed, it is the duty of the court to allow an appeal. *Paddock et al. v. The Saint Croix Boom Corporation*, 8 Minn. 277.

**555. Motion to compel satisfaction of judgment, order dismissing.** An order dismissing a motion made under Sec. 255, Ch. 66, G. S., to compel entry of satisfaction of a judgment, satisfied *in fact*, otherwise than upon execution, is an order of the court, and is appealable under Sub div. 6, Sec. 7, Ch. 86, G. S. *Ives v. Phelps et al.*, 16 Minn. 451.

**556. An order of the district court, vacating execution sale, sheriff's return, certificate, and record thereof, is appealable as a final order made on a summary application in an action after judgment, and affecting a substantial right.** *Hutchins v. Commissioners of Carver Co.*, 16 Minn. 13.

**557. Order involving the merits of the action.** It seems that Sec. 8, Subdiv. 3, Ch. 86, G. S., which allows an appeal from "an order involving the merits of the action, or some part thereof," is used to mean the strict legal rights, as contradistinguished from those mere questions of practice which every court regulates for itself, and from all matters which depend upon the discretion or favor of the court. *Holmes et al. v. Campbell*, 13 Minn. 66.

**558. Imprisonment for contempt, on non-payment of money.** An order directing a party to be imprisoned until payment of a certain sum for contempt, is an appealable order. *Register v. State of Minnesota ex rel. etc.*, 8 Minn. 214.

**559. An order setting aside stipulation, settling the issues in a case, is appealable.** *Bingham v. Board of Supervisors of Winona County*, 6 Minn. 136.

**560. Order setting aside stipulation for dismissal of the action.** Where an action has been dismissed by plaintiff, under a stipulation, an order setting aside such stipulation and reinstating the case on the calendar "involves the merits of the action or some part thereof," and is appealable. Sub. div. 3, Sec. 8, Ch. 86, G. S. *Rogers v. Greenwood*, 14 Minn. 333.

**561. Pleadings—order striking out answer of feme covert.** Under Sec. 74, p. 470, R. S. (1851), an appeal lies from an

order striking out the answer of a *feme covert* by her next friend, when her husband is a joint defendant and the action is to foreclose a mortgage against her separate estate. *Wolfe and wife v. Banning & Bucknell*, 3 Minn. 202.

**562. Order made on demurrer to pleadings.** Under G. L. 1861, Ch. 21, pp. 131-2, an appeal lies from any order made upon demurrer to any pleading in the action, whether such an order does or does not contain leave to amend or answer the pleading demurred to—changing the rule in *Cummings v. Heard*, 2 Minn. 34. *St. Paul Division No. 1 S. of T. v. Brown et al.*, 9 Minn. 151.

**563. Striking out portion of an answer.** An order striking out part of defendant's answer is appealable under Sub. div. 3, Sec. 1, p. 133, Laws 1861, which provides that an appeal lies from an order involving the merits of the action, or some part thereof. *Starbuck v. Dunklee*, 10 Minn. 168.

**564.**—An appeal lies from an order striking out of defendant's answer a general denial of all the allegations in the complaint, not expressly admitted. *Kingsley v. Gilman, impt'd, etc.*, 12 Minn. 515.

**565. Overruling demurrer, though appellant in default.** An appeal lies from an order overruling a demurrer, although the appellant was in default in the court below on the hearing of the same. *Hall v. Williams et al.*, 13 Minn. 260.

**566. Execution, orders setting aside and allowing an alias.** An order setting aside a sale on an execution issued by said court, vacating the sheriff's return thereon, and directing the issuing of an alias execution is an appealable order under Sub. div. 3, Sec. 11, Ch. 80 of R. S. *Tillman et al. v. Jackson*, 1 Minn. 183.

**567. Orders allowing after five years.** An appeal lies from an order allowing plaintiff to issue an execution after the lapse of five years from entry of judgment under Sub. div. 6, Sec. 1, p. 133, Law, 1861. *Entrop v. Williams*, 11 Minn. 381.

**568. Judgment, order compelling en-**

try of, after default, and before taking of proofs on reference. Plaintiff set up an equitable cause of action, and after judgment in his favor, on a demurrer to the answer he obtained a reference to take proofs in the case (after the defendant was in default, on an order of *respondeat ouster*). Before the referee reported, the defendant, on motion obtained an order of the court requiring plaintiff to enter up and perfect judgment *instantly* upon the demurrer aforesaid, without the referee reporting any proofs taken in the cause. *Held*, that plaintiff might appeal from such an order under Chap. 9, Sec. 12, S. L. of 1853, and that the order was erroneous, because by complying with it the plaintiff would, after taking his proofs, be taking *two final judgments* in the same cause. *Deuel v. Hanke*, 2 Minn. 50.

**569. Setting aside or opening.** An order setting aside an order opening a judgment, is appealable, under Sub. div. 5, Sec. 11, Comp. St., p. 622. *Marty v. Ahl*, 5 Minn. 27.

**570.—setting aside for irregularity in entry.** Where a judgment, is set aside on the ground of irregularity in the entry of judgment, the order is appealable. *Barcker v. Keith*, 11 Minn. 65.

**571.—refusal to set aside or vacate.** An order denying a motion to set aside and vacate a judgment is appealable under our statute, which authorizes an appeal from every order which passes upon and determines the positive legal rights of either party. *Piper v. Johnson et al.*, 12 Minn. 60.

**572.—opening thereof, after lapse of one year.** Although an order setting aside a judgment and allowing a defendant to come in and answer involves "the merits of the action," it is not appealable under Sub. div. 3, Sec. 8, Ch. 86, G. S., if made within one year from notice of judgment, it being discretionary with the court under Sec 105, Ch. 66, G. S., but when granted after the lapse of one year from notice of entry of judgment, it is appealable; for after that time the court had no

authority to grant the order. *Holmes et al. v. Campbell*, 13 Minn. 66.

**573. In proceeding to condemn land for railroad purposes, where the District Court denies a new trial.** In a proceeding to determine the amount of compensation due the owner of land for right of way of a railroad over the same, the owner appealed from the report of the commissioners to the district court. After verdict in that court, the railroad company moved for a new trial, which being denied, they appealed to the supreme court. *Held*, an appeal lies, it being a final order affecting a substantial right made in a special proceeding, under Sub. div. 6, Sec. 8, Ch. 86, G. S., distinguishing this from *McNamara v. Minn. Cent. R. Co.*, where a new trial was granted. *Minnesota V. R. R. Co. v. Doran*, 15 Minn. 230.

**574. Attachment, order vacating.** Under the amendment of 1856, pp. 12 and 13, allowing an appeal from an order granting or refusing a provisional remedy, an appeal lies from an order vacating a writ of attachment, changing the rule established in *Humphrey v. Hezlep*, 1 Minn. 239. *Davidson v. Owens et al.*, 5 Minn. 69.

**575. After an appeal from the judgment, a second appeal lies from an order made subsequently, refusing a new trial.** After an appeal from a judgment, the party moved the court for a new trial, on ground of newly discovered evidence, which being denied, he appealed from the order. *Held*, he could do so, as the appeal from the judgment would bring up for review nothing but what took place before its rendition. *Humphreys et al. v. Havens et al.*, 9 Minn. 318.

**576. Order granting a second trial to plaintiff in ejectment.** An order granting the plaintiff a second trial, in an action for the recovery of specific real property, under Sec. 5, Ch. 64, Comp. St. 595, is appealable. *Howes v. Gillett*, 10 Minn. 397.

**577. Receiver, order vacating appointment of.** The right to appeal from an order vacating an order appointing a receiver exists by virtue of the act of March

5, 1853, Sec. 12, which provides that all the statutory provisions authorizing appeals in civil actions and appeals in chancery, existing before the passage of this act, which are necessary and applicable, may be applied and used in appealing causes which, under this act, are intended to be confined to and called civil actions, and not by virtue of the general statute providing for appeals in civil actions; or the Act of 1856, allowing an appeal from an order granting or refusing a provisional remedy: hence 15 days time is allowed. *Folsom v. Evans et al.*, 5 Minn. 418.

**578. Order of District Court reversing order of court commissioner discharging prisoner on habeas corpus.** A court commissioner, on the return of a writ of *habeas corpus* before him, ordered the discharge of the prisoner. An appeal being made to the District Court, an order was made setting aside the order of discharge. *Held*, an appeal lay from the order of the District Court. *State v. Hill*, 10 Minn. 63.

**579. Peremptory mandamus.** The granting of the peremptory writ of mandamus is within the exclusive jurisdiction of the (District?) Court, and an order denying the same is appealable. *State ex rel. v. Churchill*, 15 Minn. 455.

*i. When an appeal does not lie.*

**580. Denial of an abstract proposition.** Where defendant demurred to the complaint, assigning two distinct grounds, and the court sustained the demurrer on one ground, but deciding the other ground insufficient—the defendant cannot appeal to this court to determine the correctness of the decision on the point held insufficient, as an abstract question of law—where the decision was in his favor generally—Chap. 25 Session Law, 1861, p. 136. *The Commonwealth Insurance Co. v. Pierro*, 6 Minn. 569.

**581. Case,—granting, or refusing leave to file case after the time.** An application for leave to serve a case after the time prescribed, is addressed to the favor of the court, and not based on any right. The

granting or refusal of such applications are not appealable. *Irvine v. Myers & Co.*, 6 Minn. 558.

**582. Costs on continuance, order for payment of.** Where the court granted a continuance on payment of plaintiff's costs for the term, the plaintiff, by the clerk, made the following entry: "This cause having come before the District Court at a regular term thereof, held at, etc., on, etc., and having been reached and called from the calendar in its order, defendant moved that said cause be continued until next general term; thereupon the court ordered that the case be continued, defendant paying costs of term to be taxed. Now on motion of S., Esq., attorney for plaintiff, it is ordered and adjudged by the court, that the plaintiff recover of the defendant D. & R. his costs, at this term of the court, taxes at \$26.49, in said action.

G. S. W., Clerk."

Such an entry is not a judgment, but simply an order for the payment of costs, under Sec. 11, p. 378, and Sec. 19, p. 627, Comp. St., and no appeal lies therefrom. *Fay v. Davidson*, 13 Minn. 298.

**583. Damages in laying out a road, assessment by county commissioners.** No appeal lies to the District Court from an assessment of damages, by laying out a road, made by county commissioners, pursuant to Chap. 68. G. L., 1865. The act allows no appeal, either from the assessment, or their decision locating the road, and the Comp. St., Sec. 17, Chap 7, as amended, 1862, G. L., p. 84, gives no appeal in this case, it not being a "claim" within the meaning of that statute. *Koenig v. County of Winona*, 10 Minn. 238.

**584. Damages caused by mill-dam, order appointing commissioners to assess.** An order appointing commissioners to assess damages, to be caused by a contemplated mill-dam, is not appealable. Sub. 6th of Sec. 11, Chap. 71, Comp. St., not giving that right. *Turner et al. v. Holleran et al.*, 11 Minn. 253.

**585. Evidence, order admitting or refusing on trial.** No appeal lies from an

order or ruling of the court, admitting or refusing evidence during the trial of a cause. Such rulings can only be reviewed on appeal from the judgment, or from an order denying a new trial, *Hulett v. Matteson*, 12 Minn. 349.

**586. Injunction, order granting, temporary.** No appeal lies from an order allowing a temporary injunction—following *Hoffman et al. v. Mann*, 11 Minn. 364. *Schurmeier v. The First Div. St. Paul & Pacific R. R. Co.*, 12 Minn. 351.

**587. Interlocutory orders.** On a bill praying for dissolution of co-partnership, granting of injunction, etc., an order allowing defendants to plead an agreement which purported to settle dispute, and an order dissolving injunction—such orders are both *interlocutory*, and not the subjects of an appeal under the organic act of the Territory. *Choteau v. Rice*, 1 Minn. 24.

**588. Judge, decision of, on trial without jury.** No appeal lies from the decision of a Judge on a trial before him, without a jury—must perfect judgment, and appeal from that—following *Ames v. Minn. Boom Co.*, 8 Minn. 470. *Von Glahn v. Sommer*, 11 Minn. 203.

**589. Judge at chambers, ex parte order of.** No appeal lies from an *ex parte* order of a Judge of a District Court at chambers, under Sec. 11, Chap. 71, Comp. St., as amended 1861, which provides that an “appeal may be taken to the Supreme Court, or brought there from another court.” *Hoffman et al. v. Mann*, 11 Minn. 364.

**590. Judgment, order opening.** An order below, opening a judgment, is not an order “involving the merits of the action,” nor does it fall within “summary applications in an action after judgment” in the sense of Sub. Div. 6, Sec. 12, Comp. St., p. 621-2, hence not appealable. *Westervelt v. King et al.*, 4 Minn. 320.

**591.**—An “order setting aside the judgment, opening the default, and setting aside the verdict of a jury,” under Sec. 94, Comp. St., p. 544, is not appealable—it being discretionary with the Judge—and is not “an order granting a new trial,” with-

in the meaning of Sec. 11, Comp. St., p. 621. *Myrick v. Pierce*, 5 Minn. 65.

**592.—setting aside.** Motions to set aside judgments, under Sec. 94, Comp. St., p. 544, are addressed to the discretion of the court, and orders thereon, where no abuse of discretion exists, are not appealable. *Jorgensen v. Boehmer et al.*, 9 Minn. 181.

**593.—order granting motion for.** No appeal lies from an order made in the course of the trial of an action, granting a motion for judgment; the appeal must be from the judgment, or from the order on a motion for a new trial. *Lamb v. McCanna*, 14 Minn. 513; *Rogers v. Holyoke*, 14 Minn. 514.

**594.—opening judgments.** Under Sec. 94, p. 544, Comp. St., where a party had notice of a judgment against him in Jan., and waited till the following June before taking any steps to be relieved against it; *Held*, the application was addressed to the discretion of the court, and not appealable, and the delay amounted to neglect—following *Myrick v. Pierce*, 5 Minn. 65. *Groh v. Bassett*, 7 Minn. 325.

**595. Motion, order refusing to entertain.** No appeal lies from a refusal of the District Court to entertain a motion. *Mayall et al. v. Burke et al.*, 10 Minn. 285.

**596. Non-suit, granting motion for.** The court sustained a motion to non-suit, and ordered orally that the action be dismissed, and defendant recover his costs and disbursements. Plaintiff appealed from such order and judgment, without having a regular judgment entered by the clerk. *Held*, not appealable; a formal judgment should have been entered, and the appeal taken from the judgment. *Hodgins et al. v. Heaney*, 15 Minn. 185,

**597. New trial, granting and allowance of former deposition.** An order granting a new trial before a referee was so modified, on motion, as to allow depositions taken and used in the first trial to be used on the second. *Held*, not to be an appealable order under the statute, and the granting of it was discretionary. R. S., p. 414, Sec. 11,



as amended 1856, p. 12, Sec. 18, Sub. Div. 3, does not refer to such order. *Choteau Jr. v. Parker*, 2 Minn. 118.

**598.—order granting.** The Revised Statute of Minnesota, Sec. 11, p. 414, 1849, does not authorize an appeal from an order of a District Court setting aside a judgment, or the report of a referee, and awarding a *new trial*. The statute denies an appeal from any judgment or order, which, in effect, retains the cause for a further hearing in court below. *Choteau et al. v. Rice et al.*, 1 Minn. 121.

**599.—order dismissing action, when.** No appeal lies from an order of the District Court, dismissing an action before trial on application of the plaintiff, under G. S., Chap. 86, Sec. 8, Sub. 5. *Jones v. Rahilly*, 16 Minn. 176.

**600.—order granting, on proceedings to determine compensation for railroad right of way.** Where, on the trial, in the District Court, of an appeal from the award of commissioners appointed to assess the damages caused by laying out a road, the verdict of the jury was set aside, and a new trial granted; *Held*, no appeal lay to the Supreme Court, under Chap. 86, Sec. 8 G. S., Sub. 6, it not being a *final* order in a special proceeding, nor under any statute. *McNamara v. Minnesota Central R. Co.*, 12 Minn. 388.

**601. Pleadings, order overruling or sustaining demurrer.** An order of the District Court, overruling or sustaining a demurrer, is not an appealable order, but a *judgment* which must be perfected before an appeal lies. *Cummings v. Heard*, 2 Minn. 34.

**602.—order refusing permission to amend.** An order refusing permission to amend a pleading, is not appealable, it being discretionary with the the court. Decisions on matters of discretion are not reviewable, except in cases of manifest abuse or express statute, and then only by writ of error or an appeal from the judgment. *Fowler et al. v. Atkinson*, 5 Minn. 505.

**603.—order allowing supplemental complaint, and refusing to dismiss garni-**

**shee.** An order allowing a supplemental complaint, under Sec. 12, of the garnishee act of 1860, nor an order denying a motion to dismiss a garnishee, on the ground that the affidavit on which the garnishee summons issued, does not state in what capacity the garnishee is sought to be charged; whether as debtor or possessor of money, property, or effects, are not appealable, under Sec. 11, Comp. St., p. 621. *Prince v. Hendy*, 5 Minn. 347.

**604.—order striking out portions of an amended answer.** No appeal lies from an order striking out portions of an amended answer, where the same was "irrelevant, redundant, not in conformity with the statutes, as containing the evidence of facts, and not the allegations of material facts, and as having been in substance previously struck out of defendant's answer, on motion," where no abuse of discretion on the part of the court is shown, as by striking out facts constituting meritorious defense, and well pleaded; and even where such facts are struck out, if they are so mingled with immaterial allegations as to make it difficult, if not impossible, to separate them and leave an intelligible answer. *Brisbin et al. v. American Express Co.*, 15 Minn. 43.

**605.—order denying motion for judgment on the pleadings, for insufficiency of facts, etc.** No appeal lies from an order denying a motion for judgment on the pleadings, on the ground that the complaint does not state facts sufficient to constitute a cause of action, under Sec. 8, Chap. 86, G. S. An order from which an appeal lies under this clause of the statute, must be decisive of the questions involved, or of some strictly legal right of the party appealing—in this case the party was not prejudiced from raising the point at a subsequent stage of the proceedings. *McMahon v. Davidson, impleaded, etc.*, 12 Minn. 357.

**606. Proceedings supplemental to execution.** In proceedings supplementary to execution, neither an order requiring defendant to appear and answer, or an order

directing a referee to take the answer, are appealable orders, under Sec. 11, Chap. 71, Comp. St., p. 621-2, sub. div. 6. *Rondeau v. Beaumette*, 4 Minn. 224.

*j. What is reviewable.*

**607. New trial, order refusing, will be reviewed, though judgment below has been entered, if the case properly presents it.** Under Sec. 7, Comp. St., p. 621, on an appeal from judgment, the Supreme Court will review an order refusing a new trial, where the record contains all that is necessary for that purpose—although judgment has been entered below. If the *case* on which the motion for a new trial was made, is improperly of record motion to strike out would be proper, and not to dismiss the appeal. *Mower et al. v. Hanford et al.*, 6 Minn. 535.

**608. Exception, failure to take below.** When evidence is excluded by the court, and no exception taken, it will be understood that the party acquiesces in the decision, and waives the evidence—and this, whether the error is assigned on a case, or bill of exceptions. *Roehl et al. v. Baasen*, 8 Minn. 26.

**609. Objection, failure to take below.** An objection to a pleading as defective, must be made at the trial to be heard on appeal. *Howland v. Fuller*, 8 Minn. 50.

**610. Referee's report direct, from the judgment.** The report of a referee is subject to review by the Supreme Court, on a direct appeal from the judgment rendered thereon, without the necessity of making an application to the court, out of which the reference issued for its revision or correction through the medium of a new trial or otherwise, under our statutes, Sec. 54, p. 564, Comp. St. *Cooper v. Breekenridge*, 11 Minn. 341.

**611. Harmless errors.** An appellant can not object to evidence as *hearsay*, where the same was brought out by himself on cross-examination, though the same is matter in chief. *Shelley, et al. v. Lash*, 14 Minn. 498.

**612. Merits will be reviewed, though the judgment was for costs, instead of the usual form.** Defendant entered judgment for costs simply, when they were entitled to enter a judgment on the merits in the usual way. *Held*, the omission to insert in the judgment that the defendants go without day, or words to that effect, does not affect the substantial rights of the plaintiff—it is a substantial compliance with the law (Sec. 107, Chap. 66, G. S.) and an appeal therefrom would authorize the appellate court to review and adjudicate the merits of the case, as fully as if a formal judgment had been entered in the action. *The Aetna Insurance Co., v. Swift et al.*, 12 Minn. 437.

*k. Principles of determination.*

**613. Confined to the record.** Questions arising upon rulings of a referee, can not be examined on appeal to this court, unless strictly of record, or are presented by case or bill of exceptions. *Bazill v. Ullman*, 2 Minn. 134.

**614. Pleadings, sufficiency of.** When plaintiff enters judgment by default below, an objection by the defendant on appeal that the complaint does not state facts sufficient to constitute a cause of action, will not be favored, especially when *first* made in the Supreme Court; such objection when originally made upon appeal, should be treated with less consideration than a motion in arrest of judgment, and that is not allowed when the facts material were alleged or fairly inferable from what was alleged. *Smith v. Dennett*, 15 Minn. 81.

**615. Judicial notice of transaction in the Supreme Court.** The defense being "former suit," pending, it appeared that, March 26, 1866, issues of fact and law had been joined in said suit, the latter of which the plaintiff had carried, by appeal, to the Supreme Court, the former remaining undetermined in the District Court, when on said day the plaintiff discontinued the action in the latter court, no mandate or remittitur of the Supreme Court having

been on file to show any determination of the issues in the latter court. The court below found that this discontinuance was prior to the commencement of this action, and decided that said "former suit," was not pending. *Held*, the court will take judicial notice that the issues in said former action had been determined, and were not pending therein, when this action was commenced, and consequently uphold the decision of the court below. *Thornton v. Webb et al.*, 13 Minn. 498.

**616. Presumptions as to correctness of instructions.** When it is claimed by appellant, that his evidence had no tendency to prove the state of facts assumed by the instructions of the court, but there was evidence of the other part sufficient to support the verdict, it can not be objected that the result showed the jury were misled into such a belief; hence, not objectionable on that ground. If appellant feared any such misapprehension, he should have requested a more specific instruction, and on bill of exceptions which does not purport to give the charge in full, it is to be presumed that other instructions, sufficiently explicit to prevent such misapprehension, were in fact given. *Connolly v. Davidson, et al.*, 15 Minn. 519.

**617.—as to error.** On bill of exceptions, the appellant must show affirmatively, the existence of error, before he can be relieved. *Day et al. v. Raguet et al.*, 14 Minn. 273.

**618. Appeal from order granting or refusing new trial, examined as res nova.** On appeal from an order granting or refusing a new trial, the question is presented to this court, and should be considered and determined as though the application was made here in the first place—the decision of the court below should *not* have the least influence upon the decision here. Nothing is presumed in favor of the decision below, except, perhaps, when it is based upon oral testimony taken in open court. *Brazil v. Moran et al.*, 8 Minn. 236.

**619. Questions of fact under act of March 3, 1855, concerning disputes be-**

**tween claimants to land, entered under town site act.** In examining questions of fact under the act of March 3, 1855, the appellate court must pass upon all the questions and conclusions of fact as well as law, and make a final disposition of the case, except where facts have been passed upon by a jury, when a new trial may be directed. *Castner v. Echard*, 6 Minn. 149; *Castner v. Lowry*, 6 Minn. 149; *Castner v. Gunther*, 6 Minn. 119.

**620. On motion for new trial, opinion of judge as to sufficiency of the evidence to sustain the verdict, considered.** On appeal from an order granting a new trial the opinion of the presiding judge upon the sufficiency of the evidence to justify a verdict, is entitled to great weight with the Supreme Court. If upon a careful perusal of the testimony, and upon mature reflection, we feel satisfied that the preponderance of the evidence is manifestly and palpably in favor of the verdict, the order will be reversed. *Hicks v. Stone et al.*, 13 Minn. 434.

**621. Attachment, order vacating, where affidavits conflict.** An appeal from an order vacating an attachment, will be sustained when the affidavits of both parties used on the motion conflict seriously, as to the facts, and nothing shows a manifest error in the decision of the court below. *Blandy v. Raguet*, 14 Minn. 243.

#### l. Relief granted.

**622. After remittitur, no final judgment in this court.** When an order of reversal has been made in the Supreme Court, and an order remanding the case to the District Court, at instance of the appellant, it is too late for him to move this court for final judgment, on the ground of the decision having disposed of all the issues—the case is no longer in this court for action. *Gerish & Brewster v. Pratt & Bunker*, 8 Minn. 106.

**623. After an award of new trial, on subsequent appeal from judgment, the latter was vacated.** Where an appeal had

been taken from an order denying a new trial, and a separate appeal from the judgment entered, after the order refusing a new trial, and the Supreme Court awarded a new trial, the judgment below and all subsequent proceedings were vacated. *Minn. Valley R. R. Co. v. Doran*, 15 Minn. 240.

### III. ON WRIT OF ERROR.

#### a. Who must bring.

**624. All must join.** All parties against whom judgment was rendered, must unite in bringing writ of error. *Babcock & Hollinshead v. Sanborn & French*, 3 Minn. 141.

#### b. Time for suing out writ.

**625. When it begins to run.** The time to sue out a writ of error begins to run from the actual decision of the court that tries it, and not the perfecting that decision by record, and where a demurrer was overruled with leave to answer, the judgment was conditional, until the expiration of the time, after which it was consummate—following *Furlong v. Griffin et al.*, 3 Minn. 207. *Haines v. Paxton*, 5 Minn. 442.

**626.**—In an action for equitable relief, the period in which a writ of error can be sued out, commences to run from the date of the decree determining the rights of the parties, although a reference is necessary to determine some incidental matters—following *Furlong v. Griffin et al.*, 3 Minn. 207. *Ayer v. Termatt*, 8 Minn. 96.

#### c. Effect of the writ.

**627. Stays further proceedings.** Under Sec. 25, pp. 623-4, Comp. St., the issuing a writ of error, filing bond and service of clerk's certificate on the sheriff holding an execution, stays all further proceedings, but does not annul what has been done, so as to require the officer to return property already levied upon. *The North Western Express Co. v. Peter Landes*, 6 Minn. 564.

#### d. Papers on writ of error.

**628. What papers the writ brings up.** A writ of error brings up only the record of the judgment in the court below, and that record—in the absence of a bill of exceptions duly signed—consists only of the pleadings, verdict and judgment, and in case of judgment by default, the process and proceedings thereon, showing whether or not the court had jurisdiction. *St. Anthony Mill. Co. v. Vandall*, 1 Minn. 250.

**629. Bill of Exceptions.** The only way to incorporate the evidence, or any part of it, into the record, so as to review on writ of error, the question of law arising thereon, is by bill of exceptions. *1b.*

#### e. When the writ lies.

**630. Generally.** Under Chap. 81, R. S., actions can be removed from the district court to the supreme court only by appeal or writ of error, and after final judgment, the party aggrieved may elect. If the grievance rests in an appealable order, and not in a final judgment, it can only be reviewed by appeal. *Ames v. Boland et al.*, 1 Minn. 366.

**631. Adjustment of costs by district judge.** Although the statute has provided no means for reviewing the action of the clerk, in the matter of inserting costs in a judgment, still the party aggrieved may move to correct his acts in court, and the action of the district court in such a case can be reviewed on writ of error. *Andrews v. Cressey*, 2 Minn. 74.

**632. When judgment was obtained, without service of summons.** When a judgment has been obtained against a defendant, over whom the court never had jurisdiction, by reason of failure to serve summons, a writ of error lies at his instance to reverse such judgment. *Sullivan v. Lacrosse and Minnesota Steam Packet Co.*, 10 Minn. 386.

**633. Judgment in default—defects in pleadings.** Writ of error lies to this court from judgment on default, but not looked on with favor. When the defect is in the

pleadings, it would seem reasonable that no objection could be made in this court, not demurrable under the old practice, or those specified in Sec. 65, p. 337, R. S. *Karns v. Kunkle*, 2 Minn. 316.

**634. Judgment on default.** Writ of error lies to a judgment entered on default—following *Karns v. Kunkle*, 2 Minn. 313. *Kennedy v. Williams*, 11 Minn. 314.

**635. All final judgments.** A party noticing a motion may, if his opponent make default, take his order, but he takes it at his peril, and must see to it, that his proceedings are regular, and that he takes no more than he is entitled to by the record or practice. If the judgment is final, and not sustained by the record, a writ of error lies. *Farrington v. Wright*, 1 Minn. 244.

**636.**—The case of *Moody v. Perkins*, 1 Minn. 401, which decides that all final judgments may be removed to this court by writ of error, is doubtless the proper construction of Sec. 2, Ch. 81, R. S. *Karns v. Kunkle*, 2 Minn. 313.

**637.**—A writ of error will lie to any final judgment, whether in an equitable or legal action. *Kent v. Chalfant*, 7 Minn. 487.

*f. When the writ does not lie.*

**638. Does not lie to an order.** Writ of error does not lie, under the statute (Sec. 2, p. 621, Comp. St., and Sec. 22, p. 623, *Ib.*), to bring up an order, but a judgment, and is limited to one year after rendition. An order can be reviewed only on appeal. *Gerish & Brewster v. Johnson*, 5 Minn. 23.

**639. An order striking out a demurrer to a reply,** cannot be reviewed on writ of error—following *Coit v. Waples et al.*, 1 Minn. 134. *Wakefield v. Spencer*, 8 Minn. 376.

**640. Court Commissioner.** Writ of error will not lie direct from this court to a court commissioner. Relief against his acts must be first sought in the district court. *Gere v. Weed et al.*, 3 Minn. 352.

**641. New trial, motion for.** The decision of the district court, on a motion for

a new trial, cannot be reviewed on error. *Coit v. Waples et al.*, 1 Minn. 134.

**642. Order dismissing an action.** Writ of error does not lie from an order of the district court, dismissing an action on motion of plaintiff, in behalf of either plaintiff or defendant. *Fallmans v. Gilman*, 1 Minn. 182.

**643. To review the clerk's assessment of damages.** An error in assessment of plaintiff's damages, on default by the clerk, cannot be reviewed in the first instance by this court on writ of error. EMMETT C. J., *dissenting in each case.* *Milwain v. Sanford*, 3 Minn. 175; *Willoughby & Powers v. Stanton, Sheldon & Co.*, 3 Minn. 150; *Slaughter v. Nininger*, 3 Minn. 150.

**644. After an appeal.** After an appeal from the judgment, no writ of error in the same action can be allowed. *Humphreys et al. v. Havens et al.*, 9 Minn. 318.

*g. What is reviewable.*

**645. Discretionary matters.** Length of time a jury shall be kept out, is a matter for the discretion of the court, and cannot be reviewed on error. *Coit v. Waples et al.*, 1 Minn. 134.

**646.** The statement in *Fowler v. Atkinson*, 5 Minn. 505, that an abuse of discretion may be reviewed by writ of error, was inadvertently made. Such error can only be reached by appeal from the judgment. *Fowler et al. v. Atkinson*, 6 Minn. 578.

**647. Error of fact,** as well as of law, may be considered on a writ of error. *Snow v. Hardy*, 3 Minn. 77.

**648. Referee's report.** On a writ of error, this court cannot review the findings of a referee on questions of fact. *Brainard v. Hastings*, 3 Minn. 45.

**649. No exception taken below.** When a party moved for judgment on the pleadings (defendant), and the motion was denied, but he took no exception to such ruling, the sufficiency of the complaint, as stating a cause of action, cannot be exam-

ined into, in the supreme court, on a writ of error; nor, if he has permitted a good cause of action to be proved without objection, when on proper exceptions it could not have been established, can he reverse the judgment on writ of error. *The City of St. Paul v. Kuby*, 8 Minn. 154.

**650. Excessiveness of damages.** On writ of error, the evidence not being brought up, no question can be entertained as to the excessiveness of damages. *Ib.*

**651. The admission of testimony irrelevant,** and concerning matters not in issue, without objection at the time, will not be corrected on a writ of error. *Dufovt v. Gorman*, 1 Minn. 308.

**652.** A defendant, by not objecting to the competency of evidence offered on the trial of the cause, may allow the plaintiff to cure many defects, which exist in his pleadings, and a verdict rendered, upon sufficient evidence so received, will not be disturbed on writ of error, if the complaint alone will sustain the verdict. *Daniels v. Winslow*, 2 Minn. 117.

#### *h. Relief granted.*

**653. Costs in court below.** Defendants below, could not, on a writ of error, obtain judgment for costs in the court below; that could only be done by motion to that court, and if refused, by appeal or mandamus, from this court. *Fallmans v. Gilman*, 1 Minn. 182.

#### *i. Dismissal of the writ.*

**654. When the order for judgment had been reversed, writ from such judgment dismissed.** A writ of error brought to review a judgment, entered in accordance with an order of the District Court, which order had been declared to be erroneous by this court, will be dismissed with costs. *Hawke v. Deuch*, 2 Minn. 58.

**655. Writ of error from judgement, after an appeal.** Writ of error from a judgment against appellant, entered by the clerk of the court, under order of the court,

on motion of appellant, will be dismissed, the court having no power to make the order. *Frazer v. Sherrard*, 6 Minn. 578.

**656. Want of ten days' notice.** Where a party fails to notify his adversary of the suing out of a writ of error, within ten days, as required by Rule 33, p. 7, 2 Minn. the writ will be dismissed, unless he shows some reasonable excuse, and ignorance is not such excuse. *Baker v. Terrell et al.*, 8 Minn. 195.

#### *17. Motions.*

**657. The notice, form, and contents.**

Where application for relief, concerning which the court is always open, and which is exclusively within the jurisdiction of a court, is noticed as before the judge of the proper court, it will be held sufficient, in the absence of special circumstances creating an exception. *Yale v. Edgerton*, 11 Minn. 271.

**658.**—An order to show cause in a matter exclusively within the jurisdiction of a court, cited the defendant "before the Hon. —, Judge of the District Court, for Ramsey County, at his chambers, etc." Held, the judge's chambers being mentioned as the place of hearing, does not characterize the business as chamber business, for the court may be held there, and in the absence of surprise or injury, it is sufficient. *Ib.*

**659.**—Time and place of hearing should be indicated. In ordinary motions the judge should be applied to for the appointment of date and place of hearing, unless it is to be made in term time; and although an order to show cause shortens the time, still, the time and place of hearing, should be indicated. *Marty v. Ahl*, 5 Minn. 27.

**660.**—in an adjoining district.

Where a motion is made in a district adjoining the district in which the action is pending, under Sec. 4, Chap. 67, laws 1867, it is not necessary to the jurisdiction, that the moving papers show that the place of hearing is not farther from the county

seat of the county in which the action is pending, than is the residence of the judge of the district, in which the action is pending, nor that the motion is made in time. The motion, although addressed to the judge, must be held to mean the court, and its jurisdiction is presumed. *Johnson v. Higgins*, 15 Minn. 486.

**661. Appearance at the hearing, waives irregularities.** Notice of motion was served for 1 o'clock P. M., an order to show cause in the same matter was served, also the copy served, placing the time at 10 o'clock A. M., the original being 10 o'clock P. M. Held, that the opposite attorney might have returned the notice as irregular, (viewing the two papers as separate applications) as no time had been appointed by the judge for hearing, under Sec. 44, Comp. St., 582—following *Smith v. Mulliken*, 2 Minn. 319—and had the right to regard the order as the only one he was bound to notice; but he could not attend at the time and place, hear all the papers read, and the motion made, and remain silent, making no objection, nor calling the attention of the court to the error—without waiving all irregularity. Whether he could have retained the motion papers, and disregarded the notice by not attending, *Query?* *Marty v. Ahl*, 5 Minn. 27.

**662. Evidence, additional, contrary to stipulation.** Where a stipulation has been entered into by attorneys to submit a motion on certain affidavits and other papers, it is error to allow additional papers to be submitted, while the stipulation is in force. *Shaw v. Henderson*, 7 Minn. 480.

**663.—supplemental.** After a motion has been signed and submitted, it is error for either party, without leave of court, or opportunity to the other side to be heard thereon, to submit supplemental proof by way of additional affidavits. *Dunnell et al. v. Warden et al.*, 6 Minn. 287.

**664.—affidavits always competent.** On motions, the court only needs to be advised of the facts, upon which the questions arise, and affidavits of parties familiar

with them, are always competent evidence, as well as exemplifications or sworn copies, duly compared. *Sherrerd v. Frazer et al.*, 6 Minn. 572.

**665. Relief granted.** When a party in his notice of motion served on the opposite party, asks for specific relief, and for such other and further relief or order as may be just, the court may afford any relief compatible with the facts of the case, presented—provided the opposite party is not surprised, or deprived of being heard in argument or showing proofs, as to the further relief granted. *Landis v. Olds et al.*, 9 Minn. 90.

**666. Second application on same facts.** When a motion is once denied, for any cause, technical, or on the merits, the defeated party must obtain leave from the court before he can renew it upon the same state of facts. *Irvine v. Meyers & Co.*, 6 Minn. 558.

**667.—**The rule laid down in *Irvine v. Meyers & Co.*, 6 Minn., p. 558, requiring leave to be granted from the court or judge before a motion for same relief, and on same state of facts, can be renewed, is observed by obtaining an order to show cause, and accomplishes the same object, namely, to protect the judge from being harassed with motions for same relief, on same grounds, without his consent. The order to show cause implies his consent. *Goodrich et al., v. Hopkins et al.*, 10 Minn. 162.

## 18. Orders.

**668. Orders to show cause, form and contents.** Orders to show cause why a motion referred to should not be heard at the time and place appointed, and less than eight days, may be made to fix the time and place as well as any other; but the better practice is for the order to contain all the requisites of the notice, and take the place of it altogether, or the moving papers contain all the facts, grounds of motion, papers to be read, etc., sufficient to enable the parties to prepare to oppose

it. And the judge may fix time and place of hearing, in one or two orders; and that in making such an order, it is the exercise of chamber powers, *i. e.*, as a judge, not as court; whether he signs it as *court* or not, and such an order may be made for any part of the state. *Marty v. Ahl*, 5 Minn. 27.

**669.—time for hearing discretionary with the Judge.** A “case” was proposed by the plaintiff, within the time granted by an order of the court, and returned by the other party for irregularities, whereupon the plaintiff obtained an order to show cause why the “case” should not be allowed, signed, and new trial granted thereon; said order was made *before* the expiration of the time allowed for amendments, and was returnable *after* that time. *Held*, the time for hearing the motion was discretionary with the Judge, and as the defendant had still opportunity of amendment, the error was not fatal. *Phoenix et al. v. Gardner et al.*, 13 Minn. 294.

**670.—eight days’ notice not necessary.** An order to show cause may provide that less than eight days’ notice shall be given previous to the hearing; Sec. 17, p. 627, Comp. St., applying only to motions. *Goodrich & Terry v. Hopkins & Busy et al.*, 10 Minn. 162.

**671.—subject matter, not signature of Judge, determines whether he acts as a court or at chambers.** An order to show cause during vacation at the clerk’s office, before the Judge, “at a special term,” to be held, etc., neither added to the powers of the judge, nor took away from them—he heard the motion as in chambers all the same—and this though he signed it as “By the court.” Classification of orders must always be made on the subject matter, and not upon the name by which they have been designated by the Judge or attorney. *Marty v. Ahl*, 5 Minn. 27.

**672.—an order setting aside a stipulation of dismissal, and reinstating cause on the calendar, an order of the court.** An order setting aside a stipulation between the attorney in a cause, whereby the

plaintiff has dismissed his action, and paid the clerk’s fees, reinstating the case upon the calendar, is one within the exclusive jurisdiction of a court, and an order of this kind, signed by the Judge of a proper court, although the hearing may have been at chambers, will under our statute, in the absence of special circumstances, creating an exception, be considered an order of the court. See *Yale v. Edgerton*, 11 Minn. 271. *Rogers v. Greenwood*, 14 Minn. 333.

**673. Order granting partial relief to both parties, binds one, though the other appeals.** An order extending time to answer, although contained in an order denying defendant’s motion to set aside the summons, is binding on plaintiff, notwithstanding defendant appeals therefrom—and plaintiff cannot enter judgment by default until the expiration of that term. *Yale v. Edgerton* 11 Minn. 271.

**674. Service, entry, filing, etc.** The service of an order of the court, overruling a demurrer, by copy on the attorney of the other party, before the same was filed, is, at most, an irregularity, and the defect was waived, by an admission of service. Under Sec. 226, Chap. 66, G. S., there is a wide distinction between an order and a direction for an order. If an order, the clerk, upon its being filed, must immediately pursue its terms; if a direction for an order, the order must be entered by the clerk, and then followed. *The Etna Insurance Co. v. Swift et al.*, 12 Minn. 437.

## 19. Amendments.

**675. Amending judgment roll—proof of service of summons.** Where judgment on motion has been entered, and on motion to vacate, it appeared that proof of service of answer was defective, the court had power, under Sec. 94, p. 544, Comp. St., to allow an amendment. *Dunwell et al. v. Warden et al.*, 6 Minn. 287.

**676.—pleading on the trial.** After plaintiff had rested his case, defendant moved to dismiss on the ground that no de-



mand or refusal had been alleged or proved. Plaintiff then asked leave to amend his complaint, by inserting an averment of demand, and introduce testimony to prove the same, all of which the court granted. *Held*, court had power to permit such amendments at any time during progress of trial, or receive further testimony—following *Beaulieu v. Parsons*, 2 Minn. 37; and *Fowler et al. v. Atkinson*, 5 Minn. 505. *Caldwell v. Bruggerman*, 8 Minn. 286.

#### 677. Amending prayer for relief.

Courts have power to permit a party who prays for pecuniary damages, when from the facts alleged he is only entitled to equitable relief, to amend his complaint so as to pray for and obtain the relief to which the facts show him entitled, as where the original complaint prayed for money judgment, and the amended complaint prayed that land might be conveyed in execution of a trust. *Holmes et al. v. Campbell*, 12 Minn. 221.

#### 678. Substituting different land.

Plaintiff claimed to recover damages to "lots 7 and 8, in block 182," from defendant, and was allowed on the trial to amend by inserting in lieu of that description the following, viz.: "lots 9 and 10, in block 181," there being no change in character of the claim, nor any prejudice to the defendant. *Rau v. The Minnesota Valley R. R.* Co. 13 Minn. 442.

#### 679. Conditional amendment.

The question of amendments is placed entirely within the discretion of the court, by Sec. 89 and 90, Comp. St., p. 544, except in two cases specified in Sec. 89. Under this provision, the court had power to require that as a condition, of allowing an amended answer, the defendant shall strike out one of two inconsistent defenses, and waive a written reply. *Caldwell v. Bruggerman*, 8 Minn. 286.

**680. Request to amend.** A request to "so amend the answer as to invoke the equitable power of the court," is insufficient—the request must show the particulars in which it is desired to amend. *Barker v. Walbridge*, 14 Minn. 469.

#### 681.—on appeal from justice's court.

On appeal from the courts of Justices of the Peace, the District Courts, under Sec. 107, Chap. 65, G. S., as amended, Chap. 93, Laws 1868, have the same power to allow amendments, as though the case had been originally commenced in such courts. *Bingham v. Stewart et al.*, 14 Minn. 214.

#### 682. Amending, as against strangers.

Under the lien law of 1855, (Session Laws 1855, p. 57,) party entitled to a lien on land commenced suit by filing a complaint, without having filed notice of lien, or claiming any lien on the premises, obtained judgment, and after entry of judgment, moved for permission to amend his complaint by adding to the prayer for relief a request that the judgment be decreed a lien on the premises. *Held*, that supposing a complaint was all the notice required by the statute, yet it was insufficient in not claiming a lien on the property, and specifying whether it was more than "one acre within city limits," or "40 acres outside of city limits, etc.," and the property having been sold, it was too late to create a lien on it in the hands of an innocent purchaser. *McCarty v. Van Etten*, 4 Minn. 461.

#### 683. Service of order of amendment.

It is not necessary that a party, who is allowed to amend his pleading, should first serve on the other party the order allowing an amendment. *Holmes et al. v. Campbell*, 12 Minn. 221.

**684. A writ of replevin, void ab initio,** is not amendable, under Sec. 105, Chap. 66, G. S. *Castle et al. v. Thomas et al.*, 16 Minn. 490.

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## PRE-EMPTION.

(See U. S. LAND.)

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## PRESUMPTION.

(See EVIDENCE, IV.)

## PRINCIPAL AND AGENT.

(See AGENCY.)

## PRINCIPAL AND SURETY.

- I. WHEN THE RELATION EXISTS.
- II. LIABILITY OF SURETY.
- III. SURETY'S RIGHTS AND REMEDIES.
- IV. SURETY, HOW DISCHARGED.
- V. CONTRIBUTION.

(See CIVIL ACTION, XXI.)

(See PLEADINGS, 62.)

(See LIMITATION OF ACTIONS, 12.)

(See HUSBAND AND WIFE, VII.)

## I. WHEN THE RELATION EXISTS.

**1.** S. and B. both applied to De'W. for a loan of \$2,000, both receiving the funds, it being distinctly agreed, between *the three*, that B. was to have one-half, while S. was to take the other half and give his individual bond and mortgage for *the whole debt*, but that B. should pay one-half according to the terms of S.'s bond. B., on good consideration, afterwards promised De'W. and S. to pay one-half the debt. *Held*, that S. was surety for B. to the amount of one-half the debt; and although the bond did not show it, that fact might be established by parol—that fact being collateral to the contract, and no part of it; and the fact that S. and B. afterwards formed a copartnership and invested this money in partnership property, did not change their relation to De'W., and that S. could, under Sec. 35, Ch. 72, Comp. St., compel B. to satisfy the debt to De'W., for which he was surety, the same not having been paid by B. *Metzner et al. v. Baldwin et al.*, 11 Minn. 150.

## II. LIABILITY OF SURETY.

**2.** Surety bound by payment to creditor, of interest over legal rate. When a

note is to draw interest from maturity at 4 per cent per month, and the maker pays any interest at that rate, a surety is bound by such payment. *Allen v. Jones*, 8 Minn. 202.

## III. SURETY'S RIGHTS AND REMEDIES.

**3.** Surety, on requesting principal to sue, must offer to indemnify the latter. Under the code, a surety who has taken the steps that entitle him to restrain the creditor from proceeding against him at law or equity, under the old system, may now avail himself of such acts as a defense to a civil action. But no such defense can be sustained unless it includes a request to sue the debtor, accompanied with an indemnity against loss the principal may thereby incur. *Huey v. Pinney*, 5 Minn. 310.

**4. Equity will compel creditor to first sue debtor on being indemnified.**

In equity, the relation of principal and surety casts a duty on the principal to obtain payment from the principal debtor, and not from the surety, unless the surety is unable to pay the debt, and will always protect the surety from any attempt by either the creditor or principal debtor, to deprive the surety of his right, and will interfere for good cause shown, and compel the creditor to sue the principal debtor before resorting to the surety—on condition, always, that the surety shall indemnify the creditor against loss from a fruitless suit against the principal debtor. *Ib.*

**5.** The request of a surety that the principal sue the debtor, need not be in writing. *Ib.*

**6. Surety may and should sue the debtor to compel a settlement.**

Under Sec. 35, p. 620, Comp. St., it seems that a surety has the power to sue the principal and debtor to compel the latter to pay the former, and he should exercise that right, and not demand that the principal should do so for him. *Ib.*

**7. Surety, on appeal bond, may avail himself of any defense the principal debtor may have.** On the face of an appeal bond, it expressly appeared that R., the judgment debtor, was principal, and the defendants, L. and R., sureties; and the condition of the bond (as per statute) was, that "the *appellant Rogers* will pay," etc. *Held*, sureties liable only on default of Rogers, and whatever defense the latter had to the bond as, *e. g.*, existing levy on property sufficient to satisfy the judgment—undisposed of—would inure to the benefit of the sureties. *First National Bank of Hastings v. Rogers et al.*, 13 Minn. 407.

**8. Surety, on appeal bond, may claim that judgment was satisfied when bond was executed.** An appeal bond recited the judgment and appeal, and was conditioned on the payment by appellant, etc. In an action against sureties, *Held*, they are not estopped from claiming that the judgment was satisfied at time of execution of the bond—it being a "generality to be done" within the rule that "if the condition to a bond contain a generality to be done, the party shall not be estopped to say there was not any such thing, but in all cases where the condition of a bond has reference to a particular thing, the obligor shall be estopped to say there is no such thing,"—the fact of judgment and appeal as recited not being disputed. *Ib.*

#### IV. SURETY, HOW DISCHARGED.

**9. Release, by creditor, of security.** If a creditor take a security from the principal debtor, sufficient to satisfy the debt, he does not hold it solely for his own benefit, but for the benefit of the surety also, and if he parts with it without communication with the surety, or by his gross negligence it is lost, that will operate, at least to the value of the security, to discharge the surety. *Willis v. Davis*, 3 Minn. 17.

**10.**—D. brought an action against W. as second, and F. as first indorser, on a promissory note owned by D. It appeared that, after the note became due, F., the first

indorser, with knowledge and consent of D., assigned to one Yates, property more than sufficient to pay the note, for the benefit of D., the holder. Yates accepted the trust and entered upon its discharge. Afterwards, with D.'s consent, Yates re-assigned the trust property to F., who then placed it beyond the reach of his creditors. This re-assignment to F. was without the consent or knowledge of W., the second endorser. *Held*, to discharge W. from all liability as surety. *Ib.*

**11.**—When a party recovers judgment against several defendants sustaining the relation of principal and surety, and levies upon property of the principal debtor sufficient to pay the judgment, and then releases the levy, without consent of the other defendants, (accommodation endorsers in this case,) whose liability is secondary, it will operate as a satisfaction of the judgment against them. *Moss v. Pettingile et al.*, 3 Minn. 217.

**12. Any act of creditor, injurious to surety.** If a creditor does any act injurious to the surety, or inconsistent with his rights, or if he omits to do any act, when required by the surety, which his duty enjoins him to do, and the omission proves injurious to the surety, the latter will be discharged. That which "the duty of the creditor enjoins him to do" refers to the duties which are imposed by law, and grow out of the relation of principal and surety. *Hence*, the payee of a promissory note is under no duty in law to see that the "note runs but a short time, in accordance with a verbal understanding," for the obligations arising from a written contract cannot be enlarged or lessened by parol. *Huey v. Pinney*, 5 Minn. 310.

**13.**—G., creditor of V., held as security a mortgage from plaintiff and V., of property owned by them as tenants in common; also a bill of sale of V.'s stock of goods. G., without the knowledge or consent of plaintiff, released to J. his bill of sale of the stock, which was more than sufficient to pay V.'s debt, and afterwards foreclosed the mortgage given

by plaintiff and V., and bid it in for the amount of his claim. *Held*, plaintiff was surety, and discharged by the surrender to V. of the bill of sale of the stock, and G.'s subsequent foreclosure of the mortgage as to the plaintiff's interest in the premises was void, and he took no title; nor did D., his assignee, after filing of notice of *lis pendens*, and plaintiff may bring this action to set the sale aside, after the sale as well as before. *Misener v. Gould et al.*, 11 Minn. 166.

**14.** An agreement affecting the rights of a surety, so as to affect his discharge, must be valid and enforceable at law. *Allen v. Jones*, 8 Minn. 202.

**15.** Acceptance of a note, payable at a future day. As between creditor and surety, it seems that the execution by the principal debtor, and the acceptance by the creditor, of a note payable at a future day, for and on account of the debt, would be *prima facie* a contract to extend the time of payment. *Agnew v. Merritt et al.*, 10 Minn. 308.

**16.** Existence of suretyship being unknown, an extension of time did not discharge the surety. The obligation resting on a creditor, not to extend time of payment to the debtor, without surety's consent, depends upon a knowledge on the part of the creditor of such relation existing: hence, where A. and wife made a joint note in favor of defendants, and secured the same by a mortgage on the wife's separate property, for money borrowed of defendants "for his individual use and benefit," (it not appearing that defendants knew that the money was for A.'s sole use) an extension of time to A. and wife, by defendants, will not release the wife's property from the lien of the mortgage; such notice will not be presumed, and must be proven. *Ib.*

#### V. CONTRIBUTION.

**17.** When a surety, after paying the surety debt, obtained judgment against the principal debtor, and a garnishee; lost

the judgment against the garnishee, but not against the debtor, *Held*, he could not compel contribution from a co-surety, without showing that he could not collect the judgment against the principal debtor. *Schmidt v. Coulter*, 6 Minn. 492.

**18.** Whether a surety can claim contribution against his co-surety, without showing insolvency of the principal, when the co-surety is sued alone, without the joinder of the principal—doubted. *Ib.*

#### PROHIBITION, WRIT OF.

**1.** Office of the writ. Writs of prohibition only arrest proceedings, and are not the proper remedy for redressing illegal acts, performed prior to its being issued. *Dayton et al. v. Paine et al.*, 13 Minn. 493.

**2.**—The office of the writ of prohibition is not to correct errors, or reverse illegal proceedings, but to prevent or restrain the usurpations of inferior tribunals or judicial officers, and to compel them to observe the limits of their jurisdiction. *Ib.*

**3.**—restrains judicial proceedings only. The common law writ of prohibition is usually issued to restrain courts from going beyond their jurisdiction, and is issued to the court and prosecuting party, commanding the former not to entertain, and the latter not to prosecute the action or proceeding. It is seldom granted to restrain the proceedings of other bodies or officers. Whether it were issued to another body or not, it is clear that it is only issued to restrain the exercise of *judicial* powers—our statute confirms the use of the writ, but does not change the common law in respect to its use. *Home Insurance Co. v. Flint*, 13 Minn. 244.

**4.** Practice. At common law, the writ of prohibition is directed to the Judge and parties of a suit in an inferior court, commanding them to cease from the prosecution thereof. Our statute provides that the writ shall be served upon the court and party, or *officer*

to whom it is directed, etc. Hence, perhaps, this remedy is allowed in this State, for the purpose of arresting the proceedings of an officer who is not acting strictly as a court; but if so, the office of the writ is, nevertheless, only to restrain the exercise of judicial powers. If the writ run to such an officer, he is required to make a return thereto, upon which issue is joined; and if it runs to a court and prosecuting party, a return is made by the court, the party as such not being required or permitted to make return. He may, but need not, adopt the return of the court, and whether he does or not, the question to be determined is, whether the court is to be restrained. The party is only restrained from moving the court to do the prohibited acts, and therefore, as a matter of course, unless it is determined that the court shall be restrained, he cannot be. His acts in prosecuting the suit are the only subject of inquiry in such proceeding, for the writ only arrests judicial acts, and what he does, or threatens to do, except in moving the court in the prohibited direction, is immaterial. *Dayton et al. v. Paine et al.*, 13 Minn. 493.

5.—The writ of prohibition will only issue from this court in the first instance as an order to show cause, to which a return may be made, and the return controverted by affidavits as in other motions. *Prignitz v. Fischer*, 4 Minn. 366.

6. The mere fact that a motion has been noticed before a court commissioner, in a matter over which he has no jurisdiction, will not authorize this court in granting a writ of prohibition—it must appear that he is about to proceed to hear the motion, by setting out some acts or declarations showing such an intention. *Ib.*

7. The law of March 9, 1867, regulating insurance companies, requires the county attorney "to examine into the financial condition of such company, and if, in his opinion, such company does not possess the amount of capital or assets on hand, according to the requirements of law, or in other material things is not complying with the law, he shall so certify to the State Treasur-

er." Held, the duties thus imposed upon the county attorney are not *judicial*, and cannot be restrained by writ of prohibition. *Home Insurance Co. v. Flint*, 13 Minn. 244.

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## PROMISSORY NOTES.

(See NOTES AND BILLS.)

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## PROTEST.

(See NOTES AND BILLS, IX.)

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## PROVOCATION.

(See CRIMINAL LAW, 48.)

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## PUBLIC PRINTING.

1. The Gen. Laws of 1856, p. 24, Sec. 4, do not include the printing of the debates, etc., of the constitutional convention of 1857. *Goodrich v. Moore*, 2 Minn. 65.

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## PUBLICATION OF NOTICE OF SCHOOL MEETING.

(See EVIDENCE, 154.)

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## PURCHASER PENDENTE LITE.

(See JUDICIAL SALES, 8.)

1. A purchaser *pendente lite* is bound by the proceedings in the action, though it was prosecuted to judgment in the name of

the assignor, and cannot deny the existence of any of the facts upon which the decree was based. *Rogers v. Holyoke*, 14 Minn. 220.

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## QUANTUM MERUIT.

(See EVIDENCE, 177.)

(See CIVIL ACTION, IX, 5.)

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## QUIT-CLAIM DEED.

(See DEEDS, X.)

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## RAILROADS.

### I. GENERALLY.

### II. DUTIES AND LIABILITIES TO OWNER OF CATTLE, KILLED ON ITS TRACK.

### III. COMPENSATION TO BE PAID FOR RIGHT OF WAY, AND RULES FOR DETERMINING THE SAME.

(See COMMON CARRIERS.)

(See CONSTITUTIONAL LAW.)

(See CORPORATIONS.)

### I. GENERALLY.

**1. Power of Legislature to establish police regulations.** Sec. 4, Chap. 19, Laws of 1862, and Sec. 4, Chap. 10, Laws of 1865, are mere police regulations concerning the Winona & St. P. R. R. Co., and valid as such. *Winona & St. P. R. Co. v. Waldron et al.*, 11 Minn. 515.

**2. Construction of charter as to location of route.** Railroad charters that do not directly express the contrary, must be taken to allow the exercise of such discretion in the location of the route, as is incident to an ordinary practical survey of the same, made with reference to the nature of

the country to be passed over, and the obstacles to be encountered or avoided. *Southern Minn. R. R. Co. v. Stoddard*, 6 Minn. 150.

**3. What is "any other road," where a whistle is to be blown or bell rung?** Sec. 24, of the charter of the First Div. of the St. Paul & P. R. R. Co., requiring a bell to be rung, or whistle blown where their road crosses "any other road," relates to highways or public thoroughfares. *Locke v. First Div. St. Paul & P. R. Co.*, 15 Minn. 350.

### II. DUTIES AND LIABILITIES TO OWNER OF CATTLE, KILLED ON ITS TRACK.

**4. Failure to ring bell, etc., at crossing, not negligence, as to cattle wrongfully on the track.** Where plaintiff's cow was killed by defendant's passing train, while standing on a road which crossed the railroad, at which the defendants were bound to ring a bell or blow a whistle, but failed to do either; still, the cow being wrongfully there, defendants are not liable, unless, *after discovering* her peril, the defendants could have avoided striking her. *Id.*

**5. Company bound to use reasonable care only, as towards animals wrongfully on its track.** If domestic animals are on the track of a railroad, by the fault of the owner, such owner takes all reasonable risk of their being injured. The railroad company however, are not on that account authorized to injure them wilfully, or carelessly. Even in driving off animals trespassing upon one's land, reasonable care must be used. The company in such case is bound to use reasonable care to avoid injuring them, and may not carelessly run over them, though they are not bound to presume they are on the track, but finding them on the track, the company should make such efforts as a prudent man would, if he owned both train and cattle, properly regarding both train and cattle. *Id.*

**6. The engineer is under no duty to the owner of cow, wrongfully on track, to look ahead.** Where plaintiff's cow, being wrongfully on defendants' track, was killed by a passing train, and the openness of the country rendered it practicable to have avoided the injury, had the engineer been on the lookout, still the engineer was not bound to presume the cow would be there, but might presume the plaintiff would keep her at home where she belonged, and he owed no duty to plaintiff to look ahead to see where his cow was, and while his duty to the passengers would have required him to be watchful against damage to them, still with that obligation and its extent, plaintiff is not concerned. *Id.*

**7. Absence of fence does not increase the degree of care required of a road, as to cattle wrongfully on its track.** A railroad that has not fenced its track, nor is required by law to fence it, is not, on that account, as against cattle unlawfully on its track, to be held to greater care than though its track was fenced. *Id.*

**8. Presumption as to engineer looking ahead.** When plaintiff's cow was killed by defendants' passing train, supposing it was the duty of the engineer, as toward plaintiff, to look out for the cow, the presumption is that he did look out, and saw whatever there was to be seen; and if the facts show that he could have seen her sixty rods from where she was found dead, it only tends to prove that the engineer must have seen the cow at sixty rods off, during all the time that he was passing over that distance, either on the track or coming towards it, and almost upon it—if she was there, but it is as likely that she did not start towards the track, till the train was so near that collision was inevitable. *Id.*

**9. Owner of cow, wrongfully on track, has the onus of proving carelessness after the cow was discovered—such killing no proof of negligence.** Plaintiff allowed his cow to go at large, at a season of the year when the law, both common and statutory, forbade him to do so, in consequence of

which she went upon defendants' track, and was killed by defendants' cars. *Held*, the burden on plaintiff to show a killing, by careless management of the train, after those in charge had discovered her peril, that is, an omission on part of defendants to do something to avoid striking her, which they might prudently have done with reference to the safety of the train, as well as the cow, and which, if done, would have been effectual to prevent the collision, for if not practicable by any prudent effort to avoid striking her, there was no carelessness in omitting it. That the train killed the cow had in this case, she being there through plaintiff's fault, no tendency to prove any carelessness in defendants. *Id.*

**10. Company owes no duty towards owner of cow, wrongfully on its track as to the management and speed of its train, except reasonable care after discovering her.** The owner of an animal who has not kept it within his own enclosure, when he might have done so with proper care, can not require a railroad company to regulate the management and speed of the train, with reference to such animals, coming upon its track; and the burden of proof is on him to show that the train was carelessly managed, after the peril of the animal was discovered. *Id.*

### III. COMPENSATION TO BE PAID FOR RIGHT OF WAY, AND RULES FOR DETERMINING THE SAME.

**11. Owner of land not absolutely entitled to value of strip taken, in money.** In determining the compensation due to a person for land taken by a railroad corporation, the owner is not entitled under all circumstances to compensation *in money* for the actual value of the land taken. The damages sustained are a unit, and comprise the value of the land and resulting injuries, and against their aggregate amount is to be recouped the benefits accruing to the owner, although those benefits should be the full amount of the ag-

gregate damage he had sustained. *WILSON, C. J., dissents. Winona and St. P. R. R. Co., v. Waldron et al.*, 11 Minn. 515.

**12. Value per acre, of strip taken at time of taking, and the effect upon the whole farm to be estimated.** In arriving at the compensation which should be paid for the appropriation of land for the purpose of a railroad, the payment of the value of the strip taken by the acre, and by itself, is not sufficient; to that must be added the effect of the appropriation on the whole farm—hence, it is necessary to ascertain the limits of the farm—also the additional expense rendered necessary for fencing purposes, and the value of the strip taken must be at the time of the assessment, not at the time of occupation by the railroad. *Winona and St. Peter R. R. Co., v. Denman et al.*, 10 Minn. 267.

**13. General benefits shared by the owner, in common with the neighborhood, not to be considered.** In ascertaining the “compensation” or damages to which the owner of land is entitled from a railroad for land taken by them—in the absence of statutory provision—general benefits arising from the construction or operation of the railroad, shared by the owner in common with the whole country in his vicinity, and not peculiar to him or other lands not actually crossed by the road, can not be considered, *e. g.*, such benefits as he would receive if the railroad was constructed through the country, but not crossing his farm. So, if the farm would sell for as much with the road constructed through it, *less the value* of the land actually taken, as it would bring if the road ran through the country but not crossing this farm, then the owner has sustained no damages whatever; if it will not sell for as much, the reduction in the market value of the lands not taken is the measure of the owner’s damages. *Winona and St. P. R. R. Co., v. Waldron et al.*, 11 Minn. 515.

**14. Cost of constructing additional fencing to be considered.** In the absence of different statutory legislation, where a railroad company passes through improved

lands, the cost of constructing additional fencing, rendered necessary by the road is a proper element of damage to the owner of the land taken, *in invitum*, for the purposes of the road. But when the company, whether as a condition or limitation of its right to take land for its road, or as a police regulation, is required by statute to construct such fences, the damages for taking the land, should be assessed upon the basis of the construction of such fences by the company, in accordance with the statutory requisition. *Ib.*

**15.** In determining the “compensation” to which the owner of land taken by a railroad is entitled, it is proper to ask a witness “in what manner the road runs through the land, and in what manner is the market value of the farm injured by the road.” *Ib.*

**16.** In arriving at the “compensation” to which the owner of land is entitled by reason of the same having been taken for railroad purposes it is competent to show the “market value per acre of the land” at the time it was taken, following *Winona and St. Peter R. R. Co., v. Denman*, 10 Minn. 267. *Ib.*

**17.** The rule for arriving at the “compensation” due the owner of land taken for railroad purposes, as laid down in *Winona and St. Peter R. R. Co., v. Waldron*, 11 Minn. 538, followed and applied in *The Minnesota Central R. R. Co., v. McNamara*, 13 Minn. 508.

**18. Owner can not prove damages to a distinct farm, through which the road does not run.** When on the trial of an appeal from the report of commissioners, the owner introduces evidence of title and damages to land not embraced in the petition or report, and the testimony shows beyond a reasonable doubt, that the land in the petition and report, and the other land do not constitute together one farm, but two distinct farms, the court should instruct the jury to consider them as two distinct and separate farms. *Minn. Valley R. R. Co., v. Doran*, 15 Minn. 230.

**19. What constitutes a distinct farm.**



For a statement of facts which were held to show that two pieces of land owned by the same person, and adjoining, were not one farm, so as to make a railroad company take notice of damages sustained by both such pieces, by reason of the road passing through one of said pieces, where no special notice of a claim for damages to both pieces had been given by the owner, and but one of the pieces had been included in the petition for the appointment of commissioners, see *Ib.*

**20. When the commissioners, and court on appeal, will not be confined to estimating damages to land embraced in the petition.** In proceedings to assess damages to land taken for railroad purposes, neither the commissioners, nor the court, upon an appeal from the commissioners, are necessarily restricted to the lands described in the petition; but where the lands described in the petition are but a part of a compact tract of land, actually used as one farm, and all owned by the same person, under such petition damages may be assessed to the whole tract; (following *W. and St. P. R. R., v. Denman*, 10 Minn. 267,) but if the owner has two or more distinct and separate but adjoining farms, through one of which railroad passes, the company need not take notice of damages to those distinct but adjoining farms through which the road does not pass (supposing a liability for any such damages,) nor in the absence of specific notice that the owner claimed damages for any alleged injury thereto; but, the company, when it makes application, is bound to take notice of and meet a claim for damages to the whole farm, whether it described the whole farm in the petition by government subdivision or not. *Ib.*

**21.** On the trial of an appeal from the award of commissioners to assess damages for land taken for a railroad, under Chap. 34, Title 1, G. S., it is error to ask a witness to "state what, if anything, less the property was worth at the time of the award, with the road located over it as appears on the map, than it would be worth

with the road running *near* the property, but not upon it," because it suggests the wrong rule of damages,—the owner is not entitled to have the value of his land first enhanced by general benefits conferred by the road before the damages occasioned are deducted. *Carli v. The Stillwater and St. Paul R. R. Co.*, 16 Minn. 260.

**22. General benefits from road.** In estimating the damages to land taken by a railroad company, under Chap. 34, Title 1, G. S., the value of the land at the time it is taken, must be determined irrespective of any general benefits resulting to the land from the construction of the proposed road. *Ib.*

**23.** On the trial of an appeal from an award of commissioners appointed to assess damages for land taken for a railroad, under Chap. 34, Title 1, G. S., the jury must not estimate the value of the land taken upon the hypothesis that the railroad is located *near*, and not upon, the property. *Ib.*

**24. Constitutionality of law authorizing commissioners.** An act of the Legislature which allows commissioners to be appointed to appraise damages to lands taken by a railroad on an application or notice, in which the lands to be taken are referred to as being in the line of a designated division or part of the company's railroad or branches, without requiring a particular description of the lands, or a statement for what specific uses the same are to be taken, or designation by name of the owner of the land is constitutional. *Wilkin et al., v. The First Div. St. Paul and P. R. R. Co.*, 16 Minn. 271.

**25. Application for appointment of commissioners, contents.** Sec. 13 of the charter of Minn. and Pacific R. R. Co., (Chap. 1, Ex. Ses. Laws 1857,) provides that on the performance of certain acts, the company may apply for the appointment of commissioners "to make an appraisal and award of the value of any and all lands, which are the private property of any person on the line of said railroad, and branches, or any division, or part

thereof, *which shall be designated in such application*, and which the said company shall have entered upon, possessed, occupied, or used, or which it *may thereafter* enter upon, take possess, occupy, or *use for any of the purposes* for which, by this act, the said company is authorized to enter upon, etc.," and requires notice of its intention so to apply to be given by publication; and upon affidavit of publication the court or judge shall appoint commissioners "who shall have cognizance of all cases arising on the line or route of said railroad, and branch, or any division or part thereof, *which shall be designated by such company*, in such application," and then requires the commissioners to give notice to the owner. *Held*, an application and notice thereunder in which the lands to be taken are referred to as being on the line of a designated *division or part* of said company's road or branches, is sufficient, it need not particularly describe said lands, nor state for what specific use the same are to be taken or held, nor designate the owner's name. *Ib.*

**26. Proof of claimant's title.** Where the petition of a company, for the appointment of commissioners to assess damages for land taken for a railroad, described the land to be appropriated for the use of the company with reasonable certainty, and alleged the ownership thereof to be in the claimant, such allegation is of ownership in fee, and where no issue is taken on such allegation of ownership, the question of title is not in issue, and on the trial of the appeal from the award of the commissioners in the District Court, the title to *that portion of the land*, need not be proved by the claimant. *The St. Paul and Sioux City R. R. Co., v. Matthews*, 16 Minn. 341.

**27. Possession, when proof of title.** Upon the trial of an appeal from the assessment of damages by commissioners, appointed to assess damages to a land owner for land appropriated by the St. Paul & Sioux City R. R. Co., under its charter, where the owner claims damages not only

for the land actually taken, but for injury to the remaining portion of his land by reason of such appropriation; *as to such remaining portion of the land*, in such proceeding, the company is in no better position than a stranger, and proof of actual possession of such remaining portion of land is *prima facie* evidence of title in fee, as against the company. *Ib.*

**28. Title pending appeal—who may appeal—owner's grantee.** The title to land taken by a railroad, under Chap. 34, Title 1, G. S., does not vest in the railroad company, until the time for an appeal from the award of commissioners has expired without such appeal, but remains in the original owner; and the grantee in a quit-claim deed from the original owner, executed and delivered after such award, and within the time allowed for an appeal, takes the title, and, as an incident to such ownership, the right to the damages sustained by such property, and may appeal from the award of the commissioners within the time allowed by statute. *Carli v. The Stillwater & St. Paul R. R. Co.*, 16 Minn. 260.

**29. Ownership.** The title to land *actually taken* by the St. Paul and Sioux City R. R. Co., for its road, is, under its charter, to be determined by the court at the time of appointing the commissioners to assess damages, and is not a question for the commissioners to determine. *The St. Paul & Sioux City R. R. Co. v. Matthews*, 16 Minn. 341.

**30. Judgment on appeal.** On the trial of an appeal from the report of commissioners to assess damages under the charter of St. Paul and Sioux City R. R. Co., the verdict of the jury did not describe the land. *Held*, where an appeal has been taken from the report, the judgment is the only final determination of the rights of the parties—the general appeal supersedes the report of the commissioners—and the judgment, not the verdict, passes the title; and if in such case, from the petition and case settled, together with the verdict of the jury, a judgment may be entered

clearly specifying the relief granted, the verdict is sufficient. *Ib.*

**31. Verdict of jury on appeal.** For a state of facts appearing upon the record of a trial in the District Court, of an appeal from the report of commissioners appointed to assess damages to land taken for railroad purposes, which were held sufficient to sustain a verdict of the jury awarding a gross sum in damages, without describing the land or referring to it, see *Ib.*

**32. On appeal, no new questions to be passed upon by jury.** An appeal having been taken from an award of commissioners for an unqualified right of way taken by the railroad company, the attorney for the company, upon the trial, offered that it be made part of the decree to be entered in the case, that appellant (plaintiff) should have a perpetual right of way across the land taken by the company for its right of way, and that the company should build and perpetually maintain such crossing; and requested the court to charge the jury that such offer might be considered by them as affecting the amount of the compensation for the land so taken. *Held*, the court properly refused so to charge, on the ground that the proposition was not within the subject matter of the appeal. *Schermeely v. Stillwater & St. Paul R. R. Co.*, 16 Minn. 506.

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## RAPE.

(See CRIMINAL LAW, 33.)

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## RECISION OF CONTRACT.

(See CONTRACT, III.)

(See EQUITY, III.)

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## RECORDS.

(See EVIDENCE, 178, *et seq.*)

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## RECOGNIZANCE.

(See PLEADINGS, 60.)

**1.** It is only necessary, in a recognizance taken by a judge of the Supreme Court, that it was taken in a case in which he might take a recognizance, and is conditioned to do some act for the performance of which a recognizance may be taken. *State v. Grant*, 10 Minn. 39.

**2.** Where a recognizance failed to show that the accused had an examination before the officer taking it, but does show that the defendant waived all objections to his caption, and detention, and asked to be admitted to bail—it is sufficient. *Ib.*

**3.** A recognizance taken out of court cannot become a record until it is filed in the proper court, and it must be a record before it is a complete obligation. Hence, a complaint on a recognizance which fails to show that it was filed, is insufficient. *Ib.*

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## RECORDING LAWS.

(See NOTICE.)

(See DEEDS, VI.)

**1.** The recording laws, Comp. St. 404, Sec. 54, make no distinction between conveyances passing a title in law, and of an instrument raising an equity. *Wilder et al. v. Brooks et al.*, 10 Minn. 50.

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## REDEMPTION.

(See MORTGAGE, XII. *p.*)

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## REFEREE.

(See PRACTICE,—*Trial by Referee.*)

## REGISTER OF DEEDS.

(See COUNTIES, VI.)

## REGENTS OF THE UNIVERSITY OF MINNESOTA.

**1. Public corporation—cannot make negotiable note—strangers have notice of their powers—title to lands in the State—liable to be sued.** By Chap. 23, Comp. St., p. 350, the Board of Regents of the University of Minnesota are a public corporation for the purpose, among others, of erecting a University building. To accomplish that purpose, they could not make a negotiable promissory note, in a commercial sense, because they were restricted in their expenditures to the *interest* arising from the "University Fund" provided for in Sec. 2 of said act; whereas such paper is payable absolutely. All persons dealing with them are chargeable with knowledge of their powers. An action can be maintained against them on any contract they have power to enter into, but a judgment in such actions would bind only the fund upon the faith of which the credit was given. The title to the lands reserved by Congress for the "use and support of the University," and all property, real or personal, as well as the funds placed at their disposal, is in the State, and not in the Regents. *Regents of the University of Minnesota v. Hart et al.*, 7 Minn. 61. (See CORPORATION.)

## RELEASE.

(See PRINCIPAL AND SURETY, 9.)

## REMOVAL OF CAUSES TO U. S. COURTS.

(See PRACTICE, II., 3.)

**1.** Whether a foreign corporation has a right to remove an action from a State court to a United States Court under the act of Congress, Chap. 196, passed at second session, 39th Congress, (14, Stat. at Large, 559,) McMILLAN, J., *denies*, and WILSON, C. J., *doubts*, and BERRY, J., *admits*, (?). *Dodge v. The Northwestern Union Packet Co.*, 13 Minn. 458.

**2.** If a corporation can remove a case from the State courts to the courts of the United States under Chap. 196, Law 2d Session, 39th Congress, (14, Stat. at Large, p. 559,) an affidavit of the Secretary thereof, stating that "it, the defendant, believes," etc., in the absence of all proof of authority from the corporation to make the affidavit, is not a compliance with the statute, which requires "such citizen (of another State) to make and file an affidavit stating that he has reason to, and does believe," *per* WILSON, C. J. McMILLAN, and BERRY, J. J., *dissent. Ib.*

## REPLEVIN BOND.

(See CIVIL ACTION, VIII., 3.)

## REPLEVIN.

(See JUSTICE OF THE PEACE, V.)  
(See CIVIL ACTION, XIII.)  
(See PRACTICE, II, 6.)  
(See PLEADINGS, B., VII., d., 9.)  
(See EVIDENCE.)  
(See BONDS.)

**1. Bona fide purchaser.** Replevin in the *cepit* does not lie against a *bona fide* purchaser of property of one who was in possession, though having only a *lien* instead

of the general title. *Coit v. Waples et al.*, 1 Minn. 134.

### REPLY.

(See PLEADINGS, B., IX.)

### RESULTING TRUST.

(See TRUSTS AND TRUSTEES, IV.)

### REWARD.

(See SHERIFF, 29.)

(See OFFICE AND OFFICER, VI.)

### SALARY.

(See OFFICE AND OFFICER, 8.)

## SALE OF PERSONAL PROPERTY.

(See EVIDENCE, 183.)

**1. Warranty of title.** Where a person in possession of personal property sells the same as his own, he impliedly warrants the title thereto, although the purchaser knew that the seller's title was derived through a chattel mortgage on the property, executed by a former owner; and if such former owner takes it from him by virtue of a paramount title, he has recourse to the seller. (In this case a "fair price" was paid.) *Davis et al. v. Smith*, 7 Minn. 414.

**2. Executory contract of sale.** One F. entered into an agreement with M., by which the former "sells" all the logs cut

during the season, (part of the logs were afterwards to be cut,) certain payment to be made down, but nothing showed it was actually made, nor had the logs been scaled so as to determine what amount was due, nor any delivery made. *Held*, an executory contract of sale, and not a completed sale which passed the title. *Martin v. Hurlburt et al.*, 9 Minn. 142.

**3. Delivery of logs.** To go upon a raft with the new owner, and mark the logs in each string with an axe, in his presence and with his consent. *Held*, a sufficient delivery. *Brewster v. Leith*, 1 Minn. 56.

**4. Sale by sample.** To constitute a sale by sample, it must appear that the parties contracted solely in reference to the sample, or article exhibited, and that both mutually understood that they were dealing with the sample with an understanding that the bulk was like it. *Day et al. v. Raguet et al.*, 14 Minn. 273.

**5.**—The answer set up as ground for recoupment, that certain liquor sold to defendant, by plaintiff, the price for which the action was brought, "was and should be (by contract) five per cent. better than a sample of whisky then and there shown to and examined by both parties, and should only be five below proof, and of as good quality in all other respects as said sample." *Held*, no sale by sample, and judge was correct in so instructing the jury, and refusing requests to charge upon the law of sale by sample, nothing to mislead the jury being shown. *Ib.*

**6. Warranty of quality.** If the representations of a vendor as to the soundness of sheep were made for the purpose of inducing the plaintiff to purchase, and did induce him to purchase, they amount to a warranty. *Marsh v. Webber*, 13 Minn. 109.

**7. Fraud in sale.** If a vendor of sheep, knowing them to be infected with a contagious distemper, sold them to the vendee, concealing the disease, (*suppressio veri*,) he was guilty of a fraud which made him responsible for the damage. *Ib.*

**8. Deceit in sale.** If a vendor of chat-

tels, at the time of sale and delivery to the vendee, knew the property (sheep) to be unsound—they being, in fact, unsound—and told the vendee that they were sound, and the vendee did not know that they were unsound, the vendor will be liable for deceit in the sale thereof. *Id.*

## SCHOOL DISTRICTS.

- I. GENERALLY.
- II. POWER OF THE DISTRICT.
- III. POWER OF THE TRUSTEES.
- IV. DISTRICT RECORDS.
- V. RATIFICATION OF UNAUTHORIZED CONTRACT.

(See NOTES AND BILLS, 9.)

### I. GENERALLY.

**1. School districts are under the control of the Legislature.** School districts being *quasi* corporations, are under the control of the Legislature. They may be changed and divided at the legislative will, and property transferred from one organization to the other. *Connor v. Board of Education of the City of St. Anthony*, 10 Minn. 439.

**2. Change of name and merger, does not affect existing creditors.** “*Sub-District No. 2, of the County of Anoka*,” being indebted to plaintiff, was changed (name) to “*Sub-District No. 2, of the Town of Anoka*.” It was then “merged in Sub-District No. 1,” of same town, both constituting the “*Sub-District No. 1, of the Town of Anoka*.” This latter corporation was changed (name) to “*School District No. 1, of the County of Anoka*,”—the defendant. *Held*, the change of names did not affect the existence or character of the corporation, nor the rights of parties

dealing with it, and the “merger” of Sub-district No. 2 in Sub-District No. 1, had the effect to preserve the existence of Sub-District No. 1, and incorporate No. 2 into it, together with all its rights and liabilities. *Robbins v. School District No. 1, Anoka County*, 10 Minn. 340.

**3. Merger, what is, and effect of.** When the identity or separate existence of two or more school districts is lost and absorbed in a new school district, created by the consolidation, the latter taking all the property, real and personal, of the former, and territorial limits, and the purposes of the old and new being identical, while the corporation thus formed must be conceded to be a new creature, it is not distinct from those out of which it is formed, but must be regarded as a legislative merger of the old corporations into the new, by which the latter acquires all the rights and assumes all the liabilities of the former; and not a dissolution of the old corporations, by which, in absence of statute, its personality escheats to the State, and its realty to the grantors or their heirs. *Id.*

### II. POWER OF THE DISTRICT.

**4. Amount it may expend for school-house.** A school district, under Sub. Div. 4 and 5, Sec. 64, Comp. St., p. 358, may contract through its trustees (Sec. 70, Sub. Div. 4, p. 330, Comp. St.,) to build a school-house at a cost exceeding \$600 (though the tax to be raised in any *one year* is restricted to that amount), and to postpone the payment of it to a future day, and contract for interest as the consideration of forbearance. *Id.*

**5.**—A school district may (under the statute) determine on any amount they see proper for the erection of a school-house, though they are limited in the amount of tax they may levy in any one year to meet it; nor does the exercise of the authority to thus determine the amount, exhaust the power of the district; it is a general power in the corporation—follow-

ing *Robbins v. School District No. 1, Anoka County*, 10 Minn. 340. *Sanborn v. School District No. 10, Rice County*, 11 Minn. 17.

### III. POWER OF TRUSTEES.

**6. No power to make promissory notes.** The trustees of a school district are not authorized, under Comp. St., Sec. 6, p. 358, to make promissory notes; nor is such authority necessary for the purpose of carrying into effect the powers expressly granted. *School District v. Thompson*, 5 Minn. 280.

**7. Negotiable paper of Trustees, given on an accounting, is valid as a contract of forbearance and promise to pay.** When the trustees of a school district have had an accounting with a party who has performed work and labor for them in erecting a school-house, and given negotiable paper promising to pay the amount due at a future time, with interest, such paper is valid between the parties *as a contract for forbearance, and a promise to pay the amount specified*, which will bind said trustees and their successors, and upon which suit may be brought against the district; but whether the trustees have power to execute negotiable paper, as such, we do not decide, and this whether the trustees are in possession of the particular fund out of which debt is payable or not—*i. e.*, whether tax out of which such indebtedness is to be paid has been levied or collected, or not. *Robbins v. School District No. 1, Anoka County*, 10 Minn. 340.

**8. No power to employ a teacher without a certificate.** The board of trustees of a school district, under Secs. 12 and 33, Chap. 36, G. S., have no power to hire a teacher before he has obtained the requisite certificate of qualification, and a contract entered into by them with such teacher is void. *Jenness v. School District No. 1, Washington County*, 12 Minn. 448.

**9. No power, by promise, to take a debt of the district out of the statute of limitations.** The trustees of a school dis-

trict, under Sec. 70, Chap. 23, Comp. St., (Sub. Div. 4) have no power to make a promise or acknowledgment which will take a debt out of the statute of limitations, when the statute has run against it, at least, without express authority from the district, but that power rests in the district, and can be exercised by the inhabitants in meeting assembled. *Sanborn v. School District No. 10, Rice County*, 12 Minn. 17.

**10. No power to mortgage real estate of the district.** The trustees of a school district, under the statute, have no power, in the absence of authority from the district, to mortgage the real estate of the district; for the title is in the district, under Sub. Div. 8, Sec. 64, Chap. 23, Comp. St. *Ib.*

### IV. DISTRICT RECORDS.

**11. Requisites as to showing previous determination of time and place of holding annual meeting.** The record of an annual meeting of a school district, recited the fact that "pursuant to a notice previously given in writing, agreeably to the provisions of statute, the legal voters of the school district, met," etc., but did not show that the time or place of holding this meeting had been fixed at any previous meeting. *Held*, the power of an annual or special meeting being the same, the recital of notice, as aforesaid, would sustain it as a special meeting, even though the time and place of meeting had not been determined at a previous annual meeting—such previous determination was not necessary, under Sec. 57, Comp. St., p. 359. *Ib.*

### V. RATIFICATION OF UNAUTHORIZED CONTRACT.

**12. District may ratify unauthorized act of trustees.** The unauthorized act of the trustees of a school district, can be validated by ratification on the part of the district. *Ib.*

**13.**—such ratification cannot be revoked. Where the trustees of a school district had exceeded their authority and incurred an indebtedness for the benefit of the district, but for which they became personally liable, and the district, with a full knowledge of the facts, ratified the acts of the trustees, by which the indebtedness was incurred on its behalf, the rights of the parties instantly changed—at least as between the district and trustees—and the former became solely liable, and the action ratifying the proceedings of the trustees could not be rescinded—Sub. Div. 6, Sec. 64, Chap. 23, Comp. St.—not affecting vested rights of private parties. *Id.*

### SCHOOL LANDS.

(See HUSBAND AND WIFE, 8.)

**1.** Although the Act of Congress March 3d, 1849, reserving sections 16 and 36 within the Territory of Minnesota for school purposes, amounted to a dedication of those lands, still the the subsequent act of March 3d, 1857, providing, that when any of such lands, prior to the survey, have been settled as required under the pre-emption law, the settlers may pre-empt the same, and the counties be allowed to take other lands in lieu of them (said act being passed at the request of the Legislature of the Territory, as per joint resolution Feb., 26 1856) operated to preclude the State from questioning the pre-emptor's title to such lands. *State v. Batchelder*, 7 Minn. 121.

### SEARCH WARRANT.

**1.** A proceeding under the statute relating to search warrants, may perhaps, in some instances, be a substantive criminal proceeding, but is not necessarily so; it may be ancillary to the prosecution for larceny; the facts upon which the warrant is

issued may be embraced in a separate complaint, and at a subsequent stage of the proceedings. *Cole v. Curtis et al.*, 16 Minn. 182.

### SECRETARY OF WAR.

**1.** An Act of Congress, approved February 24, 1864, which provides that any person drafted, etc., may "furnish an acceptable substitute, *subject* to such rules and regulations as may be prescribed by the Secretary of war," confers authority on the Secretary to make rules concerning the disposition of bounty money, and all subordinates acting under such orders act officially, and are entitled to protection as such. *Gales v. Thatcher*, 11 Minn. 204.

### SEAL.

(See EQUITY, 24.)  
(See DEEDS, 4, 5.)

### SEDUCTION.

(See EVIDENCE, 217, *et seq.*)  
(See DAMAGES, 45.)

### SELF DEFENSE.

(See CRIMINAL LAW, 49.)

### SERVITUDES.

(See EASEMENTS.)



## SHERIFF.

- I. LIABILITY.
- II. DUTY IN CLAIM AND DELIVERY.
- III. CUSTODY OF PROPERTY.
- IV. RIGHT TO SUE IN AID OF PROCESS.
- V. LIABILITY TO SUIT OF THIRD PERSONS, CLAIMING PROPERTY ATTACHED.
- VI. SHERIFF'S SALE.
- VII. SHERIFF'S RETURN.
- VIII. SHERIFF'S DEPUTY.
- IX. SHERIFF'S FEES.

(See EVIDENCE, 186.)

(See PRACTICE, II., 13.)

## I. LIABILITY.

**1. Misapplication of process.** An officer, with a writ of attachment against A., levying upon the property of B., becomes thereby a wrong-doer. *Caldwell et al. v. Arnold*, 8 Minn. 265.

**2. Taking property on chattel mortgage.** At request of mortgagee, a deputy sheriff took from the mortgagor, property described in a chattel mortgage, and delivered it to the mortgagee; afterwards the sheriff, on being informed by the deputy of what he had done, approved the latter's action, and took a bond from the mortgagee to keep the property—both sheriff and deputy thinking the taking in the line of official duty. *Held*, the taking was a private, not official act, and the sheriff not liable; nor did his refusal to deliver on demand make him liable, for the possession of the property was in the mortgagor. *Dorr v. Mickley*, 16 Minn. 20.

## II. DUTY IN CLAIM AND DELIVERY.

**3.** In an action to recover specific property, the officer should retain the property three days; but if he delivers the property to the plaintiff before the expiration of that time, and the defendant excepts to the sureties within that time, the error of the officer is thereby waived; and a revocation of the notice of exception to sureties given after the three days have expired, will

not destroy the waiver. *Vanderburgh et al. v. Bassett*, 4 Minn. 242.

## III. CUSTODY OF PROPERTY.

**4.** A sheriff cannot use property, which he has in his possession under a levy, for his own advantage. He can do nothing but preserve it for the best interest of the debtor and creditor, for whose mutual benefit he holds it. *Banker v. Caldwell*, 3 Minn. 94.

## IV. RIGHT TO SUE IN AID OF PROCESS.

**5. Right depends on statute.** The right of an officer holding an unsatisfied execution to collect debts due the judgment debtor, after having duly levied upon the same, and a refusal to pay depends wholly upon the statute. Comp. St., Chap. 61, Sec. 109, p. 572. *Robertson v. Sibley* 10 Minn. 323.

**6. Has the right of debtor only—not debtor's creditors.** Where an officer holding an unsatisfied execution, levies upon a debt claimed to be due the execution debtor, under the statute (Comp. St., Sub. 3, Sec. 148, p. 551), his right to enforce a collection of said debt, is the same only as that of the execution debtor to whom such debt is claimed to be due—even though the execution creditor in a direct proceeding against the individual owing the execution debtor, might enforce a payment on grounds not available to the latter, as where the debtor has certain legal claims and the creditor both legal and equitable. Nor can the officer aid his cause of action by setting up (when the execution debtor is a corporation), the insolvency of the company, its refusal to perform the necessary acts to create a legal liability, or to make provision for the payment of its debts, or its dissolution. *Id.*

**7. May sue bidder at sale.** The sheriff may collect the amount bid by a purchaser on an execution sale, by suit if necessary, both for the sake of securing his own fees,

and that he may have funds wherewith to respond to the judgment creditors. *Armstrong v. Vroman*, 11 Minn. 220.

8. Sec. 143, Comp. St., p. 552, allowing the officer to sue for "the debts and credits he has attached"—presupposes that he has taken them into his possession. *Caldwell v. Sibley*, 3 Minn. 406.

9. **Payment of note in hands of officer good.** If an officer has process in his hands, valid upon its face, and levies upon notes and takes them into his possession, he can maintain an action on them under Sec. 151, Comp. St., and collect them, consequently a payment to him by the debtor would be a valid discharge of the debt and a recovery by him a bar to a recovery by anybody else. *Rohrer v. Turrill*, 4 Minn. 407.

#### V. LIABILITY TO SUIT OF THIRD PERSONS CLAIMING PROPERTY ATTACHED, ETC.

10. **Sheriff must first have notice of their claims.** Under Sec. 2, Chap. 41, G. L. 1862, p. 98, and at common law, (following *Vose v. Stickney*, 8 Minn. 75), where personal property is found in the possession of the judgment debtor, who is exercising acts of ownership over it with the consent of the owner, and seized by the sheriff on execution, other persons claiming the same, cannot maintain an action against the sheriff without notifying him of their claims, or showing that he had notice before the seizure; but where goods are *in transitu* directed to the execution debtor, and it does not appear whether they had been delivered to the debtor by the vendors, or was being shipped to him by them, they are not in the possession of the debtor within the rule requiring notice. *Dodge v. Chandler*, 9 Minn. 97.

11. **Requisites of the affidavit of claim.** Where property of a third person is levied upon by a deputy sheriff, the affidavit of ownership, provided for by Sec. 1, Chap. 24, law 1865, where the affiant claimed through a contract, need not set

forth the contract nor all its details. If it discloses the legal effect of the contract, so far as is necessary to distinctly inform the officer that the execution debtor has no rights in the property levied upon, and that whatever rights he may have at any time possessed, have been transferred to the affiant for a valuable consideration, and the general nature of affiant's rights is a compliance with the statute. *Williams v. Mcgrade*, 13 Minn. 174.

12. **Service on deputy, when good.** Where property of a third person is levied upon by a deputy sheriff, the affidavit provided for in Sec. 1, Chap. 24, law 1865, may be served upon such deputy. *Id.*

#### VI. SHERIFF'S SALE.

13. **Where sale is enjoined—duty.** Where an injunction is served on a sheriff, restraining the sale of property on an execution in his hands, he should note the receipt of the injunction on the back of the execution, desist from all further proceedings, keeping the property; and if at the end of the 60 days from the receipt of the execution by him, no notice of the dissolution of the injunction has reached him, he should then return the execution detailing the facts. If, during the 60 days the injunction is dissolved, the sheriff should then advertise the property again under the original levy, and proceed to sell in the ordinary way. He cannot adjourn the sale to a future day, and if the injunction is removed by that day, then sell in pursuance to the adjournment. *Pettingill v. Moss et al.*, 3 Minn. 223.

#### VII. SHERIFF'S RETURN.

14. **Prima facie sufficient.** A sheriff's return is *prima facie* evidence of the facts therein stated, and his certificate would be so received—and the certificate should be a statement of facts, not conclusions of law, he might form as to what constituted a levy. *Custner et al. v. Symonds*, 1 Minn. 430.

**15. Conclusive as to third parties, when.** In case of third parties who have dealt in *good faith* without laches—public policy would seem to require that a sheriff's return should be conclusive, leaving the party to his remedy against the officer—but in other cases we think the return may be disproved. *Ib.*

**16. Generally conclusive.** As a general rule, the return of a sheriff, so far as it is evidence of formal proceedings, is conclusive upon parties, privies, and *prima facie* upon strangers, and is not liable to impeachment, except in direct proceedings, in which the officer is a party. *Tullis v. Brawley*, 3 Minn. 277.

**17. Absolutely conclusive.** On an application to open a judgment, entered by default, on the ground, among others, that the summons was not served on the day specified in the sheriff's return thereto. *Held*, the sheriff's return was conclusive in that action. *Frasier v. Williams*, 15 Minn. 288.

**18. Officer's return conclusive.** A legal and sufficient return by an officer, of a precept which he had authority to serve, as between parties and privies, is to be taken as true, and can be controverted by them only in an action against the officer for a false return; hence affidavits are inadmissible to impeach it. *Hutchins v. Commissioners of Carver Co.*, 16 Minn. 13.

**19. What a sufficient return—conclusive.** A return by the sheriff that he has "levied upon" property, without the statement of the particular facts constituting such levy, is sufficient, and cannot be inquired into, except in a direct proceeding against the officer or his sureties for a false return—following *Tullis v. Brawley*, 3 Minn. 277; and *Rohrer v. Terrill*, 4 Minn. 407. *Folsom et al. v. Carlé*, 5 Minn. 333.

**20.**—Under the R. S., (1851, Sec. 91, p. 363, and Sec. 140, p. 346,) it is not necessary that the sheriff should, in his return, state the particular or several acts done by him in making his levy. It is sufficient if he certifies in general terms, that he "levied," and from this all necessary proceed-

ings will be implied—considering *Symonds v. Castner et al.*, 1 Minn. 427. *Tullis v. Brawley*, 3 Minn. 277.

**21.**—Return of the sheriff that he has "levied" upon the "books of the said R. Ball," does not show a levy upon the *debts* and *book accounts* of said Ball. *Ib.*

**22. Return, when sufficient.** Return on an execution that the officer "levied," on property is sufficient and conclusive. *Hutchins v. Commissioners of Carver Co.*, 16 Minn. 13.

**23. Amending return.** Return of an execution sale, on an execution, may be amended, if insufficiently descriptive of the property sold. *Ib.*

**24. The return on an execution of a sale thereunder, describing the property as** "lying and being in the county of Carver, to wit: lots (3, 4, 5, 6, 7, 8,) three, four, five, six, seven and eight, in block (27) twenty-seven, in the town of Chaska, according to the plat thereof, on record in the office of the register of deeds of said county," is sufficient. *Ib.*

**25. Vacating return.** An execution sale, sheriff's return, certificate and record thereof, may be vacated by the District Court, when the exigency of the case requires it, and in furtherance of justice. *Ib.*

**26. Return amendable.** If the certificate of execution sale is insufficient, there is no need of vacating the sheriff's return of the sale on the execution, for insufficiency in the description of the property, for the return may be amended. *Ib.*

**27. Parol evidence.** The sheriff's return on an execution, recited that on the 4th of May, 1867, he levied upon the property, and that at date of return, 14th of May, 1867, he held the same in his possession. *Held*, evidence was admissible to show that the officer had ceased to possess the property on the 20th of May, 1867, and the same did not *contradict* his return, but at most only rebut a presumption of continued possession, from his possession on the 14th of May. *First Nat'l Bank of Hastings v. Rogers et al.*, 15 Minn. 381.

## VIII. SHERIFF'S DEPUTY.

**28.** The sheriff, may to secure the services of any one as deputy, give to him all the fees pertaining to the services he may render. *Pioneer Printing Co. v. Sanborn, French & Lund*, 3 Minn. 413.

**29. Right to a reward.** Where a deputy sheriff, upon the request of another person, and upon information furnished him by such person, arrested in his county, without warrant, a person who had committed a felony in another county, for whose arrest and delivery a reward had been offered, and delivered him to such authorities, he is not entitled to such reward. The statute made it his duty, if he was satisfied the information was true, to make the arrest, and for making it he was entitled to the same fees only, as though he had made it under a warrant. *Warner v. Grace et al.*, 14 Minn. 487.

## IX. SHERIFF'S FEES.

**30.** A sheriff, under Sec. 10, Chap. 70, G. S., is not entitled to any *per diem* allowance. *Thomas v. Commissioners Scott Co.*, 15 Minn. 324.

## SIGNING.

**1.** Where A. in the presence, and under the direction of B, signs the latter's name to an instrument, the same is valid to the same extent as though done by B. *Pottgeiser v. Dorn*, 16 Minn. 204.

## SIOUX HALF-BREED SCRIP.

**1.** The Supreme Court has no authority to review the decision of the U. S. Land officers, in the location of Sioux Half-Breed Scrip, the acts of Congress having authorized the President, and he the Land

officers, to pass upon these questions, and the State by the terms of its admission into the Union being prohibited from interfering with the primary disposal of the soil by the United States. *Monette et al. v. Cratt et al.*, 7 Minn. 234.

**2.** When B., the occupant of land included within the half-breed reservation, applied to have the same entered on scrip of M., under act of Congress, approved July, 27, 1854. *Held*, M. took the title to the land. *Sharpe v. Rogers*, 12 Minn. 174.

**3.** The half-breed, to whom Sioux half-breed scrip was issued under the act of Congress of 1854, had nothing in the scrip which he could transfer to another, for under that act, "no transfer or conveyance of any of said certificates or scrip shall be valid." A power of attorney, so far as intended to operate as a transfer, would be of no avail; the right of the half-breed in the scrip and land would remain the same, it could not be made irrevocable nor create any interest in the attorney, and if the latter sells he would be accountable to his principal, precisely as in the case of any power to sell. But a simple power to sell, executed by a half-breed, is good until revoked, and would extend to land subsequently acquired by means of the scrip, if within the terms of the power. *Gilbert et al. v. Thompson*, 14 Minn. 544.

## SLANDER AND LIBEL.

- I. SLANDER.
- II. LIBEL.

## I. SLANDER.

(See DAMAGES 44.)

**1. Intention.** It was not error for the court to charge the jury, that if by the use of such and such words, the defendant intended to charge the plaintiff with stealing, the words were actionable. *St. Martin v. Desnoyer*, 1 Minn. 156.

**2.** Words charging a person with having committed an act, for which, if the charge were true, he would be punished criminally, are actionable *per se*. The words "you stole my belt" are actionable *per se*. *Id.*

**3.** In slander no words are actionable *per se*, which do not charge an offense punishable by law—as to what words are actionable *per se*, no opinion expressed. *McCarty v. Barrett*, 12 Minn. 494.

**4.** The word "you did rob the town of St. Cloud—you are a public robber" may mean the legal crime of robbery, in which case it cannot be committed on a municipal corporation—it must be committed on a human being, hence not actionable *per se*, or it may mean the stealing or feloniously taking of property of another, and in this sense would be applicable to a public body, and actionable *per se*. But there is a popular sense, such as the acquisition of money or property of the public by fraud or indirection, in which sense they are not actionable—the words being ambiguous, they are not actionable *per se*, the sense in which they were used by defendant, is a question of fact to be determined by the jury from all the circumstances of the case. *Id.*

**5.** It seems, from words spoken, in themselves actionable, in the absence of all circumstances qualifying their use, malice in the defendant, would perhaps be implied; but whether actionable or not, *per se*, if it appears from other circumstances that they were not used by the defendant, or understood by the by-standers in an injurious sense, slander will not lie. *McCarty v. Barrett*, 12 Minn. 494.

**6.** It seems it is for the court to determine whether a given state of facts in any case will constitute slander, but the speaking of the words, the intention of the defendant in speaking them, and the existence of the facts in each case, are questions to be determined by the jury from all the concomitant circumstances. *Id.*

## II. LIBEL.

(See EVIDENCE, 205, *et seq.*)

**7. Privileged communications.** A libelous article in a newspaper, published against a candidate for office, does not fall within the class of privileged communications, which require express malice. *Aldrich v. Press Printing Company*, 9 Minn. 133.

**8. Malice of corporation aggregate.** A corporation aggregate may be held for libel, even where express malice is necessary to constitute the offense, as in privileged communications. *Id.*

**9. Malicious intent.** When libelous words are actionable in themselves, the malicious intent in publishing them, is an inference of law; but if the circumstances of the publishing were such as to repel that inference, and exempt the defendants from any liability, unless upon proof of actual malice, the plaintiff must furnish that proof. *Simmons v. Holster et al.*, 13 Minn. 249.

**10.** The publication in a newspaper of a notice of stolen property, containing the following statement, to-wit: "The thief is believed to be William H. Simmons, who delivered the horse to some other parties," is actionable as a libel *per se*. It imports an indictable offense as effectually as though made in positive language. The charge need not be couched in positive terms. *Id.*

**11.** When one person, without authority or color of authority, publishes a libel in the name of another, who has no knowledge of its publication until after it is made, the mere silence of the latter, or his neglect to disavow or repudiate the publication, will not render him liable, either civilly or criminally. *Id.*

**12.** Complaint charged defendant with publishing a libel, as follows, to-wit: "Sorry to hear it. We learn that the doors of a prominent Democrat in Chatfield have been shut against Father Hemphill, the *professed* editor of the *Democrat*." Thereby intending and meaning this plaintiff, who was then editor of the *Chatfield Democrat*, a newspaper published in Chatfield aforesaid, and meaning that doors had been shut against this plaintiff.

'Cause, petit larceny, viz.: taking a few spoons at one time, and at another a few children's diapers from the clothes line.' Thereby intending, etc. 'You should not be too hard on him (meaning this plaintiff), Major, for the first offense;' thereby meaning, etc." On it being objected that from this it only appeared that the first three lines, ending with "*Democrat*," before the first inuendo, was published, and that it constituted no libel, *Held*, that publication of all in quotation marks sufficiently appeared, and that it constituted a libel. *Hemphill v. Holley*, 4 Minn. 233.

### SPECIFIC PERFORMANCE.

(See EQUITY, II.)

(See HUSBAND AND WIFE, 12.)

### STAMPS.

**1.** A writ of *certiorari* is not an "original process," by which a suit is commenced, within the meaning of the U. S. Revenue Law of 1862, which requires such writs to be stamped. *Pierce v. Huddleston*, 10 Minn. 131.

**2.** Receipts were not required to be stamped until July 13th, 1864, and in the absence of anything showing the contrary, it will be presumed that a receipt, not produced because lost, was properly stamped. *Thayer v. Barney*, 12 Minn. 502.

**3.** In the absence of anything to the contrary, the presumption is that the revenue laws have been complied with. *Smith v. Jordan et al.*, 13 Minn. 264.

**4.** A. attempted to convey land in 1855, but the description was so defective as to make the deed ineffectual. Afterwards, in 1867, he made another deed to correct the description in the first. *Held*, the sale was made before the U. S. stamp act was passed, (1855,) and the transaction in 1867 did not

amount to a "sale," within the meaning of that act, so as to require an *ad valorem* stamp on the second deed. *Greve v. Coffin*, 14 Minn. 345.

### STATUTES.

I. GENERALLY.

II. CONSTRUCTION.

III. REPEAL.

(See LIMITATION OF ACTIONS, II.)

(See MECHANIC'S LIEN.)

### I. GENERALLY.

**1. Publication, presumption of.** If a publication of an act of the Legislature is necessary before it can operate, the publication in a newspaper, under Secs. 4 and 5, Chap. 3, Comp. St., is all that is necessary, and the presumption is that the law was published immediately, in pursuance of these sections. *Stine et al. v. Bennett*, 13 Minn. 153.

**2. Retrospective action of statutes.** Chap. 24, Laws of 1865, requiring notice of third person's rights to be given an officer attaching or levying on property in certain cases, does not operate retrospectively upon attachments or levies made before its passage. *Edson v. Newell*, 14 Minn. 228.

**3. Void for uncertainty.** A joint resolution of the Legislature, which, in attempting to correct county boundaries, defines impossible boundaries, cannot be followed. *State v. Timmes*, 4 Minn. 325.

**4. Mode of proceeding of public officer—directory, when.** As a general principle of law, statutes directing the mode of proceeding of public officers, are merely directory, unless there is *something in the statute itself which plainly shows a different intent*; but a *proviso* in an election statute,

which declared "that no failure of any clerk to give notice of any election, as aforesaid, shall invalidate any election," does not show an intention to invalidate an election for a disregard of any other prescribed formality or duty by the officers—the maxim, "*Expressio unius est exclusio alterius*," not applying. *Taylor v. Taylor et al.*, 10 Minn. 107.

**5. Appeal statute, retrospective operation.** Act of March 1, 1867, authorized an appeal from an order granting a new trial. *Held*, it operated retrospectively upon orders made prior thereto—following *Converse v. Barrows*, 2 Minn. 240. *McNamara v. Minnesota Central R. Co.*, 12 Minn. 388.

**6.**—The amendments to R. S., Chap. 5, G. L. of 1856, p. 13, providing for appeals from an order granting a new trial extend retrospectively to cases then pending. *Converse v. Barrows et al.*, 2 Minn. 240.

## II. CONSTRUCTION.

**7. Retrospective operation must clearly appear.** A statute which takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions already passed, is not to be deemed retrospective, but prospective only in its operation, unless the contrary clearly appears to have been the intention of the legislature. *Davidson v. Gaston*, 16 Minn. 230.

**8. The intention, to govern.** The intention of the legislature should always be followed whenever it can be discovered, although the construction seems contrary to the letter of the statute; and on the contrary, a thing within the letter of the statute is not within the statute unless within the meaning of the intention of the makers. Statutes in derogation of the common law are not to be extended by equitable construction. *Grimes v. Bryne*, 2 Minn. 106.

**9.**—In construing a statute or constitutional provision, the great object is to ascertain and interpret so as to carry out

the intention of the law giver, and as a primary rule, the language used is to be first considered as being the best evidence of what that intention is, and where the words are clear, explicit, unambiguous, and free from obscurity, courts are bound to expound the language according to the common sense and ordinary meaning of the words. *Minn. & Pacific R. R. Co. v. Governor of State*, 2 Minn. 13.

**10. Practical construction.** The court will hesitate long before it will disturb a statute, under a practical construction of which, ever since its passage, great interests have been affected, rights passed, and property involved; and not then, unless fully convinced that it was in violation of some substantial provision of the fundamental law. *Carson et al. v. Smith*, 5 Minn. 78.

**11. The opinion of a subsequent legislature on the meaning of a statute is entitled to no more weight than that of the same men in a private station.** *Bingham v. The Board of Supervisors of Winona Co.* 8 Minn. 441.

**12. It seems that a revised code of laws is to be construed as contemporaneous acts, parts of one entire system of law, so that in construing any given portion regard may be had to other provisions.** *McNamara v. Minnesota Central R. Co.* 12 Minn. 388.

**13. Construction of amendments.** When an amendatory act declares that such a statute "be amended so as to read as follows," the portions of the amended section which are merely copied without change, are not to be considered as repealed and again enacted, but to have been the law all along, except where a contrary intent appears; and the provisions or changed portions are not to be taken to have been the law at any time prior to the passage of the amendment. *Kerlinger v. Barnes et al.* 14 Minn. 526.

## III. REPEAL.

**14.** It is not necessary that an actual repealing clause should be used to discon-

tinue or repeal an existing enactment. *Col. Lee ex parte*, 1 Minn. 71.

**15.** The creation of a new court, as in the present case, with new duties and powers, but at same time embracing all the powers and duties of an inferior tribunal, is equivalent to a repeal; it is a substitution of one for another tribunal. *Ib.*

**16.** The mere omission to embody in an amendment of a remedial statute, some of the provisions of the original law which do not conflict with the amendment, and may exist independent of it, and in entire harmony with it, will not, as to existing rights, be considered as a repeal of the provisions omitted, in the absence of any other circumstances showing an intention to repeal such omitted provisions. *Kerlinger v. Barnes et al.*, 14 Minn. 526.

**17.** A new lien law, contained no express repeal of former acts, but provided that, "all acts and parts of acts, inconsistent hereunto, are hereby repealed." *Held*, persons, who under the former acts were entitled to a lien, but under the new act were not so entitled, lost those rights inasmuch as otherwise an inconsistency would arise between the two acts—even supposing the two acts could stand in the absence of an express repeal. *The Toledo Novelty Works v. Bernheimer*, 8 Minn. 118.

**18.** An act of the legislature (1857, p. 268-9), granting an exclusive ferry franchise to M. within one and a half miles above and below a certain point, provided, in Sec. 7: 1st, that the right does not extend beyond the land now owned by said M., and 2d that the grant shall not interfere with the W. & La C. R. R. charter. In the subsequent year (1858, p. 303), the limits within which M. was authorized to exercise his ferriage rights were enlarged and provided that no ferry should be established within one and a half miles above or below the enlarged limits, and then provided that Sec. 7 of the former act is amended so as to repeal all acts conflicting with the enlargement of M.'s franchise except as relates to the W. & La C. R. R. *Held*, that the former restriction

confining M.'s right to land owned by him was repealed by the last act. *McRoberts v. Washburn et al.* 10 Minn. 23.

**19. Effect of a repeal.** Where a statute gives a right in its nature not vested, but remaining executory, if it does not become executed before a repeal of the law, it falls with it, and cannot therefore be enforced. *Bailey & Gilman v. Mason & Craig*, 4 Minn. 546.

**20.**—The repeal of prior laws by the general statutes did not revive rights taken away by those laws. *Stine et al. v. Bennett*, 13 Minn. 153.

**21. A saving clause** in an act altering a corporation name, providing that all rights in favor of a party who holds a "contract, obligation, or right or lien," against the old corporation shall be preserved against the new body corporate—will save a right to damages for injuries to property. *Gould v. Sub. Dist. No. 3 of Eagle Creek School District*, 7 Minn. 203.

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## STATUTE LAWS OF ANOTHER STATE.

(See EVIDENCE, 182.)

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## STATUTE OF LIMITATIONS.

(See LIMITATION OF ACTIONS.)

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## STATUTE OF FRAUDS.

(See LIMITATION OF ACTIONS, 33.)

(See EQUITY, II., c. 1, 2.)

### 1. Requisites of written contract.

To constitute a written contract a parol acceptance of a written proposition is wholly



insufficient—the acceptance must be in writing to satisfy the statute of frauds. *Lanz v. McLaughlin et al.* 14 Minn. 72.

**2. What not a contract for sale of goods, etc.** A contract to “furnish material for, and prepare, and fit the same for putting up four houses, known as the Fitzgerald patent portable houses,” is a contract for work and labor, and not a contract of sale, within the statute of frauds, and need not be in writing. *Phipps v. McFarland*, 3 Minn. 109.

**3. Delivery of goods sold.** The delivery required by the statute of frauds (Sec. 7, p. 334, G. S.), to take a verbal agreement for the sale of goods, out of the statute of frauds may be subsequent to such agreement. *McCarthy v. Nash*, 14 Minn. 127.

**4. Subscription, what sufficient.** A contract for the sale of goods, chattels, or things, in action (Sec. 3, Chap. 50, Comp. St.), within the statute of frauds, is sufficiently “subscribed by the party to be charged therewith,” if it is subscribed by the party against whom suit is brought. *Morin v. Martz et al.*, 13 Minn. 191; *Wemple v. Knopf, Jr.*, 15 Minn. 440.

**5. Parol contract concerning land.** A parol agreement between A. and B., by which B. was to convey land to A., when A. should pay to B. what he had paid for it, is within the statute of frauds, and not enforceable without part performance by A. *Wentworth v. Wentworth*, 2 Minn. 283.

**6.**—C. and E. held land under a verbal trust in favor of F. E. represented to F. (verbally) that if he would permit C. to convey to him (E.) the share held by C., then, the next day, he (E.) would convey the whole to F. F. consented and the conveyance was made, whereupon E. refused to convey to F. Held, E’s agreement was a parol promise to convey land and void under the Statute of Frauds, and could not be relieved against. *Evans v. Folsom*, 5 Minn. 422.

**7. Promise to answer for the debt, default, etc., of another, must be collateral to an original promise.** To constitute a

promise to answer for the debt, default, or miscarriage of another person within the meaning of the Statute of Frauds, the promise must be a collateral one—there must be in existence an original liability upon which the collateral promise is founded. *Yale v. Edgerton*, 14 Minn. 194.

**8. What is a collateral promise.** A verbal promise by G. that if F. did not pay his debt he (G.) would, is within the Statute of Frauds, and void. *Dufolt v. Gorman*, 1 Minn. 309.

**9.**—The relation of landlord and tenant existing between W. and Mrs. Mc., the defendant says to the plaintiff, (W.) “If you will let mother (Mrs. Mc.) stay, I’ll be responsible for the rent, and see that it is all right.” Held, a collateral undertaking within the Statute of Frauds, and being verbal, was void, even admitting that the consideration passing to Mrs. Mc., was sufficient to sustain it, and that promise was relied upon by plaintiff. *Walker v. McDonald*, 5 Minn. 455.

**10.**—It seems that where K. purchases property of C., against which W. has a lien, and “in consideration of said sale, and in part payment of the purchase price, K. undertook and promised said C. to pay W.’s claim against C”—such promise is void if by parol.—FLANDRAU, J. *Wulsh v. Kattenburgh*, 8 Minn. 127.

**11. Original promise not within the Statute, if lien is surrendered.** A promise to pay the debt, default, or miscarriage of another, upon consideration of the surrender of property of the third person to the promisor, on which the promisee has a lien, is not within the Statute of Frauds, but an original promise and good, though not in writing. *Id.*

**12.**—Y. owned a \$1700 claim against V., secured by mortgage, and transferred both claim and mortgage to E. as security for a debt of \$300, due the latter by Y., afterwards Y. agreed verbally with E. that the latter should release and discharge V. absolutely from the mortgage debt, and after retaining therefrom the amount of the debt due from Y. to pay the balance

so remaining to Y. In accordance with which, V. was discharged and mortgage released by E., who refuses to pay balance of V.'s debt to plaintiff. *Held*, as the consideration of defendant's promise is the consent of the plaintiff to the release and discharge, absolutely, of the mortgage and the mortgage debt by the defendant, it is a sufficient consideration, and the promise is an original one, not within the Statute of Frauds. *Yale v. Edgerton*, 14 Minn. 194.

**13.** A promise to A. to pay his debt due to B. is not within the Statute of Frauds. *Goetz v. Foos*, 14 Minn. 265.

**14.**—Plaintiffs, creditors of A. and having an existing lien on A.'s land for security, of prior date to defendant's mortgage, did, on defendant's verbal request, waive said lien, and paid the costs of an existing levy on land, whereby the owner thereof, in pursuance of an agreement by defendant, had withdrawn said execution, in consideration of which, defendant promised (verbally,) plaintiff that he would pay A.'s debt to him. *Held*, An original promise not within the Statute of Frauds. *Hodgins et al., v. Heaney*, 15 Minn. 185.

**15.** When a deed not a contract for sale of land within the Statute. A deed for the conveyance of land signed and acknowledged by the grantor, and passed to the grantee for examination, without any intention to deliver the same, and by him returned to the grantor to have the latter's wife execute the same, is not a contract or memorandum of a contract for the conveyance of land within the Statute of Frauds. *Comer v. Baldwin*, 16 Minn. 172.

**16.** A. sold goods to B. upon the faith of a verbal promise by C. that he would pay for the goods if B. did not. *Held*, credit given to B. as principal debtor, C.'s promise was collateral, and within the Statute of Frauds, though not illegal or void. *Rogers v. Stevenson*, 16 Minn. 68.

**17.** Statute introduces a new rule of evidence only. An agreement, which was legal and actionable before the Statute of Frauds, is legal, since, notwithstanding

the Statute, the latter introducing simply a new rule of evidence. *Ib.*

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## STAY OF PROCEEDING.

(See PRACTICE, II. 9.)

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## STEAMBOAT.

(See EVIDENCE, 185.)

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## STIPULATION.

**1.** Where defendants based their defense partly on their being a corporation, and that fact thereby became material. *Held*, that a stipulation before trial "that all the material allegations of new matter contained in the answer should be considered denied and put in issue, as fully to all intents and purposes, as if the said plaintiff had regularly made and served a reply," would put in issue the fact of incorporation. *Becht v. Harris et al.*, 4 Minn. 504.

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## STOCKHOLDERS.

(See ST. ANTHONY FALLS WATER POWER CO.).

(See MINNEAPOLIS AND CEDAR VALLEY R. R. Co., 2, 3.

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## ST. ANTHONY, CITY OF.

**1.** Liability to levy tax for the erection of school houses. An act of the legislature approved Feb. 28, 1860, entitled "An act for the support and better regu-

lation of common schools in the city of St. Anthony," creates a Board of Education, and provides, by Sec. 9, that "when-ever said board shall deem it necessary to purchase or erect a school house or school houses for said district, or to purchase a site or sites for the same, they shall call a meeting of the legal voters, giving ten days' notice, etc., and said meeting may determine. etc., upon the erection of a school house or houses, and the purchase of a site, etc., and the amount of money to be raised for the purpose aforesaid, which money so voted shall be certified by the Board to the City Council, and there-upon the City Council shall, etc., proceed to levy such amount of money upon the taxable property of the district." Proceeding under this law, the Board resolved that, "whereas it is deemed necessary by the Board of, etc., to purchase a site or sites," etc. *Held*, this preamble sufficiently shows the necessity of building, etc., within the act, but that the meeting of legal voters must determine upon the number of houses to be erected, and the number of sites to be purchased, and must specify a definite and certain sum of money for such purpose, and that the action must precede the levying of the tax, and that "two per cent. on the assessment of the city" is not such certain amount, and that without this previous action the City Council cannot be compelled by mandamus to levy such tax. *State v. City of St. Anthony*, 10 Minn. 433.

(See BOARD OF EDUCATION OF THE CITY OF ST. ANTHONY.)

## ST. ANTHONY FALLS WATER POWER COMPANY.

**1. Liability of stockholders.** By the charter of the St. Anthony Falls Water Power Company, (Laws, 1856, p. 215,) which provides that "each of the stockholders of said company shall be personally liable for the debts of said company

to an amount equal to the amount of the capital stock held by such stockholder, and no more," a personal liability is created against each stockholder at the time a debt is contracted, and all that may voluntarily become stockholders thereafter. And this liability is a principal one, and not that of surety to the corporation—so that it is not necessary to proceed against the corporation in the first instance. *Gebhard v. Eastman & Gibson*, 7 Minn. 56.

## ST. PAUL, CITY OF.

SCOPE NOTE.—All decisions which relate to *municipal corporations* generally, will be found under that title.

(See MUNICIPAL CORPORATION.)

**1. Remedy against error of commissioners.** Sec. 2, Chap. 7, Session Law, 1854, p. 29, (Charter, City of St. Paul,) provides that "any person deeming himself aggrieved by an act of the board of commissioners may, at any time, appeal to the common council," etc. *Held*, not exclusive of other remedies—a privilege. *Weller v. City of St. Paul*, 5 Minn. 95.

**2. Street commissioners may contract for improvements, before making and filing estimates therefor.** The making and filing of the estimates of street improvements, and the proportion to be assessed to each lot, referred to in Sec. 6, Chap. 7, charter of the city of St. Paul, is not a condition precedent to the power of the street commissioners to enter into contract for the performance of such improvements. *Nash v. The City of St. Paul*, 8 Minn. 172.

**3. Assessor's compensation for listing the militia.** The "one assessor for the city at large, \* \* \* who shall perform all the duties required by law of assessors of property for the purpose of taxation for State, county, city or other purposes, within the city of St. Paul," within Chap. 79, G. L. 1865, is the "assessor of the several wards" of the several cities, within Chap.

51, Laws 1865, so that his duty thereby, among other things, was to return a list of all persons liable to be enrolled in the militia, etc., the compensation for which duty was included in his regular compensation as fixed by the city council, under Chap. 79, G. L. 1865. *McClung v. The City of St. Paul*, 14 Minn. 420.

**4. Right to appeal from city justice in certain cases, where the judgment is less than twenty-five dollars.** The charter of the city of St. Paul, as amended in 1860, conferred on the city justice jurisdiction, among other offenses, in cases of assaults, and required the same proceedings to be had, where not otherwise directed, as in courts of Justices of the Peace under the general law, *provided* that in assaults (and certain other cases) "no appeal shall be allowed where the judgment or fine imposed, exclusive of costs, is less than twenty-five dollars," repealing all inconsistent acts. *Held*, the *proviso* operated as a repeal of the general laws allowing *appeals* in those cases. 2d. In summary proceedings of this character, the subject of review is under the control of the Legislature, (within the limits of the Constitution,) and in the absence of statutory provision therefor, there is no *appeal*. 3d. The *proviso* does not conflict with Sec. 2, Art. 6, Constitution of State, for the term "appellate jurisdiction" relates to the *nature* of the jurisdiction, in contradistinction with *original* jurisdiction—has no reference to the manner in which a cause is brought up from another court; and although no *appeal* lies, yet there being no express prohibition, a *certiorari* will lie, thus leaving the appellate jurisdiction of this court, "in all cases," unimpaired so far as this case is concerned. 4th. The limitation being general, and operating alike upon all the suitors in that court, the Legislature had power to enact the proviso. *Tiernay v. Dodge*, 9 Minn. 166.

**5. City contractor—choice of remedies.** The amendment of 1857, to city charter of St. Paul, allowing the contractor or the endorsee of the certificate to sue the owner

in a civil action, at his option, in lieu of having his claim assessed with other city taxes, is invalid—no action lies under it. *McComb v. Bell*, 2 Minn. 307.

**6. Jurisdiction of city justice.** The city justice of St. Paul, being a justice of the peace, the Legislature could not, under the Constitution, confer jurisdiction on him over offenses within Sec. 9, Chap. 100, G. S., by which keeping a house of ill-fame is made punishable by imprisonment in the State prison; hence an indictment framed under such statute will not be quashed, on the ground that the said justice had exclusive original jurisdiction of an offense under such statute. *State v. Charles*, 16 Minn. 474.

**7.**—The charter of the city of St. Paul, as amended by Sec. 5, Chap. 20, Special Laws, 1870, does not transfer and vest in the city exclusive jurisdiction over offenses against Sec. 9, Chap. 100, G. S., by which keeping a house of ill-fame is made punishable by imprisonment in the State prison, nor has such statute been superseded within the city limits by the city ordinance on the subject. *Ib.*

## ST. PAUL AND PACIFIC R. R. COMPANY.

**1. Was not created by special act, within Sec. 2, Art. 10, Constitution.** Under the Five Million Loan Amendment to the Constitution, "The First Mortgage Bonds on the roads, lands, and franchises of the respective companies," provided to be taken as security for the State bonds, covered *all* the roads, *all* the lands, and *all* the franchises of the companies, including the right to be a corporation; and on foreclosure by the Governor, they became vested in the State, and it was competent for the State to hold, and it did hold, everything thus acquired, without merger or extinguishment, under act of Legislature, Aug. 12, 1858, and March 6, 1860, among

which were the roads, lands and franchises of the Minnesota & Pacific R. R. Co.,—(see, also, act March 8, 1861, Sec. 1, 2, 3 and 4.) Act of March 10, 1862, Sec. 1 and 2, transferred to persons therein named all the roads, lands and franchises of the Minnesota & Pacific R. R. Co., (then owned by the State,) which act was not unconstitutional, within Sec. 2, Art. 10, Const., as an attempt to create a corporation by special act, for it was only a transfer of corporate franchises already in existence, to persons enumerated, who, after organization, became the St. Paul & Pacific R. R. Co., duly invested with the land, roads and franchises formerly owned by the Minnesota & Pacific R. R. Co. *The First Div. St. Paul & Pacific R. R. Co. v. Parcher et al.*, 14 Minn. 297.

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### SUB-CONTRACTOR.

(See MECHANIC'S LIEN.)

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### SUMMONS.

(See PRACTICE, II. 1.)

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### SUPREME COURT.

(See COURTS, II.)

(See MANDAMUS, 1.)

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### SURPRISE.

(See NEW TRIAL, II., g.)

### SUPPLEMENTAL PROCEEDINGS.

(See PRACTICE, II, 14.)

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### SURETY.

(See PRINCIPAL AND SURETY.)

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### TAKING ILLEGAL FEES.

(See CRIMINAL LAW, 43.)

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### TAXES.

- I. REQUISITES OF A TAX.
- II. FOR WHAT TAXES MAY BE LEVIED.
- III. WHAT IS TAXABLE.
- IV. WHAT IS NOT TAXABLE.
- V. LISTING PROPERTY.
- VI. EQUALIZATION OF THE ROLL.
- VII. TAXES, WHEN DELINQUENT.
- VIII. THE DELINQUENT LIST.
- IX. THE COLLECTION OF THE TAX.
- X. PRESUMPTIONS.
- XI. THE SALE.
  - a. Time of sale.
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- XII. THE PURCHASE AT TAX SALE.
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- XIV. THE TAX DEED.
- XV. THE LIEN FOR TAXES.
- XVI. ACTIONS TO TEST THE VALIDITY OF TAX PROCEEDINGS.

(See CONSTITUTIONAL LAW, V., 14.)

(See PLEADINGS, 64.)

(See COUNTIES, III.)

(See LIMITATION OF ACTIONS, 28.)

(See MUNICIPAL CORPORATION, III.)

(See MEEKER COUNTY.)

### I. REQUISITES OF A TAX.

1. To constitute a specific tax, so as to authorize an officer in collecting it, there

must be a determination by the proper authorities of the purposes for which the taxes shall be raised for a given period, and the rates or aggregate amount to be raised, which act constitutes a levy of tax on the district; but the tax thus levied upon the district must be assessed by the county auditor equally on all real and personal property subject to said taxation, and he must determine the sums to be levied upon each tract or lot of real property, and upon the amount of personal property listed in the name of each person in such district, and extend such amount on the tax duplicate. *McCormick et al. v. Fitch*, 14 Minn. 252.

## II. FOR WHAT TAXES MAY BE LEVIED.

**2. No claim against school district "audited, adjusted, etc." by special commissioners, can be made the foundation of a tax.** No particular locality, as a school district, can be taxed, for the payment of a claim against them, which, by act of the Legislature, was "audited, adjusted, and fixed," by the commissioners of the county; for such action on the part of the commissioners was the exercise of *judicial power*, and void; hence the claim was not *legally established*, or *valid*, in the sense which allowed it to be enforced; and if it was intended as a *gratuity*, the tax to raise it should have been levied on the whole State. *Sanborn v. Commissioners of Rice Co.*, 9 Minn. 273.

**3.** The "county purposes," within the meaning of Sec. 2, Chap. 6, Laws 1861, p. 47, for which the maximum tax is limited in the counties therein specified, to three mills on the dollar, without a vote of the people, includes only the ordinary expenses of the county. The levy of taxes for the following purposes are authorized in addition to the aforesaid amount: 1. Payment of the county debt, or interest on the same. 2. An expenditure of an amount not exceeding one thousand dollars, for extraordinary purposes, including roads and bridges. 3. The poor tax. 4. The school tax,

it being not a county, but a school district tax. 5. Interest or principal of county bonds, including war bonds issued as bounties. *McCormick et al. v. Fitch*, 14 Minn. 252.

## III. WHAT IS TAXABLE.

**4. National bank shares.** State taxation of the "shares" in national banks, authorized by the National Banking Act, approved June 3, 1864, cannot be effected under Sec. 4, Art. 9, of State Constitution; but is authorized by Sec. 3, Art. 9, Constitution, which provides that "laws shall be passed taxing \* \* investments in bonds, joint stock companies," etc. *County Treasurer v. Webb & Harrison*, 11 Minn. 500.

**5. Parsonages.** Sub. 1, Sec. 3, Chap. 1, Laws 1860, and Laws 1861, p. 16, which exempts from taxation "all houses used exclusively for public worship, the books and furniture therein, and the grounds attached to such building necessary for the proper occupancy, use, and enjoyment of the same, and not leased or otherwise, used with a view to profit," does not include a parsonage situated on the church lots. *St. Peter's Church v. The Board of Commissioners of Scott Co.*, 12 Minn. 395.

**6. Property of non-residents sent to the State, for sale.** Under the laws in force in 1864-5 (Sec. 1 and 11, Chap. 1, Laws 1860,) property of non-residents sent to this State for sale, and not merely for the purpose of being stored or forwarded, was liable to taxation. *McCormick et al. v. Fitch*, 14 Minn. 252.

## IV. WHAT IS NOT TAXABLE.

**7.** Under the city charter of St. Paul in 1858, the money of residents of another State, loaned in different parts of this State, and made payable in St. Paul, was not liable to assessment for taxes. *City of St. Paul v. Merritt*, 7 Minn. 258.

**8.** It seems that under the tax law in force in 1858, the money of non-residents in this State was exempt from taxation. *Ib.*

**9. National bank shares.** In view of the fact that national bank shares must be taxed *eo nomine*, the tax laws in force in 1865 did not authorize their taxation. *County Treasurer v. Webb & Harrison*, 11 Minn. 500.

## V. LISTING PROPERTY.

**10. Personal property, like bank shares, follows the situs of the owner.** The law of 1865, providing that personal property in the nature of bank shares, shall be listed "where situated," without defining the definition of those terms, by implication adopts the ordinary rule that personal property, in the nature of bank shares, follows the *situs* of the owner. *County Treasurer v. Webb & Harrison*, 11 Minn. 500.

**11. Bank shares must be listed, as such.** Under Sec. 41, of the National Banking Act, approved June 3, 1864, the taxes authorized to be imposed upon "shares" in any bank organized thereunder, under State laws, must be upon the "shares" *eo nomine*, against the holders thereof, and in no other way; nor does the *proviso*, which provides that such State tax shall not exceed the State tax imposed upon State banks, require that State banks should exist, or that the tax imposed on them be upon their "shares" *eo nomine*, in order to justify the taxation of "shares" in National banks. *Ib.*

**12. When the owner refuses, the assessor must list.** Sec. 27, Chap. 11, G. S., which authorizes the assessor to list a tax-payer's property for taxation, etc., when he "refuses or neglects" to do so, embraces all cases of refusal, neglect or omission, fraudulent, wilful, intentional or otherwise, by any person, to make a *true* statement of *all* the personal property, exempt as well as unexempt, which, by the provisions of Chap. 11, G. S., such person is required to list for taxation, either as owner or holder thereof, or as guardian, parent, husband, trustee, executor, administrator, receiver, accounting of-

ficer, parent, agent, or factor. *Thompson v. Tinkcom*, 15 Minn. 195.

**13.**—The power of the assessor to return property for taxation, not embraced in the tax-payer's statement, is not affected by an omission of the assessor to enter upon his return, in an appropriate column, opposite the name of any person refusing to list his property, the words, "refused to list."—Sec. 29, Chap. 11, G. S. *Ib.*

**14.**—When, by mistake or otherwise, there has been an omission in the statement of property liable to taxation, as listed by the owner, of any portion of the personal property of the tax-payer, the assessor has power, and is required, to embrace in his return any and all property taxable under the law, whether omitted by mistake or otherwise, from the list made by the owner, or whether any list was made or not, under Chap. 11, G. S. *Ib.*

**15. Property must be distinctly described.** When the tax-payer neglects or refuses to list his property for taxation, the assessor, under Secs. 18 and 19, Chap. 1, Laws 1860, must not only assess the value in dollars and cents, but *list*—that is to say, describe, so as to show more or less definitely, according to its character, to what property the valuation related. A tax thus assessed on a quantity of wheat, under the head of "household goods," etc., is invalid. *Thompson v. Davidson*, 15 Minn. 412.

**16. What sufficient description of real estate.** By the tax law of 1860, the *general* assessment of real estate was to be made biennially, commencing with 1860, showing on the roll "the description of each lot, and the value thereof, as determined by the assessor," designating the town, lot, number, and part thereof, if part is listed, with the number of feet on the principal street on which it abuts. By Sec. 22, the assessor shall make a list of personal property, annually, and take a list of all real property which has become subject to taxation, since the last previous listing, with its value. Plaintiff's church lots (2) in 1862 had a parsonage thereon, which rested

partly on both lots, but no church. Prior to 1864, a church had been placed across the north end of both said lots, resting on both. *Held*, in 1862 the property was taxable. After the church was placed on the north end, the south end remained taxable, and as such change occurred between the biennial listings, an assessment of said south half as the "S.  $\frac{1}{2}$  of lots 9 and 10, in block 49, Shakopee City," was a sufficient description, without stating the feet front on the street, etc., as required in biennial assessments. Nor does the description in the assessor's biennial return relate to the county auditor. *St. Peter's Church v. The Board of County Commissioners of Scott County*, 12 Minn. 395.

## VI. EQUALIZATION OF THE ROLL.

### 17. Failure to equalize, fatal to tax.

An omission on the part of County Commissioners, under the tax law of 1856, to equalize and correct the assessment rolls, renders the tax illegal. *Board of County Commissioners of Dakota County v. Parker*, 7 Minn. 267.

## VII. TAXES, WHEN DELINQUENT.

**18.** Statute prescribes that neglect to pay taxes within 30 days after publication of the notice prescribed, shall be deemed a refusal to pay the same. Special Law, 1859-60, p. 14-15. *Held*, Taxes not delinquent until expiration of that time, although unpaid. *St. Anthony Falls Water Power Co. v. Greely*, 11 Minn. 321.

**19.** When the statute prescribed that "publication of a given notice shall be deemed equivalent to a personal demand, and neglect to pay such taxes within thirty days after publication of such notice, shall be deemed a refusal to pay the same." (Charter St. Anthony, p. 14-15.) *Held*, this omission renders necessary either a personal demand of the tax-payer, or the publication of the notice specified. Until this is done, the collector cannot proceed

to enforce the tax, and a sale so made would be void. *Id.*

## VIII. THE DELINQUENT LIST.

**20.** Want of delinquent list, as required by statute, fatal to the sale. The law required a return from the City Clerk to the County Auditor of a list of all lots, etc., upon which any tax may remain due and unpaid. The Clerk returned a list of land on which taxes were "due or unpaid," attaching to said list a certificate that "the foregoing is a list of—all land on which taxes remain delinquent and unpaid." *Held*, the list was the operative instrument, the certificate only its authentication; and the return, not conforming to the statute, is fatally defective, and gave the auditor no authority to sell. *Id.*

## IX. THE COLLECTION OF THE TAX.

**21.** A "penalty" may be collected by the summary process, authorized for the collection of taxes. *Baker v. Kelly*, 11 Minn. 480.

**22.** A County Treasurer may collect taxes, by distress or otherwise, on a delinquent list, as well as on a duplicate. *Piper v. Branham*, 14 Minn. 548.

## X. PRESUMPTIONS.

**23.** Presumption of regularity of assessment. The presumption from the return of assessments for taxes, regular upon its face, and in the hands of the proper officer, is, *prima facie*, that the tax is valid, and it is incumbent on the plaintiff (taxpayer?) to rebut that presumption. *Thompson v. Tinkcom*, 15 Minn. 295.

## XI. THE SALE.

### a. Time of Sale.

**24.** A sale of lands for delinquent taxes, made after the time designated for



the sale in the notice, is void. *Prindle v. Campbell*, 9 Minn. 212.

*b. Notice of Sale.*

**25. Notice must be given requisite time before sale.** The Charter of the City of Wabashaw (Sp. L. 1858, Chap. 5, Sec. 10,) provides that the City Marshal, on receipt, of tax list, "shall give one week's notice thereof, in the official paper, or ten days' notice by posting, etc., notices to specify that taxes on personal property shall be paid within thirty days from first publication or posting of notice, and taxes, etc., on real estate, shall be paid before the first day of August or first day of December—if not paid first of August, to draw interest, and if not paid first December, to be sold, etc., for taxes, interest and costs—the publication or posting of notice to be deemed a demand, and a neglect to pay, deemed a refusal to pay." *Held*, notice of time and place of sale must be given one week or ten days (as the case may be) prior to first day of August, and a notice published for the first time on July 29th, made the subsequent proceedings void, because the sale was for interest from August 1, whereas interest did not accrue until after ten days from the publication, and that did not expire until after August 1—thus selling for more than was due. *Ib.*

**26.—otherwise fatal.** Failure to publish the notice of sale of lands for delinquent taxes, the required length of time before sale, is not such an omission in the tax proceedings as will be corrected by a clause in the tax law, declaring as directory only, all requirements not affecting the substantial justice of the tax law. *Ib.*

**27.** A notice of tax sale, which embraces all lands upon which taxes are assessed, and is not restricted to those which may be delinquent, and gives no place of sale, is void. *Ib.*

**28. Description too uncertain.** An advertisement of sale of land for delinquent taxes, describing the land as " $\frac{2}{3}$  of

block 4, in Bass out lots," is bad for uncertainty. *Bidwell v. Coleman*, 11 Minn. 78.

**29.**—A notice of sale of lands for delinquent taxes contained no further description of certain premises than the following: "Roberts & Randall's Addition," "Lot 11, Bl'k 20," "Lot 12, Bl'k 20," dated as follows: "Auditor's Office, Ramsey County, Minn., St. Paul, December 8, 1862," nowhere describing said lots or additions as being in the City of St. Paul or Ramsey County, except as by the date of the notice. *Held*, the date cannot be regarded as referring to the premises sold, or aid in their description. The notice is insufficient, and purchaser acquired no title. *Bidwell v. Webb*, 10 Minn. 59.

*c. Sale of Subdivisions.*

**30. Sale must be made in subdivisions, as assessed.** A block of land "composed and comprising ten distinct and separate lots, numbered from one to ten inclusive, which piece, parcel or tract of land had been surveyed and platted as aforesaid, and the plat thereof filed for record in the office of the Register of Deeds," etc., was assessed for taxes as one tract, and afterwards sold as one tract, for delinquent taxes. The tax law (Chap. 4, Laws 1862) provided that actions to test the validity, etc., of assessments, must be commenced prior to sale, and actions to test the validity of the sale, within one year from recording of tax deed. Plaintiff claimed to vacate the sale, because the property was not sold in separate lots. *Held*, the block having been assessed in one tract, the County Treasurer had no authority to sell in lots; he must sell in the subdivision in which it is assessed, and no point being made as to the assessment, plaintiff cannot have the relief asked. *Moullon v. Doran et al.*, 10 Minn. 67.

**XII. THE PURCHASER AT TAX SALE.**

**31. Purchaser's lien not determined by an action to determine adverse claims.**

A parties' right to a *lien* on premises, by reason of money paid on land sold for delinquent taxes, where the sale was illegal, can not be determined in an action to determine adverse claims to real estate, under Sec. 1, Chap. 64, Comp. St., it not being an estate or interest within the meaning of the statute. *Bidwell v. Webb*, 10 Minn. 59.

**32. During redemption period, has only a lien.** The purchaser of land at a tax sale, under Sec. 151, Chap. 11, G. S., prior to the expiration of the period of redemption, has not, as against the owner, an *estate or interest in the land*, but only a *lien upon it*. *Brackett v. Gilmore*, 15 Minn. 245.

### XIII. REDEMPTION.

**33. Owner must redeem in parcels, as sold.** Where property was assessed and sold in one tract, as in a block, the county officers have no power to allow the owner to redeem any subdivision of said block as one lot—not possible to ascertain the sum for which such lot was sold. *Moulton v. Doran et al.*, 10 Minn. 67.

**34. Redemption money received for purchaser, without deduction of fees by Treasurer.** Under Chap. 4, laws of 1862, where lands sold for delinquent taxes are redeemed, the County Treasurer receives the whole sum thus paid, for the use of the purchaser or his assigns, and is not entitled to retain therefrom any portion as fees or percentage. *Stuart v. Walker*, 10 Minn. 296.

### XIV. THE TAX DEED.

**35. When to be made.** The statute clearly authorizes the making of the tax deed before the time of redemption expires, Sec. 5 and 9, tax law of 1862. *Baker v. Kelley*, 11 Minn. 480.

**36. When prima facie evidence.** A tax deed under Sec. 139 and 140, p. 186, G. S. is *prima facie* evidence of title, only when it is shown that the land sold *had not been redeemed* when the tax deed was executed and delivered. *Greve v. Coffin*, 14 Minn. 345.

**37.**—A tax deed under Sec. 143, p. 187, G. S., is not *prima facie* evidence of title when the land was charged on the tax duplicate in any other name than that of the rightful owner, unless it is shown that the taxes, for which the land was sold, were due and unpaid at the time of the tax sale. *Ib.*

### XV. THE LIEN FOR TAXES.

**38.** The lien of the State for taxes embraced in the act of 1862, (C. S., Chap. 9, Sec. 98,) attached to real estate, when the taxes were assessed thereon, that is, when the amount or proportion of tax to which each parcel of real estate was subject, was fixed and determined. *Webb v. Bidwell*, 15 Minn. 479.

### XVI. ACTIONS TO TEST VALIDITY OF TAX PROCEEDINGS.

**39. Non-appearance before board of equalization, no estoppel.** A failure to make objection as required by law, to an assessment of taxes (as by appearing before the board of equalization) can not *estop* the owner of property, from questioning its validity at any time, where the assessor had no authority to make the assessment, for in such a case the whole proceeding is void from the beginning. *City of St. Paul v. Merritt*, 7 Minn. 258.

**40. Neglect to redeem or pay taxes, no forfeiture per se, so as to bar this action.** A mere neglect to redeem the land or pay the taxes did not work such a forfeiture, as of itself to divest the plaintiff's title, and prevent the plaintiff from maintaining an action against the purchaser at the tax sale to test the validity of the proceedings. *St. Anthony Falls Water Power Co., v. Greely*, 11 Minn. 321.

## TENDER.

(See CIVIL ACTION, XXII., 2.)

## TENANTS IN COMMON.

(See PARTNERSHIP, I.)

**1.** One tenant in common, as a general rule, can not have an action of trespass *quare clausum fregit* against another, but he may have an action on the case in the nature of waste, for any misfeasance, injurious to the common property. *Booth v. Sherwood*, 12 Minn. 426.

**2.** As between tenants in common, the possession of one is the possession of all; and unless the property has been actually converted or destroyed, an action at law will not lie in favor of one against the other. *Strong v. Colter*, 13 Minn. 82.

**3.** The possession of one tenant in common, is presumed not to be unlawful, or adverse to his co-tenant. *Berthold v. Fox et al.*, 13 Minn. 501.

**4.** M. owned 23-25ths, and B. 2-25ths of certain land, as tenants in common, which had been sold under a mortgage foreclosure, the certificate of which was held by H., dated May, 1865. M. being in possession, paid to H. a back tax and interest on purchase money, for 1866-7, and in 1868, paid the sheriff one year's interest, and whole amount of purchase money at mortgage sale, for purpose of redemption, of which H. took 23-25ths only. In 1866, B. had conveyed his legal estate in 2-25ths to H. *Held*, H. took by purchase at foreclosure, and before period of redemption expired, the equitable estate or interest of a mortgagee before foreclosure, and had a right to hold such interest, for his own benefit, unless the subsequent purchase of B.'s legal estate impaired that right by merger. If there was a merger it would be a merger of the purchaser's estate to

the extent of 2-25ths in the legal estate conveyed to H. by B., and would only impair H.'s rights respecting the possession during the time to redeem. The accepting back tax, interest, and the 23-25ths purchase money showed no merger, and M., by such redemption annulled the sale, and took no title by means thereof, and need not have paid the sheriff only 23-25ths and interest. *Horton and wife et al., c. Maffitt and wife*, 14 Minn. 289.

**5. Liabilities to each other.** One owner of an undivided moiety of real estate in possession of the whole, is not liable to another owner of the other moiety, in an action for use and occupation, where there has been no demand of possession or knowledge of the latter's title. *Holmes v. Williams et al.*, 16 Minn. 164.

**6. Possession of one, that of all.** In the absence of facts showing an ouster, where a party is in lawful possession of one undivided moiety of land, he is in lawful possession of the whole, as and for the other tenant in common. *Ib.*

## TITLE.

(See EVIDENCE, 186, *et. seq.*)(See PLEADINGS, 50, *et. seq.*, 73, 74.)

## TOWNS.

**1. Power to pay bounties to soldiers.**

In the absence of statute, a town has no right to raise or appropriate money, or issue bonds for the payment of bounties to volunteers entering the United States service. *Cover v. The Town of Baytown et al.*, 12 Minn. 124.

**2. Can not indemnify individuals for bounties voluntarily paid.** Towns under Sec. 2, Chap. 8, Laws 1862, (extra session) p. 49, which provides that a \* town that

may make appropriations for bounties to soldiers, is empowered to levy a tax for a sum sufficient to cover the appropriation, can not assume the payment of money advanced to pay bounties by individuals, and issue bonds for the payment thereof. *Ib.*

**3. Town scrip issued to pay bounties** promising to pay the principal sum with interest at 12 per cent, annually, are binding both as to principal and interest, under Chap. 20, laws 1869, and judgment on such scrip will carry damages by way of interest after maturity at 7 per cent. *McCutcheon v. Town of Freedom*, 15 Minn. 217.

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## TOWN SITES.

(See U. S. LAND.)

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## TOWN BOUNTY BONDS.

(See CONSTITUTIONAL LAW, V., 8.)

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## TRANSIT R. R. CO.

**1. The grant by the State to the Winona and St. Peter R. R. Co., of the franchise, etc., of the Transit R. R. Co., did not revive the latter.** Under the constitution, the State loaned its credit to "The Transit R. R. Co.," taking as security of said company, first mortgage bonds, together with a trust deed of all the property, rights, franchises, etc., of said company, of every nature and kind whatsoever, with power of sale in case of default. Afterwards, on default, the State foreclosed the trust deed, and bid in all the rights, properties, etc., enumerated in the trust deed, and took a conveyance. Afterwards the Legislature, by an "Act to facilitate the construction of a railroad from Win-

ona westwardly by way of St. Peter," approved March 10, 1862, "*granted, transferred, and continued*," to defendant "all the rights, benefits, privileges, property, franchises, and interests, of the Transit R. R. Co., acquired by the State by virtue of said deed, etc." *Held*, the State did not revive the Transit R. R. Co., and continue and re-grant said franchises, rights, and property in and to it under a new name. *Huff v. The Winona and St. Peter R. R. Co.*, 11 Minn. 180; *Hilbert v. The Winona and St. Peter R. R. Co.*, 11 Minn. 246.

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## TRIAL BY THE COURT.

(See PRACTICE, II., 11, C.)

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## TRIAL BY REFERENCE.

(See PRACTICE, II. 11, D.)

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## TRIAL BY JURY.

(See PRACTICE, II. 11, B.)

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## TROVER.

(See INJURIES TO PERSONAL PROPERTY.)

(See CIVIL ACTION, XII.)

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## TRESPASS.

(See INJURIES TO PERSONAL PROPERTY.)

(See INJURIES TO PERSON.)

(See INJURIES TO REAL PROPERTY.)

(See CIVIL ACTION, XII., XIV., XV.)

(See DAMAGES, VI., *a. b.*)

(See PLEADINGS, B., VII., *d. g.*, 11, 12.)

## TRUSTEES OF SCHOOL DISTRICTS.

(See SCHOOL DISTRICTS, III.)

## TRUSTS AND TRUSTEES.

- I. TRUSTS HOW CREATED.
- II. OFFICIAL TRUSTS.
- III. WHO ARE TRUSTEES.
- IV. RESULTING TRUSTS.
- V. TRUSTEES.
- VI. CESTUIS QUE TRUST.

(See PARTNERSHIP, 29.)

(See DEEDS, 17.)

## I. TRUSTS HOW CREATED.

**1. Express trusts only by deed—no resulting trust where A. furnishes money to buy U. S. land in name of B.** Where A. had improved government land, and was in possession, and allowed B. to enter it at land office in B.'s name, under a parol agreement that B. should convey it to A. when he paid the purchase money, *Held*, immaterial whether A. borrowed the money from B., and paid for the land with it, or whether B. paid for it with his own money, because, in the first case, no trust could arise in favor of A., under Statute, Sec. 7 and 8, Chap. 44, R. S., nor in the second, because express trusts can be created only by deed or conveyance—not by parol agreement, under Sec. 11, R. S., p. 203. *Wentworth v. Wentworth*, 2 Minn. 283.

(See *Infra*, IV, 11.)

## II. OFFICIAL TRUSTS.

(See U. S. LAND, 111.)

**2. Duties of Judge, where the fee is burdened with an easement.** Where a Judge enters land under the town site act,

for the benefit of occupants and claimants, and the same has been dedicated to the public by a statutory dedication on the part of the rightful claimant, the Judge may well convey the fee to the claimant, for the law imposes the easement on the legal title. *City of Winona v. Huff*, 11 Minn. 119.

## III. WHO ARE TRUSTEES.

**3. Subsequently acquired title, when taken in trust.** A grantor covenanted to make further assurance when he, his heirs, etc., "shall hereafter acquire from the United States the fee simple, title, etc." *Held*, that when the grantor so acquired title from the United States, he held in trust for the grantee, and the covenantee can compel a specific performance of the covenant of further assurance. *Hope v. Stone et al.*, 10 Minn. 141.

**4.**—S. being in possession of land, and entitled to receive the patent from the United States, *quit-claimed* all his interest to A., adding a covenant for further assurance, when he acquired title from the United States. S. afterwards obtained the patent conveyed by full covenant warranty deed all his right, title, interest, etc., to H. *Held*, S., on receiving the *patent*, held the land in trust for A., and H. took only his interest: *i. e.*, the legal title, subject to the trust in favor of A. *Ib.*

**5. When joint owner of a judgment collects it.** Plaintiff and defendant were owners as tenants in common of a judgment, under an assignment which authorized either to collect the same to their joint use. Defendant issued execution, which was levied on real estate, and at the sale thereof purchased the same, receiving in due time a sheriff's deed—no money being paid on the sale. *Held*, fraud or bad faith nowhere appearing, nor that the purchase was not necessary to protect the assignee, although defendant took title in himself, still equity presumes defendant acted in pursuance of his trust, and not in violation of it, and defendant holds the title thereto

as trustee of plaintiff to the extent of plaintiff's interest. *Holmes et al. v. Campbell*, 10 Minn. 401.

**6. Husband purchases land, with wife's money, in his name.** If a husband receives from his wife money, being her separate property, on a promise to invest it in her name, but in violation of such agreement and of the trust reposed in him, purchases land with the same in his own name, he will take such lands in trust for his wife, and the courts will decree a conveyance to her. *Rich v. Rich*, 12 Minn. 468.

**7. Husband and wife—resulting trust.** Where a purchase of real estate is made, and the purchase money paid by a husband, and the conveyance is taken to the wife for the sole purpose, known and assented to by her, of providing a home for her in case she should survive him, with the mutual understanding, between such husband and wife, that in case he should survive her, the title to the premises should vest in him, and should not descend to her heirs; although it was the intention of each to have had the proper instrument in writing to effect the purpose, prepared and duly executed, no trust, express or implied, is created, or results in favor of the husband under the statutes of this State. *Johnson v. Johnson et al.*, 16 Minn. 512.

**8. P. Choteau Jr., sold land to Franchere,** taking the latter's promissory notes for the unpaid purchase money, and giving bond to convey on payment of said notes; the vendee went into possession, and remained until 1863, when he died, leaving two of said notes unpaid, and a widow, besides four children by a former wife, who are plaintiffs in this action. By will, he devised all his property, real and personal, to his wife for life, remainder in fee to plaintiffs. The widow died in 1868, leaving three children by a former husband, John S., Amelia, and J. W. In 1866 P. Choteau, Jr., died, leaving, by will, all his interest in the notes and land to Chas. P. Choteau and Julia Maffit. In 1867, said Chas. P. Choteau and Julia wrote the word "cancelled" across the two unpaid notes, delivering them to John S.

aforsaid, as his agent, for the purpose of relieving said Franchere from any further payments, in consideration of faithful services done and performed by said F. Afterwards (1867) said Charles P.C. and Julia executed a warranty deed to *Mrs. Franchere* on the aforesaid consideration. John S. aforesaid has disclaimed all interest, by a warranty deed to plaintiffs, but said Amelia and J. W., defendants, claim to own two-thirds of said land subject to plaintiffs' rights to conveyance, on paying two-thirds of the unpaid purchase money represented by the cancelled notes. *Held*, the claim for purchase money, represented by the notes, was not transferred to Mrs. F. by the deed to her, and defendants are mere naked trustess of the legal title to the lands for plaintiffs. *Chemedlan et al. v. Prince et al.*, 15 Minn. 231.

**9. W. and Van B.** "squatted" on government land, which was unsurveyed, and not open to settlement, agreeing between themselves that they would divide the same according to a certain line established. Both made improvements on the forty in question, through which this line run, but when the land came into market, both claimed the right to enter this quarter—they contested each other's claim, until it was finally determined on appeal to the Secretary of the Interior in favor of Van B., to whom a patent issued. *Held*, Van B. did not take as trustee for W. of any interest therein; said agreement being void under the preëmption law, and the facts in this case show that Van B. was entitled to the patent, though the decision of the department was not final for want of judicial power. *Warren v. Van Brunt et al.*, 12 Minn. 70.

**10. Indian agent.** F. sold defendants certain improvements on Indian lands, in accordance with a treaty which conferred power on the President to sell the same for the benefit of the Indians, taking a note in these terms: "For value received we or either of us promise to pay J. E. Fletcher, United States Indian agent, his successor in office, or order, for the use of the Win-

nebago tribe of Indians, on, etc., at etc., etc., the sum, etc., and it is agreed that no patent for the lands, on which the improvements for the purchase of which this note is given, as provided by the treaty of Feb. 27, 1855, with the Winnebago Indians, shall be issued until full payment thereof, etc." The treaty conferred power on the President to sell the property for the use of the Indians. *Held*, J. E. F. was not a trustee of an express trust—the contract was made with the United States, F. acting only as agent. *St. A. D. Balcombe v. Northup et al.*, 9 Minn. 172.

#### IV. RESULTING TRUSTS.

**11. Resulting trust exists in favor of one who furnishes means to another to purchase government land.** The rule laid down in this case by the Supreme Court of the United States (*Irvine v. Marshall & Barton*, 20 How. 558,) viz : that "Sec. 7, Chap. 44, p. 202, R. S., 1851, abolishing resulting trusts, (except in certain cases,) where land was purchased in name of one person with money of another, does not apply to land purchased from the United States," followed, as a binding authority in this case, but the opinion expressed that there are many reasons why the court would not willingly follow it in other cases, until reaffirmed by another decision. See *Wentworth v. Wentworth*, 2 Minn. 277; in conflict with this result, *ante* I. *Irvine v. Marshall & Barton*, 7 Minn. 286.

**12. Resulting trust may be rebutted.** The resulting trust which arises in equity, in favor of a person who pays the consideration for land, but the conveyance is in the name of another, may be rebutted by circumstances, or oral or written evidence. *Id.*

**13. One furnishing means to pay for deed, etc., has no interest.** S. being indebted to the plaintiff, purchased land with his own means, taking conveyance in name of Strout, but occupying the same as homestead. *Held*, plaintiff might take the land from Strout, under the statute abol-

ishing resulting trusts, and making such conveyances fraudulent *prima facie* against creditor of the party furnishing the purchase money, and S. could not be heard to protect the estate, for he had no interest whatever—it lay between plaintiff and Strout—the fact of S. and family living on the same, and claiming it as a homestead, was no defense in an action by plaintiff to realize his debt against S. out of the property. *Sumner et al. v. Sautelle et al.*, 8 Minn. 309.

**14.**—Under Sec. 5 and 7, Chap. 32, Comp. St., p. 382, a person paying the consideration for land which is conveyed to another, has no estate whatever, legal or equitable, and cannot be heard in any court of law or equity, claiming its aid to enforce or protect any pretended rights in the premises of whatever nature they may be. *Id.*

**15. Occupancy of the land as a homestead gives no claim.** The presumption of fraud, as against existing creditors, which the statute provides shall arise where a person takes a conveyance of lands, which are paid for with the debtor's means, cannot be rebutted by showing that the debtor and his family occupy the same as a homestead, and claimed the beneficial interest in the land as such, for the debtor can have no possible interest therein, while a homestead must be owned by the debtor. *Id.*

**16. Conveyance or deed necessary to give creditor any resulting trust.** It is essential to the existence of a resulting trust, in favor of existing creditors of the party paying the consideration, under Sec. 8, Chap. 43, G. S., that it arise from some conveyance or deed. *Durfee v. Pavitt et al.*, 14 Minn. 424.

**17. Verbal contract gives creditor no claim.** H. verbally contracted with A. for the sale of certain property. H. had paid the purchase money, and A. was to convey on request. *Held*, this state of facts gave rise to no resulting trust in favor of H.'s creditors, under Sec. 7 and 8, Chap. 43, G. S. The only right H. had, was to have the purchase money refunded, and his creditors by

proper steps could have reached this interest. *Id.*

**18.**—Where H. has paid the purchase money under an oral agreement with A. for the purchase of land, and for a valuable and adequate consideration, transfers his interest under such contract to P., who afterwards obtained a conveyance from A. *Held*, not to vitiate the conveyance to P., in favor of a creditor of H., under Sec. 8, Ch. 43, G. S., actual fraud on part of H., in which P. participated, or of which he had notice, prior to or at time of the conveyance, was necessary. *Durfee v. Pavitt et al.* 14 Minn. 424.

**19. Statute concerning resulting trusts relates to personal property.** Plaintiff in an action for claim and delivery of personal property showed a bill of sale from B.; defendant claimed the property as being the property of his debtor, S., the latter testified that he paid the consideration, but allowed the plaintiff to take the title as security for a debt he owed plaintiff. A stipulation in the case, confined defendant's claim to such claim as S. had in the property. *Held*, under Sec. 7, Comp. St., p. 382, S. had no interest, and as the evidence tending to show absence of fraud, which the statute raises presumptively from such transactions, was conflicting, and the jury had found for plaintiff, court could not declare the conveyance void for fraud. *Foster v. Berkey et al.*, 8 Minn. 351.

**20. The statute does not relate to personal property.** Comp. St., Chap. 32, relating to uses and trusts does not relate to personal property, and mortgages are personal property within the meaning of the statute, so that where A. furnishes B. with money to purchase a mortgage in his name and holds for A.'s use, a resulting trust arises in favor of A. *Baker v. Terrell et al.* 8 Minn. 195.

**21. Trust created by trust deed, made fee simple by grantor's quit-claim.** Plaintiff had undertaken to convey land to defendants by a deed which was void for uncertainty in the description, and

under which defendants had entered and erected and used county buildings, and were, by its terms, to hold thereunder, so long as they occupied it as a seat of justice, with a proviso, that if the county seat should be removed from that town, the land should revert to plaintiff, and with condition precedent that defendants should reimburse plaintiff and others the sums theretofore paid by them towards the erection of said buildings. Afterwards plaintiff, by a proper description, quit-claimed the same to defendants, together with all his estate of reversion or remainder therein. *Held*, second deed not confirmatory of the first, and a consideration being admitted in the quit claim, no trust resulted in favor of plaintiff, and defendants were vested with the fee simple in the land—and this though the first conveyance had not been void. *McKusick v. The Commissioners of Washington Co.*, 16 Minn. 151.

## V. TRUSTEES.

**22. Liability of trustee.** When a party takes title and possession of land subject to an outstanding contract of sale, which gave the contractee possession, under circumstances which tend to show that the contractee had abandoned the contract, such contractee, or his assigns, cannot charge such purchaser with anything but the *actual profits* of the land prior to the time he was actually informed of the contractee's claims. *Smith v. Gibson*, 15 Minn. 89.

**23. Rights of Trustees.** In an action to set aside certain deeds as fraudulent and declare the grantee therein trustee of plaintiff, after judgment but pending stay, the court could not compel the trustee to turn the rents and profits of the land over to the sheriff, to be converted into money, and held subject to the order of the court; for the trustee being so at the prayer of the complainant, he was entitled to possession of property and rents and profits, except in case of abuse of his trust or like circumstances, which was not shown in this case. *Mower et al. v. Hanford*, 6 Minn. 535.



## VI. CESTUIS QUE TRUST.

**24. Rights.** A purchase at a sale by a trustee is *voidable*, at the option of the *cestui que trust*, but not as to stranger, if regular in other respects. *Baldwin v. Allison*, 4 Minn. 25.

## UNITED STATES LAND.

## I. GENERALLY.

## II. PRE-EMPTION ACT.

## III. TOWN SITE ACT.

(See MORTGAGES, VII., b.)

(See GRANTS.)

(See TRUSTS AND TRUSTEE, 1, 8.)

## I. GENERALLY.

**1. On making sufficient proof, right of applicant vests, and patent relates back to such time.** When proof of occupation and settlement is made to the proper government officer, the party is entitled *eo instanti* to the benefits of the act under which he makes his improvements, and if those acts are subsequently recognized by the government issuing to him a patent, no subsequent settler can question the former title, for he had notice of the former settlement, and the rights of the first settler had become vested. *Leech v. Rauch*, 3 Minn. 448.

**2. When can State Courts review decisions of United States land officers?** United States land officers act judicially in determining whether a party has made the necessary settlement on public lands to entitle him to a patent. Their decision, however, can be reviewed by the State Courts on the ground of fraud, but the simple suggestion of fraud will not be sufficient; it must further appear that complainant had no notice, and was not heard, and was ignorant of the proceedings in the land office until too late to obtain

redress there, and without fault of his own he is placed in such a position that no relief can be obtained elsewhere. *State v. Batchelder*, 5 Minn. 223.

**3. State control over U. S. lands.**

United States land within the limits of this State are subject to the same control by the State government as any other lands over which its jurisdiction extends, except in those cases provided for by Sec. 3, Art. 2, State Constitution, viz.: State cannot interfere with the primary disposal of the soil within the same by the U. S., or with any regulations Congress may find necessary for securing the title in said soil to *bona fide* purchasers thereof, nor shall any tax be imposed on land of the U. S., nor non-resident proprietors taxed higher than residents. *Id.*

**4. No right can exist in unsurveyed lands.** A quit claim deed of unsurveyed United States lands is inoperative and void; an occupant on unsurveyed public lands is a trespasser. *Cole v. Maxfield*, 13 Minn. 235.

## II. PRE-EMPTION ACT.

**5. Requisites of a pre-emption.** To constitute a valid right of pre-emption under the act of 1841, the spirit and terms of the law require a personal settlement by the claimant upon the land, and the original settlement must be followed by occupancy of the land, as the home of the settler; the erection of a dwelling house thereon, and the cultivation or improvement of the land. What constitutes such occupancy or improvements depends upon the facts of each particular case, and no absolute rule can be laid down. In the case of a married man, the settlement may be made originally without the presence of his family, and the time when his family must follow may be different in different cases. The only rule that can be laid down is that the settlement and occupancy must, under all the circumstances be reasonable as to time and manner, and show a *bona fide* intention to occupy and improve the

premises. *Kelley v. Wallace et al.*, 14 Minn. 236.

**6.**—A party claiming title by a pre-emption right must prove actual residence upon the land and improvements made by him. *Brisbois v. Sibley & Roberts*, 1 Minn. 230.

**7.** For a statement of facts which sufficiently excuse a pre-emptor from following up his occupancy to land, see *Kelley v. Wallace et al.*, 14 Minn. 236.

**8. Assignee of pre-emptor takes subject to approval of the department.** Where one enters a piece of U. S. land, and pays the purchase price to the local land officer, such entry is subject to the approval of the Department; and if afterwards cancelled for want of compliance with the pre-emption laws (as it may be), and the money returned, the pre-emptor and his assigns lose all interest in the land, though the latter purchased in good faith before the cancellation—for he took subject to the liability of cancellation. *Randall v. Edert*, 7 Minn. 450.

**9.**—All parties who purchase from a pre-emptor prior to the consummation of the entry, take subject to the power of the upper office to confirm or cancel the entry that existed in relation to the original purchaser. *Gray et al. v. Stockton*, 8 Minn. 529.

**10. Pre-emptor may assign his interest from time of entry.** The prohibition contained in Sec. 12, Act of Congress, Sept. 4, 1841, is intended only to prevent the transfer of the mere right of pre-emption prior to the time of entry, and the assignment of the certificate of purchase in such a manner as to enable the assignee to secure the patent in his own name. The right to assign the land, or his interest therein, according to the laws of the State, is complete in the pre-emptor from the time of his purchase and entry (pre-emption); when the patent issues, it inures to the benefit of his grantee; and the State alone has power to regulate the force and effect of contracts relating to land within its limits, between its citizens and those seeking

aid of its courts, and is alone competent to prescribe what is evidence of title. *Camp v. Smith*, 2 Minn. 174.

**11. Pre-emptor may mortgage to secure the purchase money.** Allen, a pre-emptor on government land, before proving up and paying for the same, entered into an arrangement with W. for the purchase of two land warrants, the price to be secured by his note and a mortgage on the land. When A. made his proofs at the land office, W. was present, and delivered the land warrants immediately thereafter, one of them to the land officer in payment for the land. Thereupon A. executed his note and mortgage on the land, to W. Held, the mortgage void as to W., and all except *bona fide* purchasers for value—following *McCue v. Smith*, 9 Minn. 252. *BERRY, J., dissents.* See remarks in same case on motion for re-argument, p. 343, when the majority of the court (differently constituted) say they would not be bound by this decision in another case, and would examine it as *res nova*. *Woodbury v. Dorman*, 15 Minn. 338.

(See CONTRACTS.)

**12. None but the United States can question pre-emptor's illegal contract.** The title of a pre-emptor who has entered into contract concerning the land before pre-emption, is good against all the world except the United States—no one else can insist on a forfeiture. *Ib.*

### III. TOWN SITE ACT.

**13. Requisite of "Town Site" occupancy.** The "occupancy" required by the U. S. Town Site Act of 1844, is different from the "occupancy" required by the act of 1841 (U. S.) for pre-emption of agricultural lands. The latter has limitations, which the former has not. The requisites of the act of 1844 are complied with by settling upon and "occupying as a town site,"—not so with the other. Whether the law in either case has been complied with, is for the U. S. Land Officers to determine, and on appeal from them to their

superiors—but never for the State courts. *Leech v. Rauch*, 3 Minn. 448.

**14.**—To constitute a person a beneficiary under the town site act of the United States, there must at least be occupancy either actual or constructive; and where neither exists, no trust arises. *Carson et al. v. Smith et al.*, 12 Minn. 546.

**15.**—To reserve land, as town sites, from preemption, under the existing laws, actual *bona fide* settlement and occupation of the land as a town site is necessary; the mere selection by surveying and platting the ground into blocks, lots, streets, etc., will not be sufficient. *Ib.*

**16. Claimant's interest vests on filing sufficient proofs.** Occupants on town site having shown, under act of 1844, at time of application they had performed all the conditions necessary to enable them to enter the land for their use and benefit, and the tribunal of last resort having so adjudged, it was not in the power of any officer or set of officers to deprive occupants of their rights under such decision, by permitting an entry to be made upon other proof, or by another person. The District Judge having made the entry as trustee of the occupants, his successor would hold the title in trust for those interested, under the decision of the tribunal of last resort. *Castner v. Gunther*, 6 Minn. 119; *Castner v. Echard*, 6 Minn. 149; *Castner v. Lowry*, 6 Minn. 149.

**17.**—After the performance of the conditions necessary to authorize the entry of lands, under act of 1844, as a town site, and the actual entry and sufficient proof, no other persons can settle upon or occupy any vacant lot or parcel, and thus secure a title, pending the decision. *Castner v. Gunther*, 6 Minn. 119; *Castner v. Echard*, 6 Minn. 149; *Castner v. Lowry*, 6 Minn. 149.

**18. State courts cannot inquire into sufficiency of proofs before land officers.** The sufficiency of proofs, under the Town Site Act of 1844, to justify the decision of the Secretary of the Interior, and the entry of lands in accordance therewith, cannot be the subject of inquiry in actions be-

tween claimants under such entry. *Castner v. Gunther*, 6 Minn. 119; *Castner v. Echard*, 6 Minn. 149; *Castner v. Lowry*, 6 Minn. 149.

**19. A non-resident may have an interest in unsurveyed lands of the U. S.,** within this State, under the act of August 4, 1854, U. S. Statutes, by means of an agent, fairly on the land, and the necessary improvements—following *Davis & Barnes v. Murphy*, 3 Minn. 119, and *Leech v. Rauch*, 3 Minn. 448. *Carson & Eaton v. Smith*, 5 Minn. 78.

**20. Contracts concerning unsurveyed lands.** Under the act of August 4, 1854, the settlement of unsurveyed lands of the United States, for town site purposes, was legalized; hence, contracts relating thereto were legal—following *Carson & Eaton v. Smith*, 5 Minn. 89. *Wood v. Cullen, impl., etc.*, 13 Minn. 394.

**21. Duplicate, effect of.** A party claiming under the *Town Site Act* of Congress, May 23, 1844, attempting to show that he has entered according to the act, and government has parted with its title, nothing is pertinent save an inquiry into whether the proper land officer or department has authorized the entry of the same as a *town site*. And it is for the U. S. officer to determine the regularity of the entry, sufficiency of proof on part of claimant—not for the State courts—the *duplicate* is conclusive. *Leech v. Rauch*, 3 Minn. 448.

**22. Action between claimants to town site land—requisites of pleadings.** Under the statute of March 3, 1855, concerning settlement of adverse claims under the U. S. Town Site Act, the plaintiff must set up his title fully, but need only state that defendant claims some interest or estate therein. The defendant cannot simply *deny* the plaintiff's title, but must set up his title in detail, and the one having the better title recovers as against the other. *Castner v. Gunther*, 6 Minn. 119; *Castner v. Echard*, 6 Minn. 149; *Castner v. Lowry*, 6 Minn. 149.

**23. Heirs of occupant—not wife—are entitled to conveyance from the trustee,**

**subject to wife's dower.** On March 21, 1856, certain occupants of the present site of Mankato submitted proof of their occupation, and applied to have the same entered as a town site, under the U. S. act therefor of 1844. A. was one of those occupants, and on May 29, 1856, quit-claimed his interest as such occupant to B., who remained on the same until his death, on May 28, 1857. The town site entry was made, on the aforesaid proofs, March 6, 1858, and patent issued to the proper judge in trust for the aforesaid occupants, their heirs or assigns, June 10, 1858. (See *Leech v. Rauch*, 3 Minn. 448.) A.'s widow and infant children (plaintiffs) continued to live on the premises until September, 1860, up to which time all said children were minors. The trustee, under Sec. 3 and 4, Chap. 33, Comp. St., p. 386, gave notice to claimants to file statement of their claim, within thirty days, as required by statute, from date of notice, April, 1858. The required statement was not filed by plaintiffs as heirs of A. deceased, but their mother, wife of A., filed a statement, claiming to be entitled in her own right. Whereupon the trustee conveyed to her in fee, in execution of the trust, and defendants are *bona fide* purchasers under her. *Held*, the trustee was bound to convey—under the statute—to the person entitled, and was not bound by the statement of plaintiffs' mother. Her claim being groundless, she took no title. Nor are plaintiffs barred from questioning the validity of such conveyance by a failure to file the statement, under the statute, which declares (Sec. 4, *ante*), that all persons failing to file statement within the time "shall be forever barred the right of claiming or recovering such land," \* \* for infants were not intended to be included within such provision, under general principles of law, and defendants took title with constructive notice that the trustee, under whom they claim, took title in trust for the occupant on March 21, 1856, his heirs or assigns, and they were bound to inquire who such persons were—(*Leech v. Rauch*,

3 Minn. 449.) Plaintiffs entitled to conveyance from defendants, subject to wife's dower. *Coy et al. v. Coy et al.*, 15 Minn. 119.

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## UNITED STATES MARSHAL.

**1. Power under bankruptcy warrant to seize property in hands of sheriff of State.** A United States Marshal is not authorized, simply by a warrant in bankruptcy issued out of a District Court of the United States, commanding him to take possession of all the property and effects of a person against whom proceedings in bankruptcy have been instituted, and to safely keep the same until the further order of such court, to take from the possession of a sheriff of this State personal property held by such sheriff, by virtue of a levy of final process of execution issued out of a State court, and levied before the commencement of the proceedings in bankruptcy. *Mollison v. Eaton*, 16 Minn. 426.

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## UNITED STATES OFFICERS.

(See AGENCY, 24.)

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## UNITED STATES PATENT.

(See EQUITY, 30.)

(See GRANTS.)

**1.** The validity of a United States patent under which defendant claims title to real estate, may be tried in the State courts in the first instance. *State v. Batchelder*, 5 Minn. 223.

**2.** In an action brought under Sec. 1, Comp. St., p. 595, to quiet title to real estate, the validity of a patent from the United States may be brought in question. *Id.*

3. In the absence of statute, the rule is, that patents from the State or United States cannot be impeached at law—as in ejectment—unless they are absolutely void on the face of them, or they were issued without authority, or were prohibited by statute—they must be avoided by a regular course of pleading in equity, by which the fraud, irregularity or mistake is directly put in issue. *Ib.*

4. Where W. & P. take a patent from the United States as the assignee of the party originally entitled, and such assignment is assailed as fraudulent, they cannot protect themselves on the ground that the patent is conclusive evidence of their rights to the land. *Arper v. Baze*, 9 Minn. 108.

by which the parties thereto bind themselves, in case a judgment (which has no existence) “be affirmed, or any part thereof be affirmed,” that they will “pay the amount directed to be paid by the judgment, or the part of such amount as to which the judgment shall be affirmed,” possesses no force or vitality whatever. *Ib.*

3. An undertaking executed on the issuing of a void attachment, is itself void, and no action can be maintained upon it. *Jacoby v. Drew et al.*, 11 Minn. 408.

4. Obligors in an undertaking on appeal are liable as promissors, and do not come within the rule governing the liability of sureties. *Robertson v. Davidson*, 14 Minn. 554.

## UNDERTAKINGS.

(See CIVIL ACTION, VIII., IX.)

1. **Undertaking an appeal from an order.** By the terms of an undertaking on appeal from an order—before entry of judgment—the appellants bound themselves “if said judgment be affirmed, or any part thereof be affirmed,” to pay the amount directed to be paid by the judgment, or the part of such amount as to which the judgment shall be affirmed. The appellate court directed “that the order appealed from be reversed unless the plaintiff should remit,” a certain part of the damages, found by the verdict “in which event the District Court was instructed to permit the plaintiff to enter judgment upon the verdict in accordance with said order.” *Held*, this was not a modification of a judgment, but an order, and not, by the terms of the undertaking, the contingency on which the parties to the same agreed to pay, and a refusal to pay the judgment finally entered was no breach. *Galloway v. Yates et al.*, 10 Minn. 75.

2. On an appeal from an order denying a motion to set aside a verdict (no judgment having been entered) an undertaking

## UTTERING COUNTERFEIT BILLS.

(See CRIMINAL LAW, 40.)

## USE AND OCCUPATION.

(See CIVIL ACTION, V.)

## VACATION OF PLATS.

1. Chap. 26, Comp. St., p. 371, Sec. 12, *et seq.*, concerning vacation and abandonment of towns, plats, etc., refers to lands owned by the parties at time of the record of the plat—not to cases where the plat was filed while the title was in the United States—the latter may be vacated by any act which will let other parties in to claim a settlement. *Weisberger v. Tenny*, 8 Minn. 456.

## VACANCY.

(See OFFICE AND OFFICER, IV.)

## VALUE.

(See PLEADINGS, 65, 77.)

## VARIANCE.

(See NEW TRIAL, II., c.)

(See PRACTICE, II., 11., B. f.)

## VENDOR AND PURCHASER.

## I. VENDOR.

## II. VENDOR'S ASSIGNEE.

## III. PURCHASER.

(See CIVIL ACTION, IX.)

(See EQUITY, 7, *et seq.*)

## I. THE VENDOR.

**1. Vendor's equitable lien.** An equitable lien on lands for the purchase money exists unless waived by the vendor, or it has passed into the hands of a *bona fide* purchaser, without notice. *Selby v. Stanley*, 4 Minn. 65.

**2.—how lost.** Whenever the vendor shall take any security for purchase money upon the land sold, or upon any other land, or by pledge of chattles, or by absolute or conditional obligation of a third person, or any other security than the personal obligation or promise of the vendee, such fact shall be deemed conclusive of his intention to abandon his equitable lien unless he retain it by express agreement. *Id.*

**3.** The vendor by taking any security for the purchase money, other than the personal obligation or promise of the vendee, loses his equitable lien for the purchase money, unless expressly retained—

following *Selby v. Stanley et al.*, 4 Minn. 65. *Daughaday v. Paine et al.*, 6 Minn. 443.

**4. Lien preserved, by want of consideration.** A. sold land to B., October 30, 1856, taking three land warrants from B. in part payment, relying upon B.'s representations that he was the owner thereof. The warrants were genuine, but the assignments thereof to B. were forged, though both A. and B. were ignorant of that fact, and believed that the assignments were genuine, and there was no intent on the part of B. to deceive or defraud A. A. discovered the forgery as to two of the assignments in 1861, and of the third in 1863. *Held*, A. acquired no title to the warrants, and as to that, such part of the purchase money, in payment whereof said warrants were so taken, remained in fact unpaid, and A. had an equitable lien therefor on the land. *Duke v. Balme et al.*, 16 Minn. 306.

## II. VENDOR'S ASSIGNEE.

**5. Effect of redemption by, from execution sale, as against junior incumbrancer.** A. purchased land of B., which had already been sold on a judgment against B., and on which there was a mortgage lien as a second incumbrance. A. redeemed from the judgment sale, and claimed the rights of a purchaser at the sale, as against the mortgagee, who had failed to redeem. *Held*, A.'s redemption was the same as though the judgment debtor (B.) had redeemed, and the land was still subject to the mortgage—following *Warren v. Fish*, 7 Minn. 432. *Rutherford v. Newman*, 8 Minn. 47.

**6. Entitled to tender of balance of purchase money.** Brown having given a bond for a deed to plaintiffs, conveyed the estate to Bass, with notice. *Held*, Bass, and not Brown, was the person to whom tender of the money should be made, and of whom deed should be demanded. *St. Paul Division No. 1 Sons of T. v. Brown et al.*, 9 Minn. 157.

**7. Equitable lien for purchase money.** F. sold land to M.'s wife, and received in part payment M.'s promissory note, which he transferred to G. *Held*, G. had no vendor's lien. *Gorton v. Massey et al.*, 12 Minn. 145.

### III. PURCHASER.

**8.** A grantee of land who pays no new consideration, takes subject to all claims and equities that could have been urged against his grantor. *Baze v. Arper*, 6 Minn. 220.

**9.** Where an unrecorded conveyance is good against R., an attaching creditor of the grantor, in the absence of fraud, it is equally good against R.'s grantee, though he took without notice of the deed, because he took only his grantor's title. *Ib.*

**10. Bound by record notice of vendor's lien.** A purchaser of real estate is bound by notice of a vendor's equitable lien for the purchase money of the same, disclosed in the instruments forming his chain of title. *Daughaday v. Paine et al.*, 6 Minn. 443.

**11.** Where a purchaser takes title on the strength of an *abstract of title*, which fails to state the contents of the conveyances, it is such negligence as not to excuse him from notice of the existence of any incumbrance which is referred to in any of the conveyances in his chain of title. *Ib.*

**12. Withholding purchase money.** A purchaser of real estate will not be allowed to retain or withhold any portion of the purchase money, in the absence of fraud and misrepresentation, where there are no covenants of warranty—the presumption being (in the absence of covenants) that he takes the risk upon himself; and where the necessary covenant does exist, and a defect of title, he is presumed to have taken the covenant as an express protection against such defect, and cannot therefore detain the purchase money, until after the covenant has been broken. *Maxfield v. Bierbauer et al.*, 8 Minn. 413.

**13. Recovering purchase money.**

Where certain property (cattle) was received by the vendor of land in part payment, at \$70.00—and by subsequent acts the vendee becomes entitled to recover back the amount he has paid, he may recover the sum of \$70.00. *Bennett v. Phelps et al.*, 12 Minn. 326.

### VERDICT.

(See NEW TRIAL, II., *d.*)

(See PRACTICE, II., 11, B., *q.*)

### VERIFICATION.

(See PLEADING, V.)

### VOLUNTARY CONVEYANCE.

**1.** It is a general principle that a debtor cannot grant away his property to his family or a stranger, by a voluntary conveyance, so as to interfere with the rights of his creditors. *Filley et al. v. Register et al.*, 4 Minn. 391.

### WARRANTY.

(See CIVIL ACTION, IX, 6.)

### WAIVER.

(See EQUITY, 7.)

(See PLEADING, B., XIII.)

### WAR.

(See INTEREST, VI.)

## WATER-COURSES.

**1. Mississippi river a navigable river.**

In *law* as well as in fact, the Mississippi river is a *navigable* river, and all navigators and craftsmen of whatever description enjoy the same rights and possess same exemptions they would have at common law—among which are the right to land, or receive freight and passengers on any point below *high water* mark. *Castner v. Steamboat Franklin*, 1 Minn. 78.

**2. Right of riparian owner—title to middle of stream.** At common law, grants of land bounded on rivers above tide water carry the exclusive right and title of the grantee to the middle of the stream, unless an intention on the part of the grantor to stop at the edge or margin, is in some manner clearly indicated; except that rivers navigable in fact are public highways, and the riparian owner holds subject to the public easement. *Schurmeier v. The St. Paul & Pacific R. R. Co. et al.*, 10 Minn. 82.

**3.—right to erect dam on his own land—liable for proximate injuries only.** A riparian owner may erect a dam across a stream on his own land, without being liable for consequences casual, remote and uncertain; he is only liable for injuries which are the necessary or proximate consequences or effects of the dam; he is not liable consequently for an injury caused by the act of God, though such event, in the absence of the dam, would not have caused the injury; but an “act of God” means an accident against which ordinary skill and foresight is not expected to provide; this applied to water-courses would include only floods or extraordinary freshets, and not such rises or high water in a stream as is usual and ordinary, and reasonably anticipated at particular periods of the year. *Dorman v. Ames & George*, 12 Minn. 451.

**4.—flowing water back on land of another.** One man has no right to erect a mill-dam on his own land, so as to throw the water back and overflow the land of another without his consent, and where any

flowage is shown, though without proof of any actual damages, the plaintiff is entitled to recover nominal damages for the injury, and flowage for a day or an hour is sufficient to maintain an action, it being an obstruction to the free use of property, so as to interfere with its comfortable enjoyment within Sec. 25, p. 541, G. S., as well as the common law. *Ib.*

**5. Right to flow the water back in its natural state to his neighbor's line.** A riparian owner may keep his dam at such a height as to swell the water in the channel of the stream, in its *natural* state, up to his neighbor's line. Such “*natural* state” of the stream is that in which the stream is under the ordinary operation of the physical laws which affect it; this may be different, at different seasons of the year, and yet be ordinary by the recurrence of the same condition about the same season of the year; it may, ordinarily, be high a portion of the season, and low at another portion, and at another it may be at a medium stage, yet as these are ordinary by reason of their annual or frequent recurrence, so that a variation therefrom is an exception, they are the “*natural condition*” of the stream. For all injuries caused by a dam, in such rises or high water in the stream as are usual, ordinary, and reasonably anticipated, at any particular period of the year, the riparian owner is liable. *Ib.*

**6. Theoretical or imperceptible injuries.** Certain injuries, which result from the use of a water-course, are recognized as “*damnum absque injuria*,” *e. g.*: the insensible evaporation and decrease of water by dams, and the occasional increase and decrease of the velocity of the current, and the *quantum* of the water. These injuries are designated as theoretical or imperceptible injuries. Since a water-course cannot be applied to the most valuable uses without the aid of a dam, every owner has the right to erect such dam, and the question as to the right of action turns upon the nature and extent of the injury, and one which is merely theoretical, the law will not notice. *Ib.*



WILLFUL AND MALICIOUS  
KILLING OF HORSES, ETC.(See CRIMINAL LAW, 189, *et seq.*)

## WILLS.

1. A devise in a will to David Young of "the north half of the real estate, divided from east to west," and to Jacob B. Young of "the south half of the real estate" is not void for uncertainty—the court will ascertain by extrinsic evidence the meaning, and give effect to the provision when so ascertained. *Case et al. v. Young*, 3 Minn. 209.

2. Sec. 27, R. S., (1851), p. 238, which provides for any child, or the issue of any child, which was unintentionally omitted in testator's will, taking such share as by law it would be entitled to—does not extend to include one who is mentioned in the will, and who, from its terms, is not to receive any benefit beyond a limited sum. *Ib.*

3. The will of P., after making diverse bequests, devises, and legacies, to seven different persons, contained the following residuary clause: "all the rest, residue and remainder of my estate, of which I shall die seized and possessed, or to which I may be entitled at my decease, I give and bequeath to my beloved wife, Emily A. L. P., subject to the payment of my debts and

charges; and her rights under this residuary provision shall not be effected or changed by the birth of any child of mine, if any shall be born to me before or after my decease. *Held*, under Sec. 22, Chap. 47, G. S., a child born afterwards took nothing, a contrary intention being "apparent from the will." *Prentis et al. v. Prentis et al.*, 14 Minn. 18.

## WITNESSES.

(See DEEDS, 3.)

(See PRACTICE, II., 11, B. c. d.)

(See EVIDENCE, XII.)

(See CRIMINAL LAW, 29, *et seq.*)

## WORK, LABOR, AND SERVICES.

(See CIVIL ACTION, VI.)

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(See PROHIBITION, WRIT OF.)







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