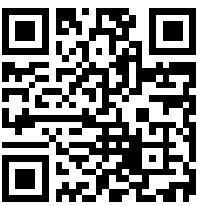

FOREWORD

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VOLUME III

1895

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Buffalo, N. Y.
July 1963

DENNIS & CO., INC.

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Minnesota Law Journal.

A MONTHLY PUBLICATION

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

Volume III.

COVERING THE YEAR

1895.

PUBLISHED BY

FRANK P. DUFRESNE,

Publisher and Law-Book-Seller,

ST. PAUL, MINN.

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...THE...

MINNESOTA LAW JOURNAL

A PRACTICAL MONTHLY MAGAZINE.

VOL. 3. JANUARY, 1895. No. 1.

JOHN A. LARIMORE, . . . EDITOR.

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THE JOURNAL begins a new volume, and starts on the third year of its existence with this number. It thinks it may be pardoned for contemplating its career to date with feelings of some satisfaction. It has aimed to make each issue better than its predecessor, and where it has failed in so doing, it has not been for lack of effort. Its theory has been to supply the legal profession of the state with articles of contemporary interest, with the news, and with an abstract of the more important decisions of the trial courts, especially those involving points of practice. It proposes for the future to follow this policy, but to expand and develop it. As a money-making enterprise its sphere is necessarily a limited one. It can appeal to the lawyers only, and its success depends upon their interest and co-operation. If they will generally subscribe for it and send it matter which is suitable for publication in its columns, the publisher will undertake to do the rest. Those who read it find it helpful and entertaining, if the expressions of their opinion which come to its ears are to be relied on. They will find it more helpful and entertaining if they will assist in furthering its aspirations in the way which is here suggested. The JOURNAL extends its good wishes to its patrons, and invites their support in the field it has pre-empted, and which it has occupied and is going to occupy.

INDEX TO VOLUME TWO OF THE MINNESOTA LAW JOURNAL.

We particularly call the attention of our subscribers to the index to volume two of the JOURNAL, which is mailed with this number. Recognizing the fact that a book or a journal without an exhaustive, accurate and properly arranged index is comparatively worthless, we have in this index provided a key to unlock the stores of legal lore and useful information contained in the volume of the JOURNAL that has just been completed. No doubt our readers will be surprised, upon an examination of the index, to find how many important decisions of our District and Supreme Courts have been reported, or commented on at length; how many opinions of the Attorney General have been rendered accessible; and how much other information of value and interest to the lawyer has been published during the year 1894. We feel assured that the profession will fully appreciate the experience, industry and skill which has been called into service in the preparation of this index, and will accept the result as an earnest of what the JOURNAL will in the future do for its patrons.

HUSBAND LIABLE FOR WIFE'S TORT, CHARGING DRUNKENNESS SLANDEROUS PER SE.

The decision of Judge Otis of the Ramsey County District Court in the case of Pett-Morgan vs. Kennedy, reported on page 13, holding that the married woman's act (Gen. St. 1878, Ch. 69) has not changed the common law in this state as to the liability of a husband for his wife's torts is one that will be read with interest by the legal profession. The case was very fully argued by counsel, and we have secured a careful report of it for the benefit of our subscribers, because of its importance.

Another point about which there has been some conflict of authority was also involved, and was decided in favor of the plaintiff.

Judge Otis holds that it is actionable *per se* to orally accuse a man of drunkenness, as drunkenness under our statutes (Scheffer law of 1889 and Gen. St. 1878, Ch. 107, Sec. 28) is an indictable offense involving moral turpitude. He moreover intimates that, irrespective of the statutes, to charge a man with drunkenness should be considered slanderous in the present advanced state of civilization and moral culture. The public at large will undoubtedly endorse his decision upon this question, whether it does upon that of the unfortunate husband's liability or not. Upon both points the profession will be inclined to commend the decision as in accordance with the true rule of statutory construction, and as sustained by the weight of authority.

A correspondent in a Western state, but who wishes both his name and address suppressed, sends us the following example of the touching appeals by means of which the Western attorney seeks to wheedle out of his unsuspecting brethren the money which they owe to his clients. This is an exact copy of a printed postal card used by one of the bright and shining lights of the profession at his bar:

.....189..

Mr.....

Esteemed Sir: Kindly call and commune with me now relative to matters concerning yourself, with which I am charged for purposes to appear anon.

Be pleased to minister to your own interest and my complacence by compliance as besought above.

With cordiality,

....Lawyer.

Office.....Block.

—*The Collector and Commercial Lawyer.*

Recent Discoveries with regard to Poisonous Matter found in Dead Bodies.

That dead bodies, especially when putrefaction has commenced, contain poisonous matter, is generally known. Even fresh meats, when from diseased animals, contain very dangerous poisons, and cases are frequently reported where whole families or all the partakers of the diseased meat were dangerously poisoned.

But it is only of late that the fact was scientifically established of the occurrence of poisons in dead bodies, very closely resembling such well known and extensively used poisons as strychnine, morphine, nicotine, conine, and others. Hitherto the theory prevailed that when such poisons as the above named were found in an exhumed human corpse, it was regarded as almost conclusive evidence that intentional or accidental poisoning was the cause of death. No cases shall be cited to discuss this proposition; the common opinion certainly held the finding of strychnine in a dead body as conclusive proof that the case was one of poisoning, and in most cases the medical experts took the same ground.

Older works on medical jurisprudence confine their observations with regard to poisons in dead bodies to the fatal effects resulting from the partaking of putrescent meat, the infectious product of cadaveric bodies and vegetable alkaloids. But within the past few years the attention of toxicologists has been called to the existence of that certain class of compounds, resulting from the decay of organic substances, now known as ptomaines.

In 1872 the Italian General Gibbone suddenly died under suspicious circumstances.* His servant, a singularly reserved fellow, was arrested and the body of the general was turned over to two experts to establish the fact whether or not poisoning was the cause of his death. They maintained in their expert opinion that death was caused by delphinine, then supposed to be a vegetable poison. Thereupon Francesco Selmi, a professor in Bologna, was asked to make another examination which gave a remarkable result, namely: That as a matter of fact a poisonous substance could be isolated which however was not delphinine, but resembled that poison, and that said poisonous substance had originated in the decaying tissues of the body. Shortly afterwards another case happened that was still more serious. In Cremona two persons were imprisoned on a charge of having caused the death of the widow Soncogno. The chemical examination resulted in the finding of morphine as the cause of death. A second examination being ordered it was again entrusted to Selmi who found that the case was not one of morphine poisoning, but that a substance could be isolated closely resembling morphine. This was the more important and dangerous, as, unlike delphinine, morphine is a very common vegetable poison and is very often used for suicidal and, occasionally, also for other criminal purposes. The substance in question had developed in the dead body within twelve days. In a third case where F. Ciotto, a very careful toxicologist, had found strychnine, it was likewise shown that a new decomposing alkaloid was contained in the parts examined. A fourth case furnished a product of great similarity to conine, the alkaloid of the hemlock, and it was then recalled that previously the

* The above account of the discovery of ptomaïnes is taken from an article by Dr. med. Karl von Scheel, "Fäulniss und Krankheitsgifte," in Velhagen & Klasings Monatshefte, October 1894, page 787, to which the interested reader is referred for information on the subject here treated as well as on matters pertaining to putrescent food and kindred matters of general interest.

eminent chemist, Prof. Sonnenschein, had succeeded in obtaining from a liquid in which anatomical preparations had lain a substance which could be distinguished only with great difficulty from the belladonna poison atropine.

These four cases from Italy were augmented by similar ones from other countries. Selmi gave to these substances, caused by the decaying process of albumen, the name ptomaines, after the Greek word ptoma, a dead body. A close definition of these substances cannot be given, just as it is difficult to define the term poison; at present it must suffice to regard ptomaines as alkaloid products of microbes, which cause fermentation, putrefaction and infectious diseases. The whole matter being in a state of progressing investigation, exception to the above definition might be easily taken.

It was formerly supposed that there was but one alkaloid of putrefaction (decomposing alkaloid), the so-called sepsin, but this later discoveries have disproved. It is, for instance, impossible to isolate from different cadavers the same ptomaine; which, among other reasons, is accounted for by the fact that cadaver alkaloids appear in the same bodies in a different form at different times. In summer time microbes may appear within a few hours after death, in winter within a few days. In frozen meat they do not appear at all, and at a certain period, dependent upon the temperature and the exposure of the body to air, they reach their highest state of development, then gradually disappearing again. To this growth and decay of the microbes with consequent production or nonproduction of ptomaines must be ascribed the discrepancies in expert testimony. Examinations of the same material made sooner or later give different results. The continued discovery of new substances adds greatly to the perplexity of the forensic experts and, to use the German authors euphemistic remark, "the longer the list of these substances, the longer the faces of our experts." Selmi, the discoverer of the ptomaines, did not succeed in developing any one of the ptomaines in a pure condition; but this was accomplished by the German chemist, Brieger, in Gratz, (Austria).

The new work on legal medicine by Hamilton & Godkin (1894) gives an exhaustive chapter on ptomaines by Dr. med. Victor C. Vaughan. He calls ptomaines "molecules resulting from the action of bacteria and being of a basic character"; and defines them as "a basic product of putrefaction, or a putrefactive alkaloid," and states further that they may result from the putrefaction of vegetable as well as of animal substances. In speaking of the different ptomaines this well informed author emphasizes the fact, already mentioned, that the kind of ptomaines formed will depend upon the individual bacterium engaged in its production, the nature of the material acted upon, and the conditions under which the putrefaction proceeds, such as the temperature, amount of oxygen present, and the duration of the process. And he adds: "Generally speaking, in all toxicological research the tissue under examination has undergone putrefactive changes in the absence of air. Therefore those products which are formed by anaërobic * bacteria are the ones which concern us specially. This fact seems to have been overlooked by the majority of toxicologists. Its importance is great, and it renders worthless the great number of experiments which have been made upon tissues allowed to decompose in the

*Such as thrive best in the absence of oxygen. The term anaërobia was first used by Pasteur.

presence of an unlimited air supply. Bacteria are always present in certain portions of the alimentary canal and in certain other cavities of the body. The death of the host does not mean the death of these bacteria. On the contrary, it enables them to extend their growth to adjacent tissues, until the whole of the cadaver is involved."*

From the above it can be easily inferred that the particular branch of medical jurisprudence relating to ptomaines is in a state of lively evolution; indeed, the whole subject is so new that the edition of Webster's dictionary of 1886 does not even contain the term ptomaines. Dr. Vaughan treats the cases related by Dr. von Scheel under the proper captions of "strychnine," "delphinine," and "morphine." His accounts are substantially the same as given by von Scheel, with the addition of such details as are only of interest to the specialist. There will also be found a formidable list of poisons, present in putrefactive bodies, with appertaining explanations. The object of this memorandum being merely to point out the more important bearings of the discovery of ptomaines, it was not deemed necessary to enter into a more particular discussion of the subject, apart from the fact that only one fully conversant with the matter could undertake such a task. The discovery of new agencies, producing poisons similar to those found in such dead bodies, where the cause of the death was actual poisoning, must very properly arrest the attention of the practitioner and especially of the criminal lawyer, who will undoubtedly hasten to make himself more acquainted with the subject, if he has not already done so.

ARTHUR HERMANN.

Minneapolis.

* Victor C. Vaughan, M. D., Ph. D., in "A System of Legal Medicine" by Allan McLane Hamilton, M. D. and Lawrence Godkin, Esq., of the New York Bar, (1894 Edition) Vol. 1, page 475.

EDITOR JOURNAL: Permit me to congratulate myself over the fact that so excellent a lawyer as Bro. Gail, of Stillwater, can find nothing more serious to criticise specifically in my notice of foreclosure than an error in the date of sale. Candor compels me to say that the error he has discovered was *not* the fault of the printer, but of the author. "A poor thing, sir, but mine own." Having twice written "1893" in the notice, I inadvertently wrote the same year a third time, in fixing the date of sale. This humiliating confession, while it may prove my own carelessness, at the same time destroys the force of Bro. Gail's criticism. Having 1893 in my mind, and intending to specify that year, what would it have profited me or my imaginary client to write "Three" instead of "3"? Would the blunder be cured by spelling out the wrong year instead of expressing it in figures? It will not do to say that the printer is more likely to make mistakes with figures than with words. My own experience is that mistakes in the proof occur in the printing of proper names much more frequently than in the figures. However that may be, no careful attorney permits the publication of his notice to begin until he has read the proof and compared it with the dates in the mortgage and in the register's certificate, so as to guard against the possibility of an error in his own work.

It would be asking too much of our poor weak human nature to expect me to write this merely to exonerate the publisher by confessing my own blunder.

What pleases me most in reading Bro. Gail's criticism is the following: "By one false motion invalidated the whole carefully constructed notice." (meaning that the fixing of the day of sale for Nov. 12, 1893,—a past date—instead of Nov. 12, 1894, as was obvi-

ously intended, rendered the proceeding a nullity.) I take up the gage, and assert that the notice was notwithstanding sufficient, and that a sale under it, on Nov. 12, 1894, would be valid.

In Mowry v. Sanborn, 68 N. Y. 153, a notice of sale was by mistake dated 1858, instead of 1868. The Court said: "The mistake in the date of the notice filed in the clerk's office, and as first published, was obvious on inspection of the notice, and could not have misled, and did not invalidate the proceedings."

In Parmly v. Walker, 102 Ill. 617, the notice advertised a sale for "Wednesday, 28th of August, at 11 o'clock, a. m.," without specifying any year. The newspaper in which the notice was published was dated 1878, and the Court held that a sale on Aug. 28, 1878, was valid.

In Gray v. Shaw, 14 Mo. 341, the notice, which was dated December 7th, advertised a sale "on the 28th day of December *next*." The Court held that a sale on the 28th of the *same* December was valid, as no one could have been misled.

It appears that a mistake of 100 years is too trifling to invalidate the sale, for in Jensen v. Weinlander, 25 Wis. 477, the sale was advertised for the year 1761, which was just a century earlier than the year in which the notice was published. The Court ruled that a sale made under that notice in 1861 was valid.

Until some one can demonstrate that mistakes are more likely to occur in figures than in words, I shall continue in the same opinion I now hold, to-wit: That we are not justified in adding folios to our legal notices by the use of words in place of figures to express dates or amounts. If we are not careful in the one form of expression we will not be careful in the other. In fact, it all depends upon the amount of care exercised by the attorney in preparing his notice. If he is as careful as he ought to be—and as I am, sometimes—he will avoid all mistakes, whether of words or figures.

M. L. COUNTRYMAN.

St. Paul.

REVISED STATUTES AND STATUTORY REVISION.

The West Publishing Company, of Saint Paul, has published a new edition of the Statutes of Minnesota, in two handsome volumes of more than twelve hundred pages each, which are on sale together for $12.00, either by the publishers or by F. P. Dufresne, of St. Paul. The size of the pages is considerably larger than in the 1878 edition or the 1888 supplement, and while the number of sheets is not greater, the character of the paper used and the width of the margins make the books bulkier. The old arrangement by chapters is followed as in the 1878 edition, but on the other hand, the sections within the chapters are rearranged so as to group together sections bearing on the same topic, and the sections are consecutively numbered through the two volumes irrespective of the chapters. Each section is followed by a reference to its chapter and section in the revision of 1866, of 1878 and in the 1888 supplement, and where it has been enacted since the 1888 supplement, by a reference to the chapter and section of the session laws, where it may be found in its original shape. No attempt is made to give the history of the various statutes except to this extent, and laws which have been repealed or held unconstitutional are omitted. Each section is also followed by a citation of Minnesota decisions in which it can be found quoted or commented on. These citations are the same as were employed in the 1888 supplement, as far as they

go, but have been brought down to date and include the Minnesota cases published in the state reports and the Northwestern Reporter up to the time when the book went to press. (Vol. 60, N.W.Rep.) Explanatory citations from other states are not given except in a few exceptional instances. There is an exhaustive index for the two books given at the end of the second volume. The type is about the same both for the text and the citations as that of the 1888 supplement, but the paper is a clear glazed white, instead of the dull surface of the earlier editions. The arrangement of the sections has been done under the editorial supervision of Henry B. Wenzell and Eugene F. Lane, and the citations written by Francis B. Tiffany, all of the St. Paul bar.

When the new version of the Bible was issued a few years ago, the great majority of reading Christians agreed that it was very "upsetting." They had learned where to find their needed texts in the books which they had and to supply their deficiencies in this direction by verbal quotations, the accuracy of which a more modern translation sadly interfered with. In the same way lawyers acquire an affection for the well thumbed volume which they have used for years, and they subject themselves to no end of inconvenience, and their memories to perilous feats, rather than take advantage of untried tools which are produced for their comfort and economy of effort. Phillips Brooks said to a church congress which was hesitating over the endorsement of the new version of the Bible, that its decision might have some effect on its own reputation for good sense, but that the new version spoke for itself, and that its success was independent of the endorsement of any body of men. So courts and lawyers may postpone for one reason or another the employment of this new edition of the statutes but there can be no question of its ultimately supplanting all previous editions and of its being a source of infinite help to those who rely on it in their work. A lawyer can get along without a typewriter, and he can continue to look up the law in the 1878 statutes and the successive volumes of the acts of the legislature since published, and yet at the same time earn a living and give satisfaction to his clients. But with the standard of legal fees which prevails in this region, he will not be wise to neglect the labor saving devices of new machinery and new books which lengthen his days and increase his income. The new edition of the statutes here under consideration comes decidedly within this category. It is handsomely printed, contains everything to the latest date and in the completest shape, and puts in the possession of the profession the indispensable raw material for its work in a style which minimizes the chances of error and oversight and also the necessary expenditure of time and effort. The JOURNAL has no hesitancy in speaking in terms of the highest commendation of a publishing concern which has the courage to undertake an enterprise of this sort, the investment in which must be so large and the field for the sale of which is so limited.

While in a general way the foregoing is a just statement of the character and merits of these books, the question as to how nearly they approach to an ideal edition of the statutes of Minnesota is one which can be answered accurately only after they have been tested by an examination closer than it is possible to give them for the purposes of writing a review. The editors have brought to their work ripe scholarship and exactness of method but whether they have been altogether equal to their task, daily

use by the profession at large alone can determine. The rearrangement of the sections and their consecutive numbering is a hazardous venture and one which for the present at least is going to cause some confusion. The statutes are quoted in the published decisions by the numberings followed in the 1878 edition. A new classification by topics while logically not to be criticised will, nevertheless, necessitate some considerable turning of pages when one is comparing the decisions and the laws. In some instances also it will probably be found that the sections are not in the right places according to the theoretic arrangement adopted. For example in chapter 34, relating to corporations, there are first grouped together under title 1, all the provisions applicable to all corporations having the right of eminent domain and after this follows grouped together the provisions peculiarly applicable to the various kinds of corporations of this class. Sec. 2 of Chap. 74 of the General Laws of 1893 appears here as Section 2722 in the group devoted to railroad companies. But it clearly does not belong here. The established doctrine of the American courts is that a corporation organized to perform a public function can not in the absence of express legislative authority, mortgage the property essential to its operation.* The statutes authorizing the formation of quasi public corporations, other than railroads, have quite generally included a clause permitting them to execute such mortgages, but curiously enough in the shuffle of repeals and amendments, the only law in existence on the subject at the time of the 1878 revision was the one which is therein published as Section 70 of Chapter 34. By its terms it was limited to railroads. The 1893 law was enacted to supply this glaring and dangerous defect, and in so many words extended the right to all corporations organized under Title 1. It should therefore appear in the group of statutes applicable to all corporations having the right of eminent domain, and not in the special railroad group. A lawyer examining the book hastily and relying on it would be led to the astonishing conclusion that a Minnesota water works company or street railway company could not execute a valid mortgage on its property. This is only one instance, and it may be the only one of its kind. But it is hardly probable when the opportunities in this direction are considered.

As to the arrangement of the citations and the statement of what they respectively decide, the surest evidence that they are satisfactory is the fact that as competent a lawyer as Mr. Tiffany has had the supervision of this part of the work. Under which section each case should go is often largely a matter of opinion and even if the determination in any given instance is open to criticism, it is quite unlikely to occasion any difficulty because a practitioner will not limit his investigation to any one section as he searches for light. Nor would it be possible without swelling the size of the books beyond useable limits to give any but the briefest suggestion of what each cited case decides or to repeat under every section the cases applicable to it. This will satisfactorily account probably for such omissions and condensations as one may be at first inclined to complain of. For instance the case of Patterson vs. Stewart, 41 Minn. 84, is simply noted as existing under Section 2600 (Chap. 34, Sec. 9, Gen. Stat. 1878), which enumerates the cases in which a stockholder is individually liable for a corporation's debts. If it has any per-

* Commonwealth vs. Smith, 10 Allen (Mass), 448.

tinency to any section, it surely is to this one, and one would expect here some summary of what it holds, and of the distinction drawn between it and the Langdon case (44 Minn. 37.) But a close examination will disclose such a summary given under Section 5905 (Chap. 76, Sec. 17, Gen. Stat. 1878) which perhaps is sufficient. So one would expect Mackellar vs. Pillsbury, 48 Minn. 396, to be noted under 4243, being the section of the insolvent law of 1881 forbidding preferences, and Greaves vs. Neal, 57 Fed. Rep. 816, which is there cited, throws much more light on the differences between our two insolvent laws than the brief syllabus quoted from it would suggest. But for the sake of space it is necessary to draw the line somewhere and no such books as these can safely undertake to do more than put those who consult them on the track of authorities which will help them. On the other hand it would have added much to the value of the edition could there have been included some illuminating references to the decisions of other states. Perhaps the limitations of space precluded the attempt. But the point is that citations from foreign decisions are made in some cases and not always in the cases where they are most needed. For instance under Sec. 2805, providing for the organization of manufacturing corporations, we are referred to a Michigan and a New York decision which discuss the question as to whether an "ice company" is a manufacturing corporation. But Sec. 5487, providing for the arrest of a judgment debtor about to leave the state, is given without any intimation that similar statutes have been held unconstitutional in many jurisdictions as being in contravention of the clause of the constitution forbidding imprisonment for debt. So also Sections 4498 and 4499, relating to the examination of persons alleged to have in their possession property of deceased persons, are followed by none of the accessible cases showing the limitations and purposes of the law.

This will probably be sufficient to convey to the JOURNAL'S readers an idea of the merits and shortcomings of these latest additions to our local legal literature. But, in conclusion, it is almost imperative to record the reflection that so much labor and expense seem out of place when the subject matter is a mass of such ill digested, contradictory and inadequate legislative enactments as are the existing general statutes of Minnesota. There is scarcely a topic, the laws in reference to which are here collated, which does not leave even the trained mind in the profoundest doubt as to its meaning; and the interpretations which the courts have given to them, as here cited, do not tend to any appreciable degree of clarification. A state where the laws are in such shape that neither judge nor lawyer can spell out the rights or liabilities of stockholders and directors in our great moneyed corporations, and where the supreme court insists to this day in holding that a mortgage is not a negotiable instrument and that an unmatured note with a past due coupon attached is past due paper and subject to the defenses of such—such a state, the JOURNAL thinks, is in crying need of a revision of its statutes which will bring it in harmony with the methods of more enlightened commonwealths. The JOURNAL'S opinion is that this work should not be done hastily or at once, but that a commission of two or three good lawyers should be established, somewhat after the New York plan. Holding office for a term of years, they could at each successive session of the legislature suggest the enactment of needed laws which would clear up the dark places and eliminate

the most conspicuous contradictions and anomalies. At the same time they could advise the governor as to the wisdom of laws passed and presented for his approval. In the course of less than a decade, if they did their work conscientiously, Minnesota would have a body of statutes adequate for its needs, and of which it might be proud.

AMBROSE TIGHE.

St. Paul, Minn.

A LARGE meeting of the state bar was held on the afternoon of Tuesday, January 29th, in the Supreme Court room, to consider the matter of revising the Minnesota statutes. Judge Daniel Fish, of Minneapolis, presided. Judge C. B. Smith, of Hennepin, moved that a committee of five be appointed to draft a bill to be presented to the legislature, providing for a revision of the statutes. Robertson Howard, of Ramsey, moved as a substitute that it be declared the sense of the meeting that the statutes of the State of Minnesota should be revised. Judge Smith withdrew his motion. Mr. Cutcheon, of Ramsey, moved as an amendment that the statutes should be revised, providing the legislature appropriated $50,000 to compensate the commission and pay for printing the statutes when revised. This amendment was opposed by Mr. Cairns, of Hennepin; Mr. Howard and others. Mr. Severance, of Ramsey, seconded Mr. Cutcheon's motion and produced a statement from H. D. West, who was present from the West Publishing Company, which he claimed showed that it cost the State of Wisconsin $72,000 to revise its statutes in 1878. Mr. Howard controverted this statement, and gave a history of the manner in which the Wisconsin statutes were revised, and called attention to the fact that in 1878, when Judge Young compiled the Minnesota statutes of 1878, the law provided that the volume should be sold by the West Publishing company for $6 a volume, and that the company had reaped a profit at that figure. Mr. Cutcheon then withdrew his amendment.

Letters received by the committee appointed at the last meeting from judges and prominent members of the bar throughout the state were read. The sentiment was in favor of a revision, provided legislation could be obtained that would result in "a good revision," the importance of which was insisted upon.

Mr. Howard's motion was put, and carried.

Judge Smith renewed his motion for the appointment of a committee of five to prepare a bill to present to the legislature providing for a revision in accordance with the views expressed. Mr. Cutcheon renewed his amendment calling for an appropriation of $50,000, and the matter of expense was again debated. Mr. Durment, of Ramsey, advocated Mr. Cutcheon's amendment. Mr. Cairns humorously told how, when a member of the last legislature, he had tried to pass what was known as the West bill for a revision, and expressed surprise at the opposition that company were now making to the proposed revision in the face of the expressions of the bench and bar in favor of such a revision. Mr. Severance said he wished the meeting to understand that he was not the attorney for the Wests. Judges Kerr and Willis, of the Ramsey county bench, were called on for an expression of opinion, and spoke in favor of "a good revision" of the statutes, notwithstanding it would cost the state a large amount, but thought it might not be well to handicap the committee by requiring an appropriation of $50,000.

The amendment was voted down. Mr. Severance then moved as an amendment that the committee report

at an adjourned meeting. This amendment was defeated, and Judge Smith's motion was carried. Hon. C. B. Smith, of Minneapolis; Hon. C. D. Kerr, Hon. H. J. Horn and F. W. M. Cutcheon, of St. Paul, and Hon. Charles S. Cairns, of Minneapolis, were appointed as the committee. When the committee can arrange a conference with the judiciary committee to discuss the proposed bill, an invitation will be extended to members of the bar to be present, and take part in such discussion.

THE PORTRAIT.

THE HON. CHARLES L. LEWIS was born on a farm near Ottawa, La Salle county, Illinois, forty-one years ago. He left the farm for school at the age of sixteen and in the course of his studies was a student both at Oberlin college, Ohio, and the University of Chicago. In 1877 he began the study of law in the office of Lawrence, Campbell & Lawrence in Chicago and was admitted to the bar in Chicago in 1879. Shortly after his admission to the bar and in September, 1879, he came to Minnesota and after being admitted to the bar of this state at the November term of the District Court of Otter Tail county he began the practice of law at Fergus Falls. After five years of successful practice he was elected county attorney of Otter Tail county and was re-elected again in 1886. While at Fergus Falls he married Miss Janet D. Moore, of Minneapolis, and now has an interesting family of four children. In April, 1891, he left Fergus Falls and located in the rapidly growing city of Duluth and on March 15, 1893, was appointed one of the judges of the District Court of the Eleventh judicial district by Governor Nelson under the law of 1893 providing for a third judge in this district. At the the time of his appointment he was not well known to the general public nor even to a large number of the lawyers of the district and was not an applicant for the position. Upon his qualification he immediately entered upon the discharge of his duties and his fitness for the office at once became recgonized both by the people and the bar. In November, 1894, he was elected to succeed himself by a majority over his opponents of four thousand and a plurality of over five thousand. This election indicates the esteem in which Judge Lewis is held by the voters of St. Louis county. As a judge he has had occasion to decide many very important and interesting questions of law and his decisions have always shown most thorough and judicial consideration of the questions involved. He discharges business rapidly without seeming to do so and without friction and always with a due essence of patience and care. His courteous manner on the bench and strict attention to the arguments of counsel and his ready grasp of legal problems have won for him the highest respect of the lawyers of Duluth. As a jurist he undoubtedly has a promising career before him. Both Judge Lewis and his accomplished wife take a deep interest in the general welfare of the city of their residence and are prominently indentified with literary and charitable work and the social problems of the community.

Old Grizzle was a man of will,
And money, too, galore,
He quarreled with his relatives,
With him, they calmly bore.

For men must die, and Grizzle did,
But with his latest breath,
He gave his money to the poor,
He had a will in death.

—*Green Bag.*

SHEEP THAT PASSED IN THE NIGHT.

A Tale of Wool From the Records of a Justice of the Peace.

(Literally founded on an actual trial in Yellow Medicine County.)

STATE OF MINNESOTA,
WORSE
FRITZ LOOMPBENGLE.

YELLOW MEDICINE COUNTY,
Justice Court.

OLE BUMQUIST,
Justice of the Peace.

A complain having ben dooly fiel in my court on the tirtieth days of Octember, 18 and 94, by Knut Hallmastersen, that ONE Fritz Loompbengle in the dark nitetime of the 29 of Octember, did tack, steel and hustle away out of the proceshion of the sade Knut the First of the parties, Two (2) sheaps worth Five dolars, and refuse to giv them back, a warrent was ishood accordan to Law, and the sade Fritz Loompbengle wur arrestid down near Swillwaller Kreak shootin of snipes and peeweas, and brought before me, when he pleed "aint gilty," and stand there fer trile.

Knute the first then swear that tose two sheaps in dispoot wur hian, bekause he swapped a barl of Sourkrout and one femail Hen to Isidoor Monkdogsky, whats livin at Hanley Falls, for the old sheap, and the young sheap was the old ones young one by Halfmastersons own nowledge and on infermashun and beleef. Knut the One also swear he kut a ear off the old sheap when he bought him, and he sade he hev it in his vest.

(By the Court)—On the courts deman, the plaintuff puts the ear in evidents. Ear in evidents. This court purceeds by taken a resess for 20 minits.

Mrs. Sven Ganderson, sworn and testerfies:

"I seed mister Hallmastersen brang them sheaps to my place bout 2 year ago last Aegoost. Well, ai tank ai kun; ai kan pick those sheaps out of a flock of ai wur sober—and of ai wasn't ai tank ai kould pick out more too." (Here the court cried: "Less order, here; less order!")

"Yes, one sheap hev loosed som of his ear. I kould tell dem sheap anywhear I met him—here oder in the old country. Yes, aim marrid and hev 7 of my own. Dem sheaps wur put inter our yard evry nite by the haystack. No, I didden seed Mr. Loompbengle grab dem sheaps and runaway, but when they wur gone and he show up mit a shephide koat, I reckuize mister Halfmastersens sheaps. Yes, dem sheaps wur cheep at haf the price."

Plaintuff rested.

Fritz Loompbengle, sworn in his own defends.

(IN THE WITNESS' OWN LANGUAGE)

"Dot sheps ist mine! I raise dot old shep und dot old shep raise dot lamp. We wuz lif togedder been nearly two yahr. Dot ear what Mr. Halfmasterson show you belongs to his wife; it aint kum from dose sheep. Mine shep is marked mit a raide hot poker on der face. I could tole you dot sheps face if I meet him under water, by jiminy! He eat me up one acre of tomatoes lats year, and I no can forget dot shep. Dot shep is mine und I bet you on it!"

Case closed.

Among other choice things, this learned Court said:

"This yar been a woolly case. They been plenta of yarn in ut. The parties disagree perfectly. The dispoot about the sheaps ear could hev been easy settled of plaintuff had stuck his wife in evidents. But he didunt. He kept her to home, away from the edgerkashunal influnce of the court. Besides, cutting a sheap from his ear is cruelty to animuls; cause if they aint hev their ear how are they going to hear the sweet silents of the woots, or see the wind roar, or smell the beauty of natcher—that is, I say, if they are substracted of a ear.

"The defenden is yust so gilty. He testerfies he raised these sheaps. I dont know if he used his toot, or a pitchfork; anyway it is a sin to kick a sheap behind his face. Then he sade something about a red hot poker. They wur no such weapin in evidents, and this testimony is wholy immarelevant and competint, and it must be struck out of my own motion, without costs to either party. He sade he could tell that sheap if he met him under water. If the defenden intends to intermate that his face is familiar enough with water for that, his whole testimony must be disregarded, for his own face wur before the Court and careful joodishul notice wur taken thereof. As for that sheap eatin' a acre of termaters, the court knows better; he has raised sheaps and termaters, and he has ate them all his life—canned, stewed & raw.

"As conclusion of Law, the Court finds it cant decide this case till spring.

"OLE BUMQUIST, Justice of the Peace."

—H. W. W.

THE MINNESOTA LAW JOURNAL.

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DISTRICT COURT.

William Pett-Morgan vs. William Kennedy and Esther Kennedy.

(District Court, Ramsey County.)

SLANDER.—HUSBAND LIABLE FOR SLANDER BY WIFE.

In Minnesota a husband is liable for the speaking of slanderous words by his wife, although he is not present when they are uttered.

SAME—CHARGE OF DRUNKENNESS ACTIONABLE PER SE.

Words that in effect charge a man with having been on a prolonged drunken debauch are actionable *per se*.

Action by plaintiff against William Kennedy and Esther Kennedy, husband and wife, to recover damages for alleged slanderous words spoken of plaintiff by the wife when her husband was not present. Defendant William Kennedy demurred to the complaint on the ground that he was not liable for his wife's tort, and that the words spoken were not actionable *per se*. Demurrer overruled.

JOHN L. TOWNLEY for defendant.

I. The common law rule holding a husband liable for his wife's torts has been abrogated by statute in Minnesota, and she is made personally liable for her torts. Gen. Stat. 1878, Ch. 69, Secs. 1, 2.

The husband certainly would not be liable when he was neither present, nor aided, nor abetted, nor assisted, nor in any manner caused the slanderous words to be spoken.

The Illinois statute which is like our own has been construed to exempt the husband from liability for his wife's torts. Public Laws, Ill., 1861, page 143; Public Laws, Ill., 1869, page 255; Martin vs. Robson, 65 Ill., 129, 139.

See also, Norris vs. Corkhill, (Kan.) 4 Pac. Rep., 862; Vocht vs. Kuklenze, 119 Pa. St., 366; Bovard vs. Kettering, 110 Pa. St., 181.

The common law rule in Minnesota was abrogated by chapter 69 of General Statutes of 1866, and when this chapter was repealed, and the present law substituted in 1869, section 6 of the new law which declared that nothing contained therein should be construed "to exempt a husband from liability for torts committed by his wife" could not, and did not have the effect of restoring this common law liability of the husband.

Section 6 of the present law is unconstitutional:

1. Because it is legislation on a subject not expressed in the title of the act. Mississippi Boom Co. vs. Prince, 34 Minn., 79, 85.

2. Because it is legislation on a subject that is beyond the nature and scope of the law which it professes to amend. State vs. Smith, 35 Minn., 257.

II. The words spoken are not actionable *per se*, because they do not charge the commission of an indictable offense involving moral turpitude.

There is a distinction between slander and libel in this respect. Townshend, Libel and Slander, 203; Cooley on Torts, 204, 205; Winchell vs. Argus Co., 23 N. Y. Sup. 652; Pollard vs. Lyons, 91 U. S. 225; Holston vs. Boyle, (Minn.) 49 N. W. Rep. 203.

The words spoken must charge plaintiff with the commission of an

Reported by Robertson Howard, Esq., of the St. Paul Bar.

indictable crime and an offense involving moral turpitude. Newell on Defamation, Slander and Libel, 84; Cooley on Torts, 195, 196 and cases cited; Townshend on Libel and Slander, 163; 13 Amer. and Eng. Encyc. Law. 346; Kinney vs. Nash, 3 N. Y. 177; Hewitt vs. Mason, 24 How. Pr. 367; Dial vs. Holter, 6 Ohio St. 241; Alfele vs. Wright, 17 Ohio St. 241; Pollard vs. Lyons, 91 U. S. 225; Young vs. Miller, 3 Hill (N. Y.) 22; Chase vs. Whitlock, 3 Hill (N. Y.) 141, 142; Straus vs. Myer, 48 Ill. 388; Tassel vs. Capron, 1 Denio (N. Y.) 250; Chaddock vs. Briggs, 13 Mass. 251; Curry vs. Collins, 37 Mo. 324, 328; St. Martin vs. Desnoyer, 1 Minn. 156, (Gil. 131); West vs. Hanrahan, 28 Minn. 385.

To orally charge one with drunkenness has been held not actionable *per se*. Broughton vs. McGrew, 39 Fed. Rep. 673; Buck vs. Hersey, 31 Maine, 558; Warren vs. Norman, 1 Walker (Miss.) 387.

But to charge a *clergyman* with drunkenness might be actionable *per se*. Chaddock vs. Briggs, 13 Mass. 252; Demarest vs. Haring, 6 Cow. (N. Y.) 88; Hayner vs. Camden, 27 Ohio St. 295; ——— vs. ———, 1 Cleveland R. (Ohio) 35.

Or to charge an offic r with being drunk while in the discharge of his duty. Gottshelmet vs. Hubacheck, 36 Wis. 515.

The words in this case not being actionable *per se*, the allegation that plaintiff "is a business man engaged in business and holding positions of responsibility and trust," will not make them actionable, and the demurrer should be sustained.

FRANK M. HOPKINS for Plaintiff.

I. At common law a husband was liable for the torts of his wife committed during coverture. Baker vs. Young, 44 Ill., 42-47; Wright vs. Kerr, Addis (Pa.) 13; Vine vs. Saunders, 5 Scott, 359; Ball vs. Bennett, 21 Ind., 427; Hinds vs. Jones, 48 Me., 348; Daily vs. Houston, 58 Mo., 361; Carleton vs. Hayward, 49 N. H., 314; Fowler vs. Chicester, 26 Ohio St., 9; Jackson vs. Kirby, 37 Vt., 448; Brazil vs. Moran, 8 Minn., 236, (Gil. 205).

This common law liability has not been abrogated in this state by the "Married Woman's Act," Gen. St. 1878, Ch. 69, nor by Gen. Laws 1887, Ch. 207.

In other states where statutes similar to ours have been enacted it has been held that the husband is still liable for torts of the wife. Stewart, Husband and Wife, Sec. 14, 15; Wheeler & W. M. Co. vs. Heil (Pa.) 8 Atl. Rep., 616; Fitzgerald vs. Quann, 33 Hun. (N. Y.) 652, affirmed 17 N. E. Rep., 354; Choen vs. Parker, 66 Ind., 195; Ferguson vs. Brooks, 67 Me., 251; Knowing vs, Manley, 57 Barb., 479; Fowler vs. Chicester, 26 Ohio St., 9, 14; McQueen vs. Fulghen, 27 Tex., 463; McElfresh vs. Kirkendall, 36 Io., 224, approved Luse vs. Oakes, 36 Io., 562; Dean vs. M. E. R. Co., 119 N. Y., 547; 13 Central Law Journ., 486.

The English married woman's property act of 1882, which is as broad as our statute, has been held to make the wife liable for her tort, but not to exempt the husband. Seroka vs. Kattenberg et ux, 55 Law Jr. Rep. Q. B. 375; 23 Central Law Journ. 364.

Section 6 of our statute, however, expressly forbids the court to construe any of the provisions of the act as in any way affecting the husband's common law liability for his wife's torts, and there can be no doubt that he was liable when Gen. Laws 1887, Ch. 207, was passed. This latter act, which was construed in Althen vs. Tarbox, 48 Minn. 18, is very "vague and uncertain," and while it confers some additional rights and powers on married women, it cannot be held to exempt the husband from his common

law liability for his wife's torts. His moral influence over her is as great as it ever was and the law still presumes that her acts and torts are the result of such influence. McQueen vs. Fulghen, 27 Tex. 463; Jerliff vs. Jennings, 61 Tex. 458.

As to how statutes changing the common law should be construed, see Sutherland on Stat. Const., Sec. 139, 400, 401.

As to repeals by implication, see Moss vs. City, 21 Minn. 421; Dean vs. M. E. R. Co., 119 N. Y. 547; Ferguson vs. Brooks, 67 Me. 251.

II. The words spoken of plaintiff charge him with drunkenness, and are actionable *per se*.

Words falsely spoken of another are actionable *per se* when they impute to the party a criminal offense for which the party may be indicted and punished, even though the offense is not technically denominated infamous, if the charge involves moral turpitude and is such as will affect injuriously the social standing of the party. Pollard vs. Lyon, 91 U. S. 308, 313; Brooks vs. Coffin, 5 Johns 188; 13 Amer. and Eng. Encycl. Law, 350, and cases cited; Miller s. Paris, 8 Pick. 385; St. Martin vs. Desnoyer, 1 Minn. 156 (Gil. 131); Reitan vs. Garbel, 33 Minn, 151; Young vs. Miller, 3 Hill (N. Y.) 21; Wright vs. Page, 36 Barb. 438; Hoag vs. Hatch, 23 Conn. 585; 10 Searg & Rawle, 18; Tasbitt vs. Clare, 9 Irish Law Rep. 86; Perdue vs. Burnett, Minor (Ala.) 138; Chesdle vs. Buell, 6 Ohio 67; 113 Mass. 193; Healy vs. Gregg, (Io.) 38 N. W. Rep. 416; Gray vs. Bennett, (Wis.) 10 N. W. Rep. 602; Davis vs. Carey, 141 Pa. St. 314; Redway vs. Gray, 31 Vt. 292, 297; Starkie on Slander, 43; Andreas vs. Kappenhoffer, 3 Searg & Rawle 254.

Charging a woman with drunkenness has been held actionable *per se*, as such offense would subject her to a disgraceful punishment. Brown vs. Nickerson, 5 Gray 1.

Drunkenness is a crime in this state under Gen. Laws 1889, Ch. 13.

It is, moreover, an indictable crime, as all public offenses are indictable in this state. Gen. St. 1878, Ch. 107, Sec. 28.

It is also a crime involving moral turpitude, and punishable by an infamous punishment.

The words spoken were therefore actionable *per se*, and the demurrer should be overruled.

OTIS, J. This action is brought against a husband and wife to recover damages for alleged slanderous words of the wife not, so far as appears, spoken in her husband's presence. The husband demurs on the ground that no cause of action is stated as against him.

I. It is urged that our married woman's act, so-called, exempts a husband from all liability for the torts of his wife. It is considered that but for this act such liability exists. Such was the common law rule long since recognized and adopted by our supreme court—viz: Brazil vs. Moran, 8 Minnesota, 236, (Gil. 205). The decisions are not at all uniform as to the effect of these married woman's acts, some very respectable courts holding that they operate to exempt the husband, and others of equally high authority holding to the contrary. These acts, so far as I have observed, do not contain express provisions for such exemption, and when they have been held to have such effect it has been the result of judicial construction of what was intended by the legislature.

A careful examination of the legislation had upon the subject in this state compels me to the conclusion that the common law rule of the husband's liability for the torts of his wife has never been abrogated.

The first act of this kind is Chapter

69 of the Revised Statutes of 1866. After very materially changing the status of a married woman and enlarging her rights, powers, duties and liabilities, it is provided in Section 5 that in case of abandonment by her husband she "may engage in and transact any business or trade in her own name and sue and be sued in the same manner as though she were unmarried. * * * * And all contracts made by her in the usual course of such business or trade shall be as valid and binding on her as if she were sole," and that property so acquired by her may be held and disposed of by her without her husband's consent, "provided that the husband shall not be liable for any contract, default, or tort of the wife made, done or incurred in the course of transacting any such business or trade." It necessarily follows from this proviso that the legislature understood that, save so far as it is here abrogated, the common law rule of the husband's liability for the torts of his wife should prevail. By implication such seems to have been the legislative intent, as otherwise the proviso is meaningless.

In 1869, Chapter 69 of the Revised Statutes of 1866 was superseded by chapter 69 of the General Statutes of 1878, and this act, while still further enlarging the rights of married women, and more clearly defining the property relations of husband and wife, closed with section 6, which reads as follows:

"Nothing in this act shall be construed to affect ante-nuptial contracts for settlement, nor to exempt a husband from liabilities for torts committed by his wife."

The legislature thus recognized a subsisting liability of the husband for his wife's torts, thereby giving a legislative construction of the act of 1866, and expressly providing that such liability should not be impaired or abrogated by the later enactment of 1869. I am reluctantly forced to the conclusion that in this state husbands must respond in damages for their wives unruly tongues, and if they would be relieved from such thralldom they must appeal to the legislature and not to the courts.

II. It is further strenuously insisted that the language used did not amount to slander. The language charged to have been uttered is as follows:

"He has been drunk throughout Thanksgiving week. He has not retired any night during that week other than in a state of drunkenness. He has drunken people in his room. He gets people in his room and makes them drunk. He was drunk during the early hours of the morning after Thanksgiving."

This in effect charges plaintiff with having been on a prolonged drunken debauch. Drunkenness, under the Scheffer law, Chapter 13, Laws of 1889, is a crime punishable for the first offense by a fine or imprisonment and for each subsequent offense by imprisonment only, not commutable by fine. All public offenses are indictable in this state.—Ch. 107, Sec. 28, Gen. St. 1878. In West vs. Hanrahan, 28 Minn. 285, the Court says: "In an action of slander, if the words alleged to have been spoken of the plaintiff, when taken in their plainest and most natural sense, and as they would be ordinarily understood, obviousl import the commission of a crime punishable by indictment, such words are actionable *per se*."—Citing 3 Wis. 623, 15; Wend, 327, and 1 Minn. 156, (Gil. 131.) It necessarily follows that the language here alleged to have been used, since it charges an indictable offense, is clearly slanderous and actionable *per se*.

But the statute aside, I am of the opinion that the language referred to should, in this state at least, be held

actionable. Whether words are defamatory or not depends somewhat upon the sentiment of the community in which they are uttered. It is true that in Indiana and Mississippi the courts have held that it was not a slander to orally charge a man with drunkenness. Perhaps in those communities and under the circumstances of those cases such words were not defamatory. In this state, where the moral sentiment of the people has placed upon the statute books such enlightened legislation as the Scheffer law there can be no doubt that to orally charge a man with a week's drunken debauch is actionable per se, and if there is no precedent for such a holding, the time with us, at least, has come when one should be made.

L. C. Caulkins, et al., vs. Mary A. Spring, et al., and Chicago, St. Paul, Minneapolis and Omaha Ry. Co., Garnishees.

(District Court, St. Louis County, 10263.)

GARNISHMENT—

The funds or property of a debtor may be garnished if found in this state though the debtor himself is a non-resident; and the exemption laws of the former state will govern in the action.

ALFORD & HUNT for plaintiff. WHITE & MCKEON for defendant.

MOER, J. Upon motion of C. S. Spring (who appears specially) to dismiss the action for want of jurisdiction of this court over either of the defendants, and also moves the court to quash the garnishment issued in this case.

The facts, briefly stated, are that the plaintiffs became the creditors of the defendants while both were residents of the state of Nebraska; that defendant C. S. Spring is a married man, the head of a family, and a resident of the state of Nebraska, and that he is employed by the defendant garnishee in the state of Nebraska, and that his wages which are sought to be garnished in this action are for labor performed within sixty days from date of service of garnishee summons herein, and that such wages under the laws of the state of Nebraska are exempt from execution.

The garnishee defendant is a railway company doing business in the states of Nebraska and Minnesota and other states, and has its principal office in the city of St. Paul, Minnesota. From the record it does not appear whether plaintiffs are now residents of this state or of the state of Nebraska, but for the purposes of this case, it will be decided upon the theory that they are still residents of the state of Nebraska.

The contract of employment between the defendant C. S. Spring and the garnishee defendant was entered into in the state of Nebraska, and defendant Spring has always been by defendant garnishee employed in said state. It does not appear that any particular place was agreed upon as to where garnishee should pay defendant Spring.

The garnishee defendant has answered, admitting an indebtedness to defendant Spring of something over two hundred dollars.

No question is raised as to the regularity of the proceedings had in this case, other than the want of jurisdiction in this court, based upon the fact that the sum due defendant Spring from the garnishee is by the laws of the state of Nebraska exempt from seizure on attachment or execution in that state, and that this court has, therefore, no jurisdiction over the parties or the fund in the hands of the garnishee due said Spring.

In support of this contention the moving defendant cites several cases from Nebraska and from other states. In determining this question, the first point to be determined, in my mind, is the *situs* of the debt. The Omaha Railway Company does business in both states, and under all the authori-

ties it can hardly admit of question that the defendant Spring, if he so desired, might bring suit against the Company in this state to recover the amount due him. This being so, it follows that for the purpose of attachment, a debt has a *situs* wherever the debtor can be found. Wherever the creditor might sue for its recovery, there it may be attached as his property, provided the laws of the forum authorize it.

Harvey vs. Great Northern Ry. Co., 50 Minn., 405.

The laws of the forum in this case clearly authorize it.

Secs. 5010, 5012, 5018 Kelley's Statutes. Secs. 164, 166 and 173, Ch. 66, G. S. 1878.

It would seem to follow—it being conceded that the situs of the debt for the purpose of bringing suit or attachment is at such place as the debtor can be found—that the motion of defendant Spring must be denied unless the exemption law of the state of Nebraska is to be given extra territorial force. Can such effect be given it?

It is contended on the part of the moving defendant that "the exemption laws in force when they (debts) were contracted will govern as to the rights of debtor and creditor." The cases cited in support of this contention do not in my judgment reach the real point in issue. In DeWitt vs. Sewing Machine Company, 17 Nebraska, the court says, following the language above quoted: "that is, after a debt is contracted the legislature cannot diminish the rights of the creditor nor take from the debtor property previously exempt to apply on that particular debt." In Dorrington vs. Myers, 11 Neb., 388, the court, in holding that it "is well settled that the law in regard to exemption, as well as that relating to stay of execution, valuation or appraisement laws in force when a contract is entered into, becomes the law of such court." Passing the question of whether or not the law is well settled on this question as to homestead, it does not follow that if such be the law, that the extra territorial force will be given to the exemption laws of a sister state.

The following authorities hold that an exemption law of one state has no effect in an action brought in another state.

Boykin vs. Edwards, 21 Ala., 261.

Mooney vs. Union Pacific, 14 N. W., 343 (Iowa.)

Newall vs. Hayden, 8 Iowa, 140 and numerous other Iowa cases.

Baltimore & O. Ry. Co., vs. May, 24 Ohio St., 325-347.

Morgan vs. Neville, 74 Pa., 52.

Sock vs. Johnson, 36 Me., 464.

Carson vs. Memphis & C. Ry. Co. (Sup. Ct. Tenn.), 8 L. R. A., 412, which gives a full and able discussion of this question.

It having been determined by our Supreme Court that the situs of the debt is wherever the defendant may be found, I think the better reasoning, as well as the decided weight of authority, is against the contention of this moving defendant, and this motion to dismiss and quash should, therefore, be dismissed, and it will be so ordered.

In re Receivership of Great Western Manufacturing Co., insolvent, upon motion of Receiver to require John Kennedy to surrender possession of certain real estate and personal property of said insolvent to said receiver.

(District Court, St. Louis County, 10,369.)

PRACTICE—CONFLICTING RECEIVERSHIPS—

Where the United States Circuit Court has appointed a receiver, who, as such, is in possession of property of the insolvent, and thereafter a receiver for the same insolvent is appointed by the District Court of this state, the proper method for the latter to test the question as to which of the receivers is entitled to possession of property of the insolvent in this state is by trial of title in the ordinary manner, and

not by order for the U. S. Receiver to show cause why he should not turn the property in his possession over to the District Court Receiver.

COTTON, DIBELL & REYNOLDS for District Court Receiver. J. L. WASHBURN, and REED & BROWN for defendant Kennedy.

After the U. S. Court in Chicago had appointed a receiver for the property of the insolvent company to take charge of all of the insolvent's property in Illinois and also in Duluth, Minnesota, the District Court of St. Louis Co., upon proper petition, appointed another receiver. The U. S. receiver, having been appointed first, had already acquired possession and assumed control of the manufacturing plant in Duluth. The District Court receiver, in order to test the conflicting claims and interests of the two opposing receivers, obtained an order from the District Court requiring K., the agent of the U. S. receiver, to appear and show cause why said manufacturing plant and other property in Minnesota should not be surrendered to the District Court receiver.

MOER, J. In this matter it is shown by the affidavits that defendant Kennedy acquired possession of the property prior to the initiation of these proceedings for the appointment of a receiver in this state. K. claims the right to the possession of the property for ne Fowle, who was appointed receiver of the insolvent in the United States Circuit Court for the Northern District of Illinois. It is claimed on the part of the receiver in this proceeding that Fowle has no title whatever to the property in controversy; that the affidavit filed in this proceeding discloses the fact that the claim of title made by receiver Fowle is based upon a certain deed of the insolvent made to said Fowle under an order of the said U. S. Court and that such deed (which is set out in the affidavits) is void upon its face, and that, being void, this is the proper proceeding upon the part of this receiver appointed by the state court.

In my judgment it is clearly a question of title between the parties; and the defendant Kennedy having acquired possession of the property for Fowle prior to the proceedings having been begun in the state court, he cannot be summarily ordered to turn over the property, but is entitled to a trial and a determination of his rights in the ordinary manner. So far as this proceeding is concerned, it is wholly immaterial, in my judgment, whether the title of the receiver of the U. S. Court is good or bad; it cannot be disposed of in this manner. For this reason the order to show cause must be discharged and the motion denied.

First National Bank of Chattanooga vs. Alfred Merritt, et al.

(District Court, St. Louis County.)

ACTION TO SET ASIDE FRAUDULENT CONVEYANCES—AVERMENT OF DELIVERY AND ACCEPTANCE OF DEEDS—ALLEGATION OF FRAUD UPON INFORMATION AND BELIEF—

Where the complaint alleges that the defendant, grantor, conveyed to the grantees the premises, allegation of delivery and acceptance of the deeds is unnecessary.

Facts constituting the fraud alleged upon information and belief held sufficient.

Where there are several judgment debtors, in the former action, held unnecessary to aver that none of the defendants had property out of which judgment could be satisfied at the time of bringing suit to set aside the fraudulent conveyances.

MCCAFFREY & RICE for plaintiff. A. A. HARRIS & Son for defendants.

Plaintiff recovered judgment against the defendant Merritt and two others on a promissory note, July 17th, 1894; on August 9th, 1894, execution against said defendants was returned wholly unsatisfied. October 4th, 1894, plaintiff commenced this action to set aside several conveyances of real estate made by the defendant Merritt to the other defendants herein, as fraudulent.

Plaintiff, in its complaint, alleged the recovery of the judgment and the return of the execution unsatisfied;

also that the cause of action existed prior to the alleged fraudulent conveyances; that the defendant Merritt executed to the defendant grantees the several deeds of conveyances (describing them,) and that said deeds conveyed to the defendants the property therein described. The complaint further alleged "that as plaintiff is informed and believes, the said several conveyances, and each and all of them, were made without any consideration, and for the fraudulent purpose," &c. and that the defendant Merritt has no other property out of which judgment can be satisfied.

A demurrer was interposed to the complaint and argued on the grounds, 1st, that a positive averment of delivery and acceptance of the deeds was essential, citing Doerfler v. Schmidt, 30 Pac. Rep. 816; 2nd, that an allegation of fraud upon information and belief is not sufficient, Seidman v. Geib, 11 N. Y. S. 705; 3rd, that plaintiff must show that at the time of commencing suit, none of the defendants had property out of which judgment could be satisfied. 72 Ind. 57; 82 Ind. 803; 73 Ind. 472; 73 Ind. 93; 7 Colo. 107.

Plaintiff first contended that *execute* imports delivery and acceptance of the deeds, 1 Bouvier Dict. 622; Anderson's Dict. 429; 13 Minn. 154, 164; State v. Young, 23 Minn. 551, 560, and that to convey is to transfer title, and hence implies delivery and acceptance. Plaintiff, second, distinguished between the allegations of fraud "that plaintiff is informed and believes that" &c., and "that as plaintiff is informed and believes" &c., the former being an allegation of plaintiff's information and belief and insufficient, while the latter is sufficient. Lucas v. Oliver, 34 Ala. 326; Story's Eq. Pl. 241 n (a); Wells v. Bridgeport, 30 Conn. 316; Campbell v. Paris, 71 Ill. 611; 1 Daniel's Ch. Pl. 361; Memphis v. Neighbors, 51 Miss. 412.

Third: That plaintiff need proceed only to judgment, and in this state it is not necessary to allege that defendants have no other property subject to execution. Bump on Fraud, Conv. 530 (and cases); Wadsworth v. Schisselbauer, 32 Minn. 84. In jurisdictions where legal remedies must be exhausted before suit to set aside, the issue and return of an execution unsatisfied is sufficient, 2 Beach Eq. Jur. 893; Bump on Fraud, Conv. 537; 129 Ill. 9; 117 Ill. 477; 130 N. Y. 421; 34 N. E. 148; 47 N. W. Rep. 1132; 13 N. Y. 161; 9 Wend. 548; 15 How. Pr. 417; 31 Barb. 390; 32 N. Y. 53; 101 U. S. 688.

The demurrer was overruled.

MOER, J.

T. O. Hobe vs. Rodney B. Swift.
(District Court, St. Louis County.)

ACTION—COMMENCEMENT OF—

Where the defendant did not usually or last reside in the county where the action is brought, the mere handing of the summons to the sheriff with the intent that it be served, does not constitute the commencement of an action within the meaning of Sec. 14, Ch. 66, G. S. '78.

JOHN RUSTGARD, for plaintiff. W. B. PHELPS, for defendant.

Plaintiff brought suit against defendant to recover under section 24, Chapter 81, G. S. '78 for excessive costs and charges in a mortgage foreclosure, asking for treble damages as provided in said section.

LEWIS, J. The defendant claims that this action was not commenced within the year prescribed by Sec. 24, Ch. 81, G. S. '78. Said section reads "That the mortgagor, his heirs or assigns, at any time within one year after foreclosure may recover," &c. By foreclosure is meant the completion of the process of foreclosure. The day of the sale in this case was April 23d, 1892; the year thereafter expired with the 23d day of April, 1893; but the Court takes judicial notice that the 23d day of April, 1893, was a Sunday, hence under Section 82, Ch. 66, G. S., the year expired with the 24th.

The record shows that the complaint is dated April 22d and filed in the clerk's office April 24th, 1893. The summons was dated April 22d and filed in the clerk's office on the 25th. Attached to the summons is the return of the sheriff to the effect that the defendant could not be found, and the return is dated April 25th. An affidavit and bond in attachment, approved April 24th, were filed on the 24th. A writ of attachment was issued on the same day, and under this writ the sheriff, on the 25th, levied upon the lots covered by the mortgage in question, and made a return on the writ to the effect that the defendant could not be found within the county. This writ and levy and return were filed on the 25th. On the first of May counsel for plaintiff made an affidavit and obtained an order for publication of the summons, and the publication was commenced the next day. Defendant answered May 31st.

The question is when was this action commenced? If on the 24th, then it was in time. If at a subsequent time then the plaintiff cannot recover under Section 24, Ch. 81. Section 13, Ch. 66, G. S., provides that an action is commenced against a defendant when a summons is served upon him. Section 70 of the same chapter provides that "No natural person is subject to the jurisdiction of a court of this state unless he appears in the court or is found within the state or is served with process therein, or is a resident thereof, or has property therein upon which the plaintiff has acquired a lien by attachment or garnishment, and then only to the extent of such property, except in cases where it is otherwise expressly provided by statute." Under this section the plaintiff acquired no lien by his attachment proceedings, because the levy was not made within the year. If the action was not commenced prior to the levying of the writ, the action was commenced too late. The publication of the proceedings which followed were for the purpose of acquiring jurisdiction in pursuance of the proceedings commenced by attachment.

There was no personal service within the year, and the next question presented is: Was the action commenced within the year within the meaning of Sec. 14, Ch. 66? As before noted the summons was dated April 22d and filed April 25th with the return of the sheriff thereon, dated April 25th, to the effect that the defendant could not be found in the county. There is no proof as to when the summons was handed to the sheriff. If on the 25th it was too late. But an action can be thus "commenced" only in a case where the defendant usually or last resided in the county; and again such attempt shall be followed by the first publication of the summons, or personal service thereof, within sixty days. In this case, there is no evidence on the question of the residence of the defendant on the 24th of April when the summons might have been handed to the sheriff. We will give the plaintiff the benefit of the doubt, and concede that the plaintiff gave the summons to the sheriff on the 24th of April with the intent that it be served personally on the defendant. On this question of time I think the presumption would be that it was delivered within the year, and that the burden is on the defendant to show that it was delivered later. Section 14 must be construed with reference to all the provisions in the chapter wherein it is found. The publication referred to in section 14 must refer to section 64, subdivision 3 of Chapter 66. This section provides that summons may be published when the defendant is a non-resident and has property therein and the court has jurisdiction of the subject of the action (as amended

1881.) The only way to get service under this division of the section is by attaching the property of the defendant and proceeding to publish the summons as therein provided. The summons may also be published against a resident when he departs with intent to defraud his creditors, &c. We are compelled to conclude that section 14 refers to a case where the defendant did actually, usually, or last resided within the county, and it is a personal service that is meant. In such case if the defendant cannot be found within the county then the summons may be published, if the facts referred to in subdivision 2 section 64 apply, and this explains the reference to publication in section 14. Hence in this case the burden of proof was upon the plaintiff to show that at the time he handed the summons to the sheriff the usual or last place of residence of the defendant was within the county. Having failed to do that he cannot claim now the benefit of section 14. The conclusion is that the action was not commenced within the year, even though the summons might have been handed to the sheriff within the year.

In the Matter of the Application of the City Comptroller of the City of Duluth for Judgment for Delinquent Assessments. Upon Application of Henry Dibblee to Open said Judgment and for leave to answer same.

(District Court, St. Louis County.)

MUNICIPAL ASSESSMENTS—

Held, upon the facts in this case, that it would be an abuse of discretion to open judgment.

M. DOUGLAS for defendant. PAGE MORRIS for City of Duluth.

The city of Duluth through its Comptroller published the list of delinquent assessments, and after proper publication entered judgment against the lands described in the notice. This defendant, a non-resident property holder, made application to have the judgment opened as to his property, and for leave to file an answer. This application was made on affidavits with a copy of the proposed answer setting up various good and meritorious defenses. The judgment was entered on February 8th, 1893, and the property sold and bid in for the city.

LEWIS, J. I am satisfied it would be an abuse of discretion of this Court to open this judgment. The record shows that the applicant lived in the city of Chicago; that he had no notice of the entry of the judgment until soon before this application was made; that in 1889 he made inquiries of the proper authorities of the city of Duluth to know if there were any taxes and assessments against his land, and was told that by making inquiry at the county treasurer's office he would find out all about his taxes and assessments; that in 1893 he relied upon that information and made special inquiry at the office of the county treasurer as to whether there were any special assessments against his property, and was informed that there were none; that during the year 1889 he purchased said land from one Harrison, of Duluth, and that said Harrison agreed to keep him posted on any action that might be taken by the city affecting said premises; that some time thereafter the said Harrison died and one Hinton looked after the matter of the applicant's taxes and assessments, and that said Hinton paid the taxes and assessments for the applicant during the years 1891 and 1892; that the applicant in 1891 and 1892 paid the said assessments at the county treasurer's office; that he had no knowledge or reason to believe that the said assessments were payable at any other place than the county treasurer's office, or that the law in reference thereto had been changed; that he made inquiry at the county treasurer's office in 1894 of same person that he had in 1893 concerning his

taxes and assessments; and first learned in May, 1894, of the assessment proceedings and judgment. From the above statement it appears that no statement was made directly to the applicant by any person of the city of Duluth or the county subsequent to the year 1889, which, it is claimed, threw the applicant off the track and caused him to omit looking up the matter of assessments. It appears that after that time he entrusted the matter entirely to the local agents, Harrison and Hinton. These parties were on the ground, in the city, and if they failed to do their duty in applying at the proper office to find out whether there were any assessments delinquent or due, the applicant is chargeable with such neglect. No sufficient ground has been laid to appeal to the discretion of the Court. It appears, however, from the proposed defense that the petitioner has a good and valid and meritorious defense by reason of the matters and things set forth in his objections filed herewith. Motion denied.

Jennie Pugsley vs. J. R. Carey, Adm., et al.

(District Court, St. Louis County, 9,265.)

ADMINISTRATOR'S SALE—INSUFFICIENT DESCRIPTION—

W. K. GASTON for plaintiff. CASH, WILLIAMS & CHESTER, JAMES SPENCER for defendants.

LEWIS, J. This is an action brought to test the validity of an administrator's sale of certain real estate. The intestate who died in 1874 was the owner of an undivided one-fourth of the NE ¼ and SW ¼ of a certain section. The administrator made application to sell the real estate to pay the debts of the estate, and included among other descriptions the said land but described it as follows: The undivided half of 320 acres in the proper section. The proper proceedings were had with this last description all the way through, except that in the report of sale it was called the undivided one-fourth of 320 acres, but was confirmed as the undivided half. All the land included in the application was sold in one bid to several different persons who bid together. The land in controversy was thereupon deeded to defendant's intestate for a part of the bunch bid.

Held, that the sale was void and invalid for indefiniteness as nothing in particular had been sold.

International Trust Company vs. American Loan & Trust Co., W. E. Richardson, Assignee of said Co., A. B. Chapin, and other stockholders.

(District Court, St. Louis County, 9,703.)

LIABILITY OF STOCKHOLDERS—

There is no individual liability imposed by statute on stockholders in corporations organized under the act of March 5, 1883, which act provides for the incorporation of Annuity, Safe Deposit and Trust Companies.

JAMES SPENCER for plaintiff. J. L. WASHBURN, BILLSON, CONGDON & DICKINSON, DRAPER, DAVIS & HOLLISTER, PEALER, TITUS & LEMMON, and ABBOTT & CROSBY for defendants.

This is an action under chapter 76 of the General Statutes to sequestrate the property of the defendant company, to appoint a receiver, and to fix and enforce the individual liability of the various stockholders. The defendants demurred, mainly on the ground that the complaint did not state a cause of action, thus raising the question as to the liability of the stockholders.

The defendant company was organized under the act of March 5, 1883, entitled "An act to authorize the organization and incorporation of annuity, safe deposit and trust companies." It was claimed by defendants that the stockholders of the company were not subject to any liability under the provisions of either Article IX or X of the Constitution of the state. Article IX, subdivision three, provides merely that the legislature, when it passes any general banking law, shall impose a certain

double liability upon "the stockholders in any corporation and joint association for banking purposes *issuing bank notes.*" Companies organized under the said law of 1883 had no authority to issue bank notes and therefore this section of the constitution is not applicable. Article X imposes a liability only upon corporations having no *banking privileges*, and it was maintained that such a company as the defendant company exercises, and under the act of organization is authorized to exercise, many such privileges. This section does not apply to corporations exercising banking privileges, such as are granted by the said act of 1883. The act providing for the organization of such companies places no liability on the stockholders.

There being no provision in either the constitution nor the act of 1883, and there being no applicable provision in the general incorporation act, it follows that there is no individual liability of the stockholders. Demurrers sustained.

ENSIGN,
LEWIS, J. J.

Levi Longfellow, et al., vs. Central W. C. T. U. Coffee House.

(District Court, Hennepin County, 61,632.)

CORPORATIONS—COPARTNERSHIPS—

Persons who have incorporated, but who carry on a business not authorized by the articles of incorporation, under a different, though similar name, are liable as copartners to those who deal with them under the latter name and in the business not authorized by the articles of incorporation.

F. W. REED for plaintiff. SMITH & PARSONS for defendant.

Action was brought against several persons as copartners; the defense set up was that the defendants were not copartners but incorporators, and that not as a copartnership, but as a corporation they had dealt with plaintiffs.

The Court found, among other things, that the plaintiffs had sold to the defendants certain goods, wares and merchandise, and that only a portion of the price thereof had been paid; that the defendants were associated together and doing business under the name of the Central W. C. T. U. Coffee House, and that each of them had authorized the purchase of the goods sued for, and ratified their purchase thereafter. The further material facts appear in the memorandum.

JAMISON, J. The foregoing action was brought by plaintiffs against the defendants as copartners under the style of Central W. C. T. U. Coffee House. The sole contention at the trial of said cause was over the question of partnership of the defendants. The evidence disclosed that the corporation was organized, the corporate name being "Central Women's Temperance Union of the City of Minneapolis;" that the object of said corporation as expressed in its articles was "To arouse the women of the city of Minneapolis to an active interest in the temperance cause and to form them into city or local unions which shall work to advance temperance sentiment, to secure pledges to total abstinence, to use all possible means toward suppressing the manufacture and traffic in spirituous liquors, and to enter into any Christian work connected therewith as the Lord may direct." That shortly after the formation of said corporation it was concluded at a meeting thereof, to open a coffee house, the purpose being, as expressed, "to thereby further the cause of temperance." Thereupon a so-called "Coffee House Board" was appointed, the duty of said board being the running and managing of the coffee house. Shortly thereafter a building was leased and the business of conducting a coffee house commenced. For several years thereafter business was conducted by said board under the title of

"Central W. C. T. U. Coffee House." A sign was placed over the door and meal tickets were issued bearing the name "Central W. C. T. U. Coffee House, ———Treasurer."

The business grew very rapidly, and the board soon found itself conducting a restaurant business, where hundreds were fed daily. The business, so far as the public was concerned, was a restaurant business. The business thus carried on was not authorized by the articles of incorporation, and was beyond the power of said corporation. They were engaged in a busines sbeyond the scope of the corporation, and were conducting the same under a name different from the corporate name. The evidence shows that the plaintiff sold the goods without knowledge that the business was, in fact, carried on under the direction of the corporation, to-wit, the Women's Christian Temperance Union, and if the members of the corporation assumed a name other than the corporate name, and thereunder did business not authorized by the articles of incorporation, and permitted themselves to be held out as jointly conducting such business, and under such circumstances plaintiffs sold the goods in question, believing that the said defendants were jointly engaged in carrying on the said business, independently of the corporation, then defendants under the law should be held liable to the plaintiffs. The business undertaken and carried on by the defendants was of a partnership character, and the purpose was such as to suggest the relation of copartners between those engaged in it. Therefore plaintiffs are entitled to judgment.

D. M. Sabin vs. J. C. O'Gorman, A. T. Jenks, Searles & Gail, et al.

(District Court, Washington County.)

INJUNCTION—ASSIGNMENT OF JUDGMENT—ATTORNEY'S LIEN.

Where a judgment creditor has assigned his judgment as collateral security and with the understanding that the same shall be assigned to a third person upon payment of his debt, he cannot institute supplementary proceedings on the judgment.

DAVIS, KELLOGG & SEVERANCE for plaintiff. SEARLES & GAIL for defendants.

In a former action the defendant O'Gorman had obtained a judgment against the plaintiff Sabin. Thereafter the said judgment creditor assigned his judgment to the defendant Jenks. After this assignment the defendants Searles & Gail gave notice of intention to claim an attorney's lien on the judgment, they having been the attorneys for the defendant O'Gorman in the action in which he had recovered judgment against plaintiff herein. Thereupon supplementary proceedings were instituted by said O'Gorman (Searles & Gail being his attorneys in the proceeding) against the plaintiff herein, and this action was brought to restrain the defendants, and each of them, from continuing those proceedings. It further appeared that the assignment to Jenks was merely as security for a debt due from O'Gorman to Jenks, and upon an agreement that upon payment of his debts Jenks was to assign the judgment to O'Gorman's wife.

Held, that an injunction issue against defendants O'Gorman and wife, and Searles & Gail as attorneys of O'Gorman in the supplementary proceedings, but the right of Searles & Gail to foreclose their lien is not affected.

WILLISTON, J.

Sullivan bought a goat, for which he paid $5. Shortly after he received a tax bill on the goat of $8. He called on Rafferty, the assessor, and said: "Why do you tax me $8 on my goat when I paid but $5 for him?" "Well," said Rafferty, "I have carefully read what the statutes say, and it reads: 'Whoever owns property a-butting on the street shall be taxed $4 a front foot.'"—*Shoe and Leather Reporter.*

"I am going to call my baby Charles," said the author, "after Lamb, because he is such a dear little lamb." "Oh, I'd call him William Dean," said the friend; "he Howells so much."—*Advance.*

AMENDMENT TO SUPREME COURT RULES.

ORDERED that Rule 9 be and is hereby amended so as to read as follows:

RULE IX.

1. The appellant, or party removing a cause to this Court, shall at least three days (excluding Sunday) previous to the argument thereof, file eight copies—one for each of the Judges, and one for the Reporter, Clerk and Librarian, respectively—of the paper book, his assignment of errors, points and authorities; and within the same time the respondent shall file eight copies of his points and authorities; any party failing to do so shall not be entitled to statutory costs, in case he prevails.

2. The paper book and briefs must be printed, and the folios of the paper book distinctly numbered in the margin. The paper book shall consist of so much of the return as will clearly and fully present the questions arising on the review, with the reasons of the court below for its decision, if any were filed, also the notice of appeal, verdict or finding, and judgment, if there be one.

3. Prefixed to the brief of the appellant, but stated separately, shall be an assignment of errors intended to be urged. Each specification of error shall be separately, distinctly and concisely stated, without repetition, and they shall be numbered consecutively. When the error specified is that the finding of the court below or referee is not sustained by the evidence it shall specify particularly the finding complained of. No error not affecting the jurisdiction over the subject matter will be considered unless stated in the assignment of errors.

4. The points and authorities of appellant shall contain a concise statement of the case so far as necessary to present the questions involved, and shall state separately the several points relied on for a reversal of the order or judgment of the court below, with a list of authorities to be cited in support of the same.

5. Whenever either the settled case or the paper book contains any unnecessary, irrelevant or immaterial matter, and the appellant prevails he shall not be allowed any disbursements for preparing, certifying or printing such unnecessary matter.

If the settled case contains all the evidence, but the appellant does not prevail on any error which required the bringing up all of the evidence, but does prevail on an error, which could have been raised, without the evidence or by a bill of exceptions, he shall not be entitled to tax disbursements for preparing, certifying or printing any matter not reasonably necessary to present the points on which he prevailed.

The respondent's objection to the taxation of disbursements in such cases shall point out—specifying the folios—the particular portions of the record, or paper book, for which he claims that the appellant is not entitled to tax disbursements.

Ordered, that the Clerk of this Court cause this order to be published in at least two daily newspapers in each of the cities of St. Paul and Minneapolis and in at least one daily newspaper in the city of Duluth, also in the calendar of this Court for the next term.

Feb. 9, 1895.

Our Correspondents.

Persons to whom matter for THE JOURNAL may be handed.

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HON. D. B. SEARLE,

District Judge, Seventh Judicial District.

...THE...

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LIABILITY OF STOCKHOLDERS OF TRUST COMPANIES.

We are of the opinion that no decision of greater importance has of late been rendered by our courts than that in International Trust Co. vs. American Loan and Trust Co., reported in our previous issue, 3 M. L. J. 23. By subtle, ingenious, and what appears to us to be sound reasoning, the attorneys for the stockholders of the insolvent American Loan & Trust Co. have obtained a decision which relieves their clients of all personal liability for the debts of the corporation. Personal liability of stockholders, it was held, must be based upon either Article IX or X of the Constitution, and corporations organized under Ch. 107, G. L. 1883, the act under which almost all, if not all, Minnesota trust companies are organized, do not fall within the kinds of corporations mentioned in either article, and, therefore, stockholders in such corporations are not liable in any amount for the corporation's debts. If this decision should be affirmed, and we are of the opinion that it will be, it will reduce the assets or responsibility of trust companies organized under said law from what it has heretofore been supposed to be by the amount of their capital stock. This state of affairs would seem to demand legislative action. Trust companies are now favored by law more than is advisable. Acting as trustees, executors, receiv-

ers, etc., without bond, they have in their possession millions of dollars of trust funds for which there is absolutely no security but the integrity and business ability of their officers, and even trust companies will sometimes become insolvent.

REVISION OF THE STATUTES.

On March 7th the bill to revise the statutes was put on its passage in the house and passed, after considerable debate, by a vote of seventy-two in its favor to seven against it. The bill provides for the appointment by the Supreme Court, within thirty days after the passage of the act, of not less than three, nor more than five competent commissioners, to revise and annotate the general laws of the state. The commissioners are to have three hundred copies of their report printed as soon as their revision is completed, and furnish one copy to each member of the legislature that meets after the revision is ready for acceptance. Their compensation is to be fixed by the judges of the Supreme Court, and the sum of $35,000, or so much thereof as may be necessary, is appropriated to pay such compensation, printing, clerk hire and other necessary expenses. The bill will undoubtedly pass the senate, and the profession may hope to possess in the near future a harmonious and consistent body of written law, for which it will be duly grateful.

INITIATIVE AND REFERENDUM.

The following is a report of Hon. H. W. Childs, Attorney General, on the initiative and referendum, given in response to a resolution of the Senate asking therefor.

To the Honorable, the Legislature of Minnesota:

The very comprehensive resolution adopted by the Honorable Senate of 1893, requesting the Attorney General to present to the present Legislature a report upon "The Initiative and Referendum," has imposed upon me a very exceptional and difficult duty.

The resolution requires in brief that this report contain:

1. The history of the principle of "The Initiative and Referendum;"
2. Its workings in Switzerland;
3. How far it could be made applicable to existing conditions in this State; and,
4. What would be the effect of its adoption upon legislation in this State in the way of lessening corporate interference therewith and preventing extravagance and corruption.

I deem it proper at the outset to define in a few words, as accurately as I may, the two institutions which form the subject of this report.

As applied to the political affairs of Switzerland, the Initiative implies "that every citizen shall have the right to propose a measure of law to his fellow-citizens;" or, as otherwise defined, it is "the exercise of the right granted to any single voter or body of voters to initiate proposals for the enactment of new laws, or the alteration or abolition of existing laws."

The Referendum, on the other hand, is understood to imply "that the majority shall actually enact the law by voting the acceptance or the rejection of the measure proposed."

Of the Initiative, it will be necessary to speak but briefly.

The experience of the Swiss people, with whom it is now on trial, is not such as to commend its adoption here or elsewhere. The canton of Zurich in Switzerland teaches an instructive lesson as to the value of the institution. That canton, in point of wealth and population, is one of the most important in Switzerland, and enjoys an experience with the Initiative of twenty-five years. Although it has there been frequently resorted to, it has

rarely resulted in the enactment of laws, as they have almost invariably been defeated by the popular vote.

It is said that from 1869, when the Initiative was first established in the canton, through 1885, a period all the more valuable by reason of the careful statistics covering it, this mode was resorted to in the submission of eighteen proposed measures. "Four of them were approved by a majority of the Council, and of these, two were ratified by the people, and two rejected; in one other case the Council proposed a substitute, which was adopted; while of the thirteen proposals which were disapproved by the Council, only three were enacted by the people."

Obviously, the Initiative is illy adapted to the formulation of wise measures of legislation, as it affords no opportunity for ample discussion, which is essential to the enactment of salutary laws, and "gives no room for compromise and mutual concession between different opinions, which is the very essence of legislation." But the fact that it has been adopted by only fourteen of the twenty-two cantons of Switzerland, and in some of them only in reference to constitutional amendments, clearly indicates that it has not, as yet, demonstrated its usefulness as an agency of legislation. As an institution, it is conceded to be "still in its infancy and requiring development."

THE REFERENDUM.

The Referendum is a subject which merits careful consideration. As a principle, it is of remote origin and of wide observance. For many centuries the Swiss people had in their communal meetings and the Landsgemeinden exercised the right of voting upon questions of local government.

Moreover, it had been a frequent custom, under the old Swiss federation, for the deputies of cantons represented in the federal Diet to refer all questions acted on by them to the cantonal councils. This custom became distinguished by the Latin expression—*ad referendum*—from which the term Referendum is derived.

As an institution, within the meaning of the term as employed in the resolution, it is very modern and wholly confined to Switzerland. As thus regarded, it owes its origin to the action of the canton of St. Gallen in 1831, in so framing its constitution as to require a submission of laws to popular vote when demanded by a certain number of voters. This was designed to secure to the people of the canton a veto power by which to counteract injudicious legislation. From St. Gallen the idea spread to other cantons, until at last it seems to have become a deeply rooted institution throughout the Confederation.

Whatever may be said for or against its adoption by the people of this country, it must be admitted that it has grown into great favor with the people among whom it is now in vogue. It is said by one writer that "the conservatives, who violently opposed its introduction, became its earnest supporters when they found that it undoubtedly acted as a drag upon hasty and radical law-making."

As now practiced in Switzerland, the Referendum is of two forms—*faculative*, or *optional*, and *obligatory*. By virtue of the former a law must be submitted to popular vote when demanded in writing by the proper number of voters, while the other requires the submission of all laws to such vote without previous demand. Notwithstanding the fact that the obligatory form has proven the more expensive of the two in Switzerland, where a proposed measure is printed and widely distributed before an election held thereon, it is deemed

preferable to the other by the best informed of Swiss statesmen. It has grown into favor for the reason that it avoids the serious agitation of the measures always incident to the work of procuring the signatures requisite to submission.

In the Swiss Confederation, by which is meant the federation of the several cantons of Switzerland, the obligatory form applies to all amendments to the federal constitution; while the faculative applies to all laws passed by the federal assembly, if properly demanded. As to the latter, the demand emanates either from the voters as individuals, or from the cantons speaking through their constituted authorities. In order that it may be invoked by popular demand, 30,000 voters must unite in asking for it. It is said that while in practice it is seldom, if ever, sought by the cantons, the people themselves have frequently exercised their right to use it. Out of one hundred and sixty-nine laws passed by the assembly between the years 1874 and 1893, the Referendum was demanded as to nineteen of them; of which number six were ratified and thirteen rejected at the polls.

The cantons, without exception, like the Confederation, require submission of all questions affecting their constitutions; but they are widely apart in its applicability to ordinary legislation. One is still governed by a representative legislature; two others restrict its use to financial measures; "in others it is optional with the people who sometimes demand it, but oftener do not; in others it is obligatory in connection with the passage of every law."

It would, in my judgment, be at variance with the truth to deny that the Referendum, as applied to the affairs of the Swiss people, has proven a wise and salutary institution. A consensus of the expressed views of those who have most thoroughly studied its workings among that people admits of no other conclusion. Serving, as already suggested, as a drag upon hasty and radical legislation, it has elicited the concession of its enemies that its employment in that country has been attended with economy in all departments of the public service.

Before discussing the applicability of the Referendum to the conditions of this country, and especially to this State, I deem it well to call attention to the conditions under which it is maintained in Switzerland.

The geographical area of that country is 15,892 square miles, or scarcely one-fifth that of Minnesota. Thirty per cent of its territory consists of glaciers, water-sheds and unproductive mountains, and eighteen per cent is covered with forests. Its productive territory is therefore but slightly in excess of 8,000 square miles, or one-tenth the area of this State. Notwithstanding its limited territory, it has a population of 3,000,000, or quite double that of our own. More than 400,000 of the Swiss people reside in cities having a population of 20,000 and upwards.

In material progress and the general diffusion of knowledge, the people of Switzerland take high rank as the facts hereinafter stated abundantly indicate. Notwithstanding the broken character of their country, they have in operation 2,000 miles of well equipped railroads, which, although under private ownership, are subject to rigorous public supervision, both as to construction and operation. They are also served with an extensive and adequate system of telegraph, which is likewise under close public supervision. The postal service has attained a high degree of economic and efficient management. No country,

it is safe to say, is better served in this respect than Switzerland.

The Swiss people are pre-eminently an educated people. They lead the world in the minimum of illiteracy, as the percentage is lower there than anywhere else. That country has for years been committed to a policy of free, thorough and compulsory primary education, and maintains four great and influential universities, which yearly attract the attendance of large numbers of foreign students. It ranks, moreover, with this country "at the head of the statistical list for the world" as to the number of newspapers and periodicals proportionate to population.

It is a country of small land owners. Its large rural population, with so limited an area of agricultural lands, could not result otherwise among a free and enlightened people, than in a very great number of small holdings. Swiss lands are freehold, and their subdivision has been carried to such an extent that an ordinary holding is barely sufficient for the maintenance of the family which occupies it.

While the homogeneity of that people may be more marked than that of the people of Minnesota, yet it is interesting to note the range of national types of the former as indicated by the languages spoken among them. In such respect they may be divided as follows: German, 2,092,000; French, 637,000; Italian, 165,000; Romansch, 30,000.

But enough has already been shown illustrative of Swiss character and institutions to disabuse every thoughtful mind of the belief that the conditions affecting that people are so radically different from our own as to necessitate radically different forms of government. Every candid and thorough observer of the people and affairs of both Switzerland and this country will claim no superiority of the latter over the former, either in point of morals, general education, or sound views of government. It is no disparagement of our own excellent institutions to say that we can profit much from a study of those of the other country.

It may be said in answer to the resolution that the principle of the Referendum is, to a large extent, adaptable to American institutions. This conclusion is in fact demonstrated by what has already spontaneously taken place among us. That principle has frequently been applied during the growth of our system of written law. Whenever a constitution is adopted or amended, or a statute submitted for ratification to popular vote, the principle of the Swiss Referendum is employed. It does not, however, follow that we should now, if ever, adopt that institution in the form in which it is known and applied in Switzerland.

We are as yet a young State, and passing through a formative period in legislation. The work which will necessarily engage our legislatures in the immediate future will be the revision of the great mass of statute law already enacted, much of which is crude, ill-advised, replete with incongruities, temporizing and experimental. While it is not to be presumed that all or the greater part of the statutes which might be passed with the Referendum in force would be submitted to popular vote, yet in view of the great volume of legislation which awaits us, there would be too many such submissions demanded to warrant proper consideration at the hands of the voting public.

In Switzerland the importance of intelligent action on the part of the voter is properly recognized, and provision is therefore made to furnish him, although at great expense, with desirable information emanating from

official sources. But the Assembly of that country during the nineteen years immediately following 1874 passed only 169 laws, while the Legislature of this State during its last session passed no less than 241. This naked statement in comparison of the extent of the legislation of the two countries suggests the practical difficulties in the way of an immediate adoption of the Referendum.

Now that we have done with the great evil of special legislation and entered upon an era of greater deliberation in the enactment of general laws, we shall rapidly approach the time when the labor of the legislator will be comparatively light. Until that time shall have arrived, and it may be no distant day, the Referendum would, in my judgment, prove an expensive and injudicious institution.

Those who now advise its immediate adoption, urge that it would serve as a check upon the growth of corporate influence and monopolistic privileges. I will not controvert such contention, as I fully concur therein; but however salutary in such regard, it would, I fear, if immediately adopted, give birth to greater evils than those it might suppress.

In thus expressing myself, I recognize the fact that I may not have properly estimated the effect of the Referendum upon the action of a legislature. I incline to the view that it would tend to fewer enactments; but whether it would beget greater care and deliberation upon the members of that body, or the reverse, may be a debatable question.

Respectfully submitted,

H. W. CHILDS.

January 28, 1895.

"Will you be mine?" asked young Mr. Short of Miss Scadds.

"Your gold mine, do you mean?" was the girl's unfeeling reply.—Ex.

AMERICAN SUGAR REFINING COMPANY.

Trusts—The Act of Congress of 1890 Against Monopolies Construed.

The Supreme Court has affirmed the decisions of the Circuit Court and Circuit Court of Appeals in dismissing the bill against the American Sugar Refining Company as being an unlawful combination in restraint of trade, contrary to the provisions of the Act of 1890.

The Court does not consider the question of whether the company has, in fact, by the acts set out in the bill, obtained a monopoly of refining sugar material, but bases its decision upon the fact that the business of the company, primarily, is a manufacturing business; that commerce, interstate or international, is merely incidental or auxiliary to its main business, that the product of its manufacture, or a portion thereof, may never become a subject of interstate or international commerce, and that, therefore, the company is not subject to congressional control. The opinion was rendered by Chief Justice Fuller, and is in part, as follows:

The fundamental question is whether, conceding that the existence of a monopoly in manufacture is established by the evidence, that monopoly can be directly suppressed under the act of Congress in the mode attempted by this bill.

It can not be denied that the power of a State to protect the lives, health and property of its citizens, and to preserve good order and the public morals, "the power to govern men and things within the limits of its dominion," is a power originally and always belonging to the States, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive. The relief of the citizens of each State from the burden of monopoly and the evils resulting from the restraint of trade among such citizens was left with the States to deal with, and this court has recognized their possession of that power even to the extent of holding that an employment or business carried on by private individuals, when it becomes a matter of such public interest and importance as to create a common charge or burden upon the citizen, in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort and by means of which a

tribute can be exacted from the community, is subject to regulation by State legislative power.

On the other hand, the power of Congress to regulate commerce among the several States is also exclusive. The Constitution does not provide that interstate commerce shall be free, but, by the grant of this exclusive power to regulate it, it was left free except as Congress might impose restraints. Therefore it has been determined that the failure of Congress to exercise this exclusive power in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by the several States, and if a law passed by a State in the exercise of its acknowledged powers comes into conflict with that will, the Congress and the State can not occupy the position of equal opposing sovereignties, because the Constitution declares its supremacy and that of the laws passed in pursuance thereof; and that which is not supreme must yield to that which is supreme. "Commerce, undoubtedly, is traffic," said Chief Justice Marshall, "but it is something more; it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse." That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the State: Gibbon v. Ogden, 9 Wheat. 1, 210; Brown v. Maryland, 12 Wheat. 419, 448; The License Cases, 5 How. 599; Mobile v. Kimball, 102 U. S. 691; Bowman v. Railway Co., 125 U. S. 465; Leisy v. Hardin, 135 U. S. 100; In re Rahrer, 140 U. S. 545, 555.

The argument is that the power to control the manufacture of refined sugar is a monopoly over a necessary of life, to the enjoyment of which by a large part of the population of the United States interstate commerce is indispensable, and that, therefore, the general government in the exercise of the power to regulate commerce may repress such monopoly directly and set aside the instruments which have created it. But this argument can not be confined to necessaries of life merely, and must include all articles of general consumption. Doubtless the power to control the manufacture of a given thing involves in a certain sense the control of its disposition, but this is a secondary and not the primary sense; and although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly. Commerce succeeds to manufacture, and is not a part of it. The power to regulate commerce is the power to prescribe the rule by which commerce shall be governed, and is a power independent of the power to suppress monopoly. But it may operate in repression of monopoly whenever that comes within the rules by which commerce is governed or whenever the transaction is itself a monopoly of commerce. * * *

It will be perceived how far-reaching the proposition is that the power of dealing with a monopoly directly may be exercised by the general government whenever interstate or international commerce may be ultimately affected. The regulation of commerce applies to the subjects of commerce and not to matters of internal police. Contracts to buy, sell or exchange goods to be transported among the several States, the transportation and its instrumentalities, and articles bought, sold or exchanged for the purposes of such transit among the States, or put in the way of transit, may be regulated, but this is because they form part of interstate trade or commerce. The fact that an article is manufactured for export to another State, does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the State and belongs to commerce. * * *

Contracts, combinations or conspiracies to control domestic enterprise in manufacture, agriculture, mining, production in all its forms, or to raise or lower prices or wages, might unquestionably tend to restrain external as well as domestic trade, but the restraint would be an indirect result, however inevitable and whatever its extent, and such result would not necessarily determine the object of the contract, combination or conspiracy.

Again, all the authorities agree that in order to vitiate a contract or combination it is not essential that its result should be a complete monopoly; it is sufficient if it really tends to that end and to deprive the public of the advantages which flow from free competition. Slight reflection will show that if the national power extends to all contracts and combinations in manufacture, agriculture, mining and other productive industries, whose ultimate result may affect external commerce, comparatively little of business operations and affairs would be left for State control.

It was in the light of well settled principles that the act of July 2, 1890, was framed. Congress did not attempt thereby to assert the power to deal with monopoly directly as such; or to limit and restrict the rights of corporations created by the States or the citizens of the States in the acquisition, control, or disposition of property; or to regulate or prescribe the price or prices at which such property or the products thereof should be sold; or to make criminal the acts of persons in the acquisition and control of property which the States of their residence or creation sanctioned or permitted. Aside from the provisions applicable where Congress might exercise municipal power, what the law struck at was combinations, contracts and conspiracies to monopolize trade and commerce among the several States or with foreign nations; but the contracts and acts of the defendants related exclusively to the acquisition of the Philadelphia refineries and the business of sugar refining in Pennsylvania, and bore no direct relation to commerce between the States or with foreign nations. The object was manifestly private gain in the manufacture of the commodity, but not through the control of interstate or foreign commerce. It is true that the bill alleged that the products of these refineries were sold and distributed among the several States, and that all the companies were engaged in trade or commerce with the several States and with foreign nations; but this was no more than to say that trade and commerce served manufacture to fulfill its function.

Sugar was refined for sale, and sales were probably made at Philadelphia for consumption, and undoubtedly for resale by the first purchasers throughout Pennsylvania and other States, and refined sugar was also forwarded by the companies to other States for sale. Nevertheless it does not follow that an attempt to monopolize, or the actual monopoly of, the manufacture was an attempt, whether executory or consummated, to monopolize commerce, even though, in order to dispose of the product, the instrumentality of commerce was necessarily invoked. There was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce, and the fact, as we have seen, that trade or commerce might be indirectly affected was not enough to entitle complainants to a decree. The subject matter of the sale was shares of manufacturing stock, and the relief sought was the surrender of property which had already passed and the suppression of the alleged monopoly in manufacture by the restoration of the *status quo* before the transfers, yet the act of Congress only authorized the Circuit Courts to proceed by way of preventing and restraining violations of the act in respect of contracts, combinations or conspiracies in restraint of interstate or international trade or commerce.

A lengthy and strenuous dissenting opinion was filed by Justice Harlan, in which he forcibly combats the construction placed upon the act by the majority of the court.

THE PORTRAIT.

HON. D. B. SEARLE, the subject of this sketch, was born in Franklinville, New York, June 4th, 1846, and graduated in the high school and academy of his native town. Served in the rebellion of 1861 in Co. I, 64th N. Y. infantry about two years; was afterwards appointed to a clerkship in the war department at Washington, which he filled till 1866. He graduated in the Columbia law college at Washington in 1868; came to Minnesota in 1871 and entered upon the practice of the law at St. Cloud, with Hon. E. O. Hamlin, the firm being Hamlin & Searle, where he has ever since resided. He served as city attorney of St. Cloud for six years, county attorney of Stearns county for two years and U. S. district attorney under President Arthur's administration from April, 1882, till December, 1885, when he resigned. He was a member of the Republican State Central Committee in 1886 and 1887, and took an active part in the national campaign of 1884, and in the state in 1886. Was appointed judge of the Seventh Judicial District November 14th, 1887, by Gov. McGill and was elected to that office without opposition in the fall of 1888, being indorsed by all parties and the entire bar of the district. He was re-elected without opposition at the last election. Judge Searle was a candidate for congress from the Sixth Congressional District in the fall of 1892 and, although defeated by a small majority, he ran ahead of the state and national ticket in the district about one thousand votes.

Judge Searle has always been a consistent republican but is equally popular with all political parties. He has a well trained judicial mind, quick to see and grasp the important questions involved in a case. He listens patiently to the arguments of counsel and his decisions are prompt and to the point.

REVIEWS.

American Probate Law and Practice, by Frank S. Rice. Published by Matthew Bender, Albany, N. Y. 786 pages. Price $6.50 net.

This book is by the author of Rice on Civil and Criminal Evidence, a work of exceptional value which has received the endorsement of the profession with the greatest unaminity. The present work was a difficult undertaking because the field is a new one and because probate law and practice are so largely matters of statute that it is not easy to find a thread of general theory around which to collate decisions, and because the decisions themselves very frequently have only a local applicability. More than two hundred pages are devoted to printing in full the New York and California statutes on the subject.

The rest of the book contains a general discussion of pertinent topics arranged somewhat after the method of the author's books on evidence already referred to. That is to say, the cases are not quoted in foot notes, after the conventional fashion, but are included in the body of the text, and in many instances are quoted *in ipsis verbis*, so that the necessity of a reference to the report is obviated. For Minnesota practitioners the work will supplement Gary's book, which was written with special reference to our probate code, and in general puts into the hands of the practitioner a large amount of helpful material conveniently arranged and classified.

LITERARY NOTES.

The *Review of Reviews* for March is on our table, and is as interesting as ever. The subjects treated are too numerous to mention. The character sketches of Francesco Crispi and Lord Randolph Churchill are both excellent. The description of electric street railways in Budapest will indeed be an object lesson to many Minnesotans who think that there are no electric street railways worthy of the name outside her large cities.

† † †

The March *Atlantic* contains, as always, many interesting articles. The ideas of H. Sidney Everett on Immigration and Naturalization are unquestionably sound, and it would be well if they were embodied in federal legislation. "Gridou's Pity" gives promise of being an interesting short story of the French Revolution. "The Secret of the Roman Oracles" explains, ingeniously, and apparently correctly, how some of the oracular responses were obtained. In "A Point of Departure," in the contributors' club, is given an account of what one who has the faculty of observing may see even in what is to many so uninteresting a place as the St. Paul Union Depot. "A Pupil of Hypatia," "Some Words on the Ethics of Co-operative Production" by J. M. Ludlow, and, indeed, everything in the number will well repay perusal.

H. T. Nippert vs. J. G. Silvis.
(Municipal Court, City of St. Paul.)

JUSTICE OF THE PEACE—JURISDICTION—PLACE FOR ANSWERING.

A Justice of the Peace loses jurisdiction, if, at the time and place when and where the defendant is summoned to answer, he, the Justice, is not present.

A. J. DIAMOND for plaintiff, John A. Larimore for defendant.

The summons required the defendant to appear before the justice issuing the same at his office, No. 89 South Robert street, in the City of St. Paul, at a certain hour. At the time and place in the summons mentioned the defendant appeared, waited one hour, but neither the justice nor the plaintiff appeared. Between the day of issuing the summons and the return day the justice had removed his office to No. 85 South Robert street in said city, and had caused notice of that fact to be posted at his former office. The defendant thereupon went to No. 85 South Robert street and appeared specially and moved for a dismissal of the said action, and objected to any proceeding being had therein, on the ground that at the time and place mentioned in the summons he had appeared and that he had waited there one hour, that neither the plaintiff nor the justice appeared, and that thereby the justice had lost the jurisdiction acquired by the service of the summons. The motion was denied by the justice, but being seasonably renewed on appeal the action was dismissed.

ORR, J.

"It is in evidence," said the judge, "that the prisoner beat his wife."

"Hardly, your honor," replied the prisoner. "I am but a frail man, and I have always said that my wife was hard to beat."—Ex.

THE MINNESOTA LAW JOURNAL.

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DISTRICT COURT.

The National German American Bank, Plaintiff, and S. Russel Smith, Intervenor, vs. St. Anthony Park North Real Estate Improvement Co.

(District Court, Ramsey County, 55214.)

RECEIVERS—COMPETENCY OF—RIGHTS OF CREDITORS—

The creditors of an insolvent corporation are entitled to a receiver who will handle the assets of the corporation, including the liability of stockholders, in their immediate interests, and realize therefrom sufficient to pay their claims in the quickest possible way, untrammeled by considerations as to how action to this end may affect the stockholders and subject them to loss. Therefore a stockholder and an officer of a corporation, prior to its insolvency, is incompetent to act as receiver if objection be made.

Application was made by one S. Russell Smith for the removal of Gustav Willius as receiver of the St. Anthony Park North Real Estate Improvement Co., an insolvent corporation. It appeared, among other things, that the receiver was the president and a director of the insolvent company for some time prior to his appointment as receiver; that he is a stockholder of the company, and, as such, subject to liabilty to pay the debts thereof, if its assets should prove insufficient; that he holds a judgment against the insolvent company, which he insists upon as a preferred claim; that he is interested in another corporation which also claims to be a preferred creditor of the insolvent, and that he, as president of the insolvent company, permitted such preference to be obtained.

It was claimed that the company had a defense to the claim of the moving creditor, which claim was evidenced by notes, on a part of which judgment had been obtained and part of which were not mature, but all of which were given as a part of one transaction.

T. R. Palmer and W. T. McMurran for petitioner: A receiver is defined to be an indifferent person between the parties, appointed by the court, and on behalf of all parties and not of the complainant or of the defendant only, to receive the thing or property in litigation pending the suit.

Baker vs. Administrator, 32 Ill. 79.

A receiver should be impartial between the parties; consequently a party to the cause should not be appointed receiver.

Bolles vs. Duff, 54 Barb. 215. Young vs. Rollins, 12 Am. & Eng. R. cases, 455. Lupton vs. Stevenson, Irish Eq. 484.

In proceedings against an insolvent corporation a person connected with the management will not be appointed.

Freeholders vs. State Bank, 28 N. J. Eq., 166. McCullough vs. Merchants Loan Co., 29 N. J. Eq., 217. Buck vs. Ins. Co., 4 Hughes (U. S. C. C.), 415. Kiefer vs. Elev. R., 9 Abb. N. C., 166–180. In re Mast, Buford & Burwell Co., 59 N. W., (Minn.) 1044.

Henry B. Wenzell, for receiver: Opposition by Mr. Willius, as a shareholder, to the claim of Smith as now exhibited is not incompatible with the

duty of the receiver, as an officer of this court, to administer the insolvent estate. The action against the stockholders upon their double liability is brought, not by the receiver, but by the creditor.

G. S. 1878, Ch. 76, Sec. 17.

Johnson vs. Fischer, 30 Minn. 176.

Where the claim contested is that of a person alleged to have perpetrated a fraud upon the corporation, a person interested against the accused is an eminently proper person to be a receiver. Shirwald vs. Lewis, 8 Fed. 878. This is not an application for the appointment of a receiver, but for his removal, and the fact that the counsel for complainant had acted as counsel for the receiver is not sufficient grounds for his removal unless the employment was "perverse and collusive."

Bank vs. Schermerhorn, 1 Clark's Ch. 256.

In re Mast, Buford & Burwell Co. is not similar to the case at bar. There the assignee was a confidential employe of the insolvent corporation, and was cognizant of and did not attempt to set aside fraudulent preferences; his attorney was the attorney for the insolvent; his compensation was guaranteed by the president of the insolvent; and he had entered into engagements incompatible with his duties as assignee.

OTIS, J. This action has been heard and submitted upon an application made by S. Russell Smith, claiming to be a large creditor of defendant corporation, for an order removing Gustav Willius as receiver and appointing some other suitable person in his stead.

It is not claimed that the present receiver is not entirely honest and competent, or that under ordinary conditions and circumstances he would not be eminently qualified for such office, but the ground for his removal is based upon the fact that his interests in regard to the matter here in litigation, and to be litigated, must necessarily conflict with his duties as receiver, whereby he would necessarily be strongly tempted to disregard the duties he owes to creditors, and that no one, however upright and competent, likely to be subjected to such temptation, should be retained in such office.

While the affidavits and briefs for and against the application are voluminous and exhaustive, and the oral arguments made upon the hearing were able and comprehensive, as it seems to me, the facts which must control the decision are few and simple and uncontroverted.

The present receiver and his attorney were for a considerable time president and attorney of the defendent corporation prior and down to the beginning of this action. At their instance a prior action was brought against the corporation in which Mr. Willius was appointed a receiver of its assets, and this proving abortive, they caused this action to be brought; the attorney of the corporation prepared all papers therein for both parties thereto and, without notice to creditors, procured the appointment of the president of the defendant corporation, Mr. Willius, as receiver herein. It appears that with this corporation there is what is known as a stockholder's double liability. In actions of this kind, under such circumstances, when the same is brought in the interests of creditors, it is customary and desirable to join such stockholders as defendants in the first instance, that this liability may be resorted to in case of deficiency of assets and thereby avoid the necessity of instituting other proceedings to this end. They were not joined as defendents in this suit though it was already in the in-

terests of creditors that this should have been done. Later when this petitioning creditor applied for leave to file an intervening complaint, making such stockholders parties, this receiver, who happened to be a large stockholder, vigorously resisted the application and has appealed to the Supreme Court from the order granting the same, his attorney, as receiver, acting for him in his resistance, as stockholder, of such application. Moreover, the extent of his holding of stock is in issue and must be judicially determined as well also as that of other stockholders, and to this end all the records and proceedings of the corporation should be open to creditors. Mr. Willius, himself, claims to be a preferred creditor by virtue of a judgment, which, as president, he suffered to be taken against the corporation shortly prior to the commencement of this suit, and not unlikely the plaintiff bank of which Mr. Willius is vice-president and a stockholder, may in like manner by reason of its prior judgment on which this action is predicated, claim that it is entitled to a preference as to the proceeds realized from sales of real estate on which its judgment so became a lien; and substantially all the property of the defendant corporation consists of equities in real estate encumbered by such liens. It is a notorious fact that real estate values are just now greatly depressed and a large stockholder would naturally be inclined to postpone sales thereof for better times, in hopes that he not only might be relieved from personal liability, but that something might be saved for his stock. This, however, is a purely private corporation and the public has no interest in its continued existence. In such case, the only question for the court to consider is how creditors may in the quickest possible way procure payment of their claims, equally and ratably, and to the fullest extent. Their interests alone, and not that of stockholders, must receive first consideration, and whenever a sale of the assets, with what may be realized from the liability of stockholders, will pay their claims, then such sales must be had, and they are not to be postponed for better markets simply to relieve the stockholders from liabilities and enable them to save something out of their stock. An action of this kind cannot be used as a club to stand off creditors for the benefit of stockholders. What they are entitled to is a receiver who will handle the assets of this corporation, including the liability of stockholders, in their immediate interests and realize therefrom sufficient to pay their claims in the quickest possible way, untrammeled by considerations as to how action to this end may affect the stockholders and to subject them to loss. If immediate sales will pay the debt, then such sales should be made, though attended by loss to the stockholders, which by delay might perhaps be averted. The rights of creditors are paramount.

The foregoing facts and considerations would indicate that Mr. Willius' action down to the present time has not been altogether in the interests of creditors, or the action which one having the interest of creditors only at heart would have taken, and they also show that his interest as a resisting stockholder, as a confessedly large stockholder interested in saving something on the stock, as one claiming to be a preferred creditor, and as the vice-president of and stockholder in this plaintiff bank claiming to be another preferred creditor, may not unlikely conflict with his duties as receiver for the benefit of creditors at large. As was said *in re* Mast, Buford & Burwell Company, 59 N. W. Rep., 1044, "That this assignee (receiver) is a man of honesty and integrity is

not disputed; but he might have to be a man of the greatest firmness and most heroic moral courage to be able to do his whole duty under the circumstances of this case."

It is argued that the record shows that others besides the petitioning creditor are interested in the claim represented by him. That he has a direct personal interest therein cannot be gainsaid, while it may be proper and necessary that others interested with him should become parties to the suit before final adjudication thereon.

It is also urged that there is a good defense to this claim. In view of the fact that the claim was established against the defendant corporation after a protracted trial and vigorous resistance by this receiver and his counsel, then acting in their capacity as president and counsel of the corporation, aided by other counsel of unquestioned integrity and ability, it is fairly to be presumed at least that the claim is well bottomed. Mr. Willius as a stockholder may perhaps further resist the allowance of this claim, but it may well be doubted whether the receiver should employ counsel to this end and charge the expense thereof to the trust estate. It is true that only one creditor asks for a change of receivers, but when it is remembered that his claim in amount greatly exceeds all other unsecured claims combined, he certainly has a standing in court and a greater interest to be protected than any or all of the other creditors.

It follows that the application must be granted, and counsel for petitioning creditor may prepare the proper order and present the same to the court at its next special term, December 15, 1894, at which time the court will receive suggestions from all interested parties as to who shall be so appointed and what bond shall be required.

James R. Thorpe, et al., vs. Benjamin F. Hanscom, et. al.

(District Court, Hennepin County, 61,567.)

INSANE PERSONS-CONTRACTS OF-GUARDIANSHIP OF-NOTICE.

The contracts of insane persons under guardianship are not void, but voidable, but the letters of guardianship are *prima facie* evidence of insanity.

When the fact of insanity is established, parties who have dealt with the insane person are entitled to show that they dealt in good faith, without knowledge of the fact of his incapacity, and that they received no inequitable advantage; and thereupon they are entitled to be placed in *statu quo* before the insane person, or his representative, will be entitled to a recision of the contract.

WOODS & KINGMAN for plaintiffs. LOUIS A. REED for defendants.

Action was brought upon certain promissory notes secured by mortgage. The defendant, Benjamin F. Hanscom, was, at the time of the execution of the notes sued, under guardianship as being an insane person, the defendant Brown, being such guardian. Defendants demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action.

ELLIOTT, J. The defendant, Benjamin F. Hanscom, demurs to the plaintiffs' complaint on the ground that it does not state facts sufficient to constitute a cause of action, because it appears on the face of the complaint that at the time of the execution of the note and mortgage in question, Benjamin F. Hanscom was under guardianship. His counsel strenuously contends that the contract of a person who has been declared insane by the Probate Court and placed under guardianship is void, not merely voidable; and this raises the first and principal question to be determined upon this demurrer.

Certain of the states have statutes providing that such contracts are void. Such was the statutory law in Minnesota prior to 1889, and has been the law since April 17th, 1893. Sec. 11, Chap, 59, G. S. 1878, was as follows: "The county commissioner, or the

petitioner, may, as soon as the notice mentioned in section nine of this chapter shall have been given to the person proposed to be put under guardianship, cause a copy of the application or petition, and of the notice and proof of service of such notice on the person to be served therewith, to be filed in the office of the Register of Deeds of the county, and recorded therein; and if the guardian or guardians shall be appointed on such application or petition, all contracts, except for necessaries, and all gifts, sales, or transfers of real or personal estate made by the person put under guardianship, after the filing of such papers in the office of Register of Deeds, and before the termination of the guardianship, shall be void." The present statute provides the method for the termination of such guardianship.

Sections 8, 9, 10 and 12 of Chap. 59 were re-enacted in sections 142, 143, 144 and 145 of Chap. 8, G. L. 1889; but section 11 was omitted and repealed and section 145 added. Section 11 was apparently omitted by mistake, and on April 17th, 1893, it was substantially re-enacted as an addition to section 142. See Gen. Laws 1893, Chap. 116, Sec. 12.

It will thus be seen that on August 1st, 1892, when the note and mortgage in question were executed, there was no provision for filing notice in the office of Register of Deeds, and no statute declaring the character of contracts made with persons under guardianship. I do not understand that the question has ever been determined by the Supreme Court of Minnesota. In Schaps vs. Diedrichs, (Minn.) 55 N. W. Rep. 911, the question was raised but not decided. The Court there said: "The use sought to be made of this is, that the deed of an insane person, while under guardianship, is not merely voidable, but absolutely void; but there is no assignment of error that raises that point. * * * The general rule, both in equity and in law is, that the mere fact that one of the parties to the contract is insane (he not having been found to be a lunatic by judicial proceedings) does not render the contract void, but at most only voidable, and is no ground for setting it aside when the other party had no notice of the insanity, and derived no inequitable advantage from it; and when the parties cannot be placed in statu quo."

From the language in the parenthesis it might be inferred that the court intended to intimate that if the party had been found to be a lunatic by judicial proceedings, the contract would be absolutely void; but the inference to be drawn from the subsequent case of Youn vs. Lamont, (Minn.) 57 N. W. Rep. 476, is otherwise. This case arose while section 11, above referred to, was in effect. At the trial, the plaintiff offered to show that a petition had been made to the Probate Court for the appointment of a guardian for Lamont; that the petition was filed and an order for hearing made and served upon Lamont, a hearing had and testimony taken; and that, upon such testimony, a guardian was appointed, qualified and entered upon the discharge of his duties; and continued in charge of the property until after the transaction out of which the litigation arose. When this offer was made, the court asked the defendant's counsel the question: "Do you propose to show, that at the time of the execution of the mortgage from John Lamont to Edward F. Quackenbush, the understanding of John Lamont was clouded, or his reason dethroned by actual intoxication? Do you propose to show that the complaint, petition and order upon which John Lamont was placed under guardianship was recorded in the office of Register of Deeds?" The defendant's attorney

answered: "We do not." The offer was thereupon objected to as incompetent, irrelevant, and immaterial, and because it did not include an offer to show that John Lamont was in such a condition, at the time of the execution of the mortgage, as to be incapable of transacting business. The court sustained the objection, and the Supreme Court said: "If the plaintiff could not and did not offer to prove that John Lamont, at the time of the execution of the mortgage to Quackenbush, was incapacitated to execute it, and did not propose to show that the petition and notice of hearing served upon Lamont, and the proof of service thereof on him were filed in the office of Register of Deeds, as required by G. S. 1878, Chap. 58, Sec. 11, then the court below was justified in this ruling."

This clearly determines that at the time when section 11 was in force, proceedings in the Probate Court were insufficient to debar the plaintiff from trying the question of insanity at the time of the transaction as a matter of fact. It might also be argued from this case that even after the notice had been filed, it was also necessary to show actual incapacity; that it was necessary to show that Lamont was actually incapacitated to execute the contract, although the petition and notice of hearing had been filed.

I do not think, however, that it can fairly be said that our Supreme Court has ever held that a contract made with a person under guardianship is void. Many cases are cited by the learned counsel for the defendants in support of his contention, and some of them undoubtedly do so hold, upon the theory, that under the statute which provides for notice and trial in open court, the proceedings are *in rem*, and determine the status of the party. There are reasons which may be urged in support of this view, with much plausibility; but to my mind, such a doctrine, although logical, is contrary to every principle of justice and equity which should guide courts of equity in determining such questions. I can conceive of no good reason for holding that the contracts of persons under guardianship are void, and that those of an infant, or of an insane person not under guardianship, are simply voidable, to be rescinded or not, as the equities of the case may require. If this money was received by Hanscom and added to his estate, and is now a part of his estate, upon what principle of equity or public policy should he be permitted to retain it, while an infant, or insane person under guardianship, would be required to return the money before the contract could be rescinded? In the one case, the fact of insanity is established by one kind of evidence, and in the other, by a higher kind of evidence, a judicial decree. But why should it change the character of the contract? I think the proper rule should be that the letters of guardianship are evidence of insanity, but that they are only *prima facie* evidence of insanity at any time subsequent to their issuance. "In those jurisdictions," says Buswell in his work on Insanity (Sec. 199,) "where proceedings to determine the sanity or insanity of a party are had in courts of probate, and the insane person remains in charge of a guardian appointed until such guardianship is revoked, the fact of the existence of the guardianship is evidence of insanity, the same as the existence of a finding of lunacy by a commission *de lunatico inquirendo*." So in Breed vs. Pratt, 18 Pick. 115, Chief Justice Shaw held that the fact that the testator was under guardianship was *prima facie* evidence of insanity and incapacity to make a will; and that it was incumbent upon the executor to show, beyond a reasonable doubt, that the testator had both such mental capacity, and such freedom of

action, as are necessary to render a will valid. And in Stone vs. Damon, 12 Mass. 388, it was held that if it appeared that a lunatic, under guardianship, was restored to his reason, he might make a valid will, although the letters of guardianship were unrevoked. In Blaisdell v. Holmes, 48 Vt. 92, where the defendant, being under guardianship as an insane person, was sued upon a contract, Redfield, C. J., said: "Where it affirmatively appears that the ward has recovered from his infirmity, and is in possession of a sound mind, and conducting business under his own name, and the guardian does not interfere, we see no good reason, nor rule of law, that should shield him." See also Robinson vs. Robinson, 39 Vt. 267; Jenckes vs. Court of Probate, 2 R. I. 255. From a remark of the court in Minn. L. & T. Co. vs. Beebe, 4 Minn. 7, it may be inferred that letters of guardianship, in this state, are conclusive evidence of insanity, at least at the time of their issuance. The court says: "In a collateral action, the letters themselves are conclusive of the regularity of the proceedings resulting in their issuance, as well as of the insanity of the person upon whose estate they are issued."

But if we admit that the letters of guardianship are conclusive evidence that Hanscom was insane at the time he executed the note and mortgage, the contract should be governed by the same general principles which are applied to contracts of insane persons not under guardianship. Before it can be avoided, at the instance of the insane person or his representative, the Court should consider all the equities of the case. As said in Youn vs. Lamont, supra. "conveyances are not now set aside on the sole ground that the grantor is a lunatic or *non compos mentis*." If a party deals with an incapacitated person in good faith, without knowledge of the incapacity, and takes no advantage of him, a court of equity will not set aside the contract if an injustice would be done the other party and the parties cannot be placed in *statu quo*.

As said by Pollock, C.B., in the leading case of Moulton vs. Comroux, 2 Exch. 487, the rule now is that "when a person, apparently of sound mind, and not known to be otherwise, enters into a contract which is fair and bona fide, and which is executed and completed, and the property, the subject matter of the contract, has been paid for and fully enjoyed, and cannot be returned so as to put the parties in *statu quo*, such a contract cannot afterwards be set aside, either by the alleged lunatic or by those who represent him." Scanlon vs. Cobb, 85 Ill. 296.

In Buswell on Insanity (Sec. 413) it is said "that complete contracts for the sale of land, made by an insane vendor, without fraud or notice to the vendee of the grantor's insanity, and for a fair consideration, will not be set aside, either at law or equity in favor of the vendor or his representatives, except the purchase money be returned, and the parties be reinstated in the condition in which they were prior to the purchase." This rule was recently applied in the case of Johnson vs. the N. W. L. Ins. Co. (Minn.) 59 N. W. Rep. 992, in a case of infancy, but it seems to me equally applicable to the case at bar. Justice Mitchell, after reviewing the cases and commenting upon them, says: "Our conclusion is that where a personal contract with an infant, beneficial to himself, has been wholly or partly executed on both sides, and the infant has disposed of what he has received, and the benefits received by him are such that they cannot be restored, he cannot recover back what he has paid, if the contract was a fair

and reasonable one, free from any fraud or bad faith on the part of the other party; but that the burden is on the other party to prove that such was the character of the contract."

In order to be protected, the person dealing with the incapable must have been without knowledge of the want of capacity. If he had such knowledge, he is deemed to have perpetrated a fraud, and a court of equity will not aid him. Knowledge of the incapacity deprives him of the protection awarded to parties who act in good faith without such knowledge. From the decision in Youn vs. Lamont, supra, it appears that the fact of letters of guardianship alone is not conclusive on the issue of insanity at a time when the statute provided for the filing of the notice in the office of the Register of Deeds. The Court there placed great stress on the fact of want of actual notice of the condition of the party, and as there was no filing of the petition, etc., there was no constructive notice. That is, the rights of the plaintiff are made to depend entirely upon whether he had knowledge of the fact of guardianship. I am unable to see why the lack of statutory provision for constructive notice should have the effect of increasing the efficacy of the Probate Court. If the filing of the petition, and the subsequent proceedings, and the appointment of a guardian, was not notice in 1888, how can it have any greater effect in 1892 after the repeal of section 11? If it was conclusive in 1892, the re-enactment of it in 1893 was merely a work of supererogation.

This demurrer admits that the plaintiffs had no notice or knowledge whatsoever of any proceedings at any time instituted, or attempted to be instituted, for the purpose of placing the defendant under guardianship, or that the defendant was not of sound mind at the time of the making of the note and mortgage. It also admits that the plaintiffs believed the defendant to be sane and fully capable of making the contract. If they had no knowledge of his condition, I am satisfied that the records of the Probate Court did not convey such notice as would deprive them of the rights of persons acting in good faith. Such notice would be merely constructive. The question is, were the plaintiffs acting in good faith toward the defendant at the time they made this contract? If they had knowledge of his condition, they were not acting in good faith. If they had no such knowledge as would bind their consciences, they are entitled to the protection of a court of equity. It is knowledge, not notice, which must be brought home to them. Knowledge binds the conscience; constructive notice does not. Bailey vs. Galpin, 40 Minn. 324.

My conclusion is, that the contracts of persons under guardianship are not void, but voidable; that letters of guardianship are, at least, *prima facie* evidence of insanity; that when the fact of insanity is established by this or other evidence, the parties who deal with such insane person are entitled to the privilege of showing that they dealt in good faith, without knowledge of the fact of his incapacity, that they receive no inequitable advantage, and that under proper conditions they are entitled to be placed in *statu quo* before the insane person or his representative is entitled to a recision of the contract. Demurrer sustained as to defendant Brown, and overruled as to defendants Hanscom.

Jacob Leqve, Assignee, vs. Franz J. Stoppel, et al.
(District Court, Olmsted County.)

FRAUDULENT CONVEYANCES — A Certain Transfer held not to be—

C. C. WILLSON for plaintiff. CHAS. B. CALLAGHAN and H. A. BCKHOLDT for defendants.

BUCKHAM, J. Franz J. Stoppel on April 14th, 1890, owned 400 acres of land worth $11,000, including home-

stead worth $3,500; also personal property worth $1,400. At the same time he, with five other persons, was engaged in a solvent butter manufacturing business under the name of the Rochester Separator Butter Company.

That long before engaging in that business he had agreed with his three sons (also defendants) that if they would remain at home after severally attaining their majority and work and carry on the farm, and help pay off an incumbrance of $7,000 thereon, he would convey all said real estate and personal property proportionately to them; that said sons fully performed all the conditions of said agreement on their part, and paid up said indebtedness. Thereafter, on April 14th, 1890, said Franz J. Stoppel duly conveyed all said real estate and turned over all his chattels to his three sons, pro rata; the deeds were duly recorded, and the sons entered and took possession of all the property, and ever since have and still do hold possession, and have made valuable improvements thereon; and said Franz J. Stoppel and his wife have continued to reside on the homestead tract with one of their sons, under an oral contract for support and payment of certain moneys, afterwards, on December 31st, 1890, reduced to writing.

That thereafter Franz J. Stoppel had no property, except his interest in said partnership and payments to be made to him under the contract of December 31st, 1890.

That said conveyances and transfer to said sons were made in good faith, and for valuable consideration, without any intent or purpose on the part of either or any of the parties thereto, to hinder, delay or defraud the creditors of said Franz J. Stoppel, then or subsequently existing.

The two mortgages from the son Frank, to the mortgagee defendants, for $1,000 and $300, were executed in good faith to secure repayment of sums actually advanced and paid to said Frank, without knowledge in either of any infirmity in his title, if any there was.

Plaintiff is not entitled to have the transfers by Franz J. Stoppel of his property to his three sons, or to either or any of them, set aside as fraudulent.

Let defendants, except the defendant bank, have judgment against plaintiff, dismissing the action on the merits.

In re Estate of Charles Scheffer.

(District Court, Ramsey County, 30,772.)

EXECUTORS AND ADMINISTRATORS—INVESTMENTS BY.

Improper and unauthorized investments made by executors are made at their peril; they are chargeable with any resulting loss, but may not profit by any increase. But they are not liable for loss resulting from an investment authorized or approved by the Probate Court, but a Probate Court ought not to authorize or approve of investments of an estate by executors in the stocks or bonds of speculative companies, especially where there is a double liability in case of loss.

WARNER, RICHARDSON & LAWRENCE for appellants. HENRY C. JAMES for respondents.

Charles Scheffer died testate in 1875. By his will he devised the bulk of his estate to certain persons as trustees, with direction to invest the same on bond and mortgage on real estate or other good and sufficient security, and to pay the proceeds thereof to certain beneficiaries, and, after the lapse of a certain time and the happening of certain contingencies, to pay over the corpus of the estate. These devisees in trust were also appointed the executors of the will. They duly qualified as such executors, and, as such, administered the estate, and, from time to time rendered accounts to the Probate Court. These accounts were all duly allowed, and it appeared by the last of them filed January 24, 1887, that the estate had been fully administered and was ripe for distribution. The estate, however, was

not distributed, and thereafter the executors, as such, from time to time, filed accounts in the Probate Court. No action of the court was asked for or had on these accounts. By them it appeared that the corpus of the estate had been by the executors reinvested since the allowance of their account in 1887. These investments were in the stock of certain fire, life and accident insurance companies, in the stock of certain banks, and in the bonds of a company engaged in loaning money on real estate, which company was controlled by one of the executors, and the loans and investments of which were of a speculative character. These investments proved disastrous, and the beneficiaries under the will objected to the allowance of these latter accounts and sought to have the executors charged with the amount thereof and interest. The Probate Court sustained the objections and so charged the executors. The executors appealed to the District Court, and there moved to have the decision of the Probate Court reversed on the ground that the latter court had no jurisdiction of the matter, for the reason that the estate, being ripe for distribution in 1887, ought by the executors to have been turned over to themselves as trustees; and that, in equity, being presumed to have done that which they ought to have done, they will be presumed to have so turned the estate over; and that, therefore, their investments since that date having been made as trustees and not as executors, they were accountable to the District Court and not to the Probate Court. This motion was granted, but reversed on appeal. In re Scheffer's Estate, 59 N. W. Rep. 956. Thereupon, the District Court proceeded to examine the accounts as the accounts of the executors, and substantially affirmed the decision of the Probate Court.

OTIS, J. This action comes to this Court upon an appeal from an order of the Probate Court in the matter of the executors' accounts, whereby certain investments, made by said executors without authority of the court, were disapproved and disallowed and the executors were charged with the amount thereof as cash.

A prior account of the executors was filed, approved and allowed in 1887, from which it appears that the property coming to their hands had been invested for the benefit of the beneficiaries under the trusts created by the will. As appears from the accounts here presented, the investments so made and approved were all realized on and the proceeds again invested for the benefit of such beneficiaries in other securities, objections to certain of which were made and allowed, and the executors charged therewith in their accounts.

It is not claimed, nor does it appear, that the trial, which has been had, shows any different situation of appellants with respect to this property than existed when this matter was heard and passed upon by the Supreme Court. Their counsel then insisted and now insists, that with respect to this property and the investments so made, the appellants hold as trustees and not as executors, and that therefore they cannot be called to account for it in the Probate Court, or here on appeal.

There is before me no fact or circumstance bearing upon this contention which was not before the Supreme Court, and that Court, in holding that the Probate Court had jurisdiction to examine into the transactions as disclosed by their later accounts brought here on appeal, must have held that they were transactions for which they were accountable as executors, for upon no other hypothesis was jurisdiction conferred. But

that there should be no misunderstanding on this point, the Appellate Court expressly predicates its decision upon the ground that the property belonging to this estate never passed to appellants as trustees under the will, but that they still hold the same in their capacity as executors, and must account for the same in the Probate Court as such. The question, chiefly argued by counsel, must, then, be held *res adjudica*, so far, at least, as this court is concerned.

The only other question remaining for consideration is whether the items in the account, to which objection is made, should be allowed as a credit to the executors. Appellants' counsel concedes that the investments represented by these items objected to were such as the executors could not lawfully make, and the Supreme Court in its decision suggests as much. In such cases, as it seems to me, the rule must be that in making such unauthorized investments the executors do so at their own peril, and having assumed the responsibility of making them, they are to be charged with any resulting loss, though they may not profit by the increase, had there been any. When application is made to the Court for a settlement of their accounts, it is competent for the Court to approve or disapprove of such investments as it may be then advised will be for the best interests of the estate which it is administering. And this would seem to be the legal effect of the order of 1887 allowing the account then presented, and all that was intended by the Court in its action. If the investments so returned and accepted as assets in the hands of the executors had turned out badly, they would not have been holden for the loss on such accepted investments, since the Probate Court had elected to accept and approve them; but when realized on, and the proceeds again invested in like manner without authority, such substituted investments should be accepted or rejected just as the Court, when called to act thereon, shall find them profitable or otherwise.

Appellants' counsel insists that we have nothing to do with the question as to whether, if these investments had been made by the appellants in their capacity as trustees, they would have received credit therefor by the tribunal having jurisdiction in the premises, and we agree with him in this contention. Assuming it to be true (a matter by no means free from doubt) that the will authorized appellants, as trustees, to make the class of investments here objected to, and further assuming, what is unquestionably true, that, in what was here done, the appellants acted in perfect good faith, and did what they believed would be for the best interests of the beneficiaries under the will, it may be that a court of equity would not hold them responsible for resulting loss when called upon to pass upon their accounts. But where they have acted without authority, they must be held responsible for all injurious consequences, however good their intentions, or mistaken they were as to their powers and duties.

As it seems to me, the most which appellants can ask is that Court should determine the question of accepting their investments as it would have determined it if application had been made in the first instance for leave to make them, and it had been within the power of the Court, in the exercise of its discretion, to grant such leave. While I cannot concur in this view, still I do not think that, even under such condition, the application ought to have been, or would have been granted.

The corporations, in the stocks or bonds of which these trust moneys

were invested, were all new and untried. In case of failure there was a liability over against the stockholders for the full amount of the stock respectively held by them, and as to the bank, there was a double liability; the assets of the mortgage company and the security for its bonds were of uncertain value; all of which considerations would have compelled a denial of the application, for no court would have taken the responsibility of subjecting the trust moneys to the hazards of such speculative enterprises, attended with such grave liabilities in case of disaster. The supreme confidence of the appellants in the happy outcome of the enterprises, and their absolute good faith and desire to earn large dividends for the beneficiaries might perhaps have relieved them from liability as trustees, conceding that they were authorized by the terms of the will to make such investments, but I cannot believe that any court would, in advance, have authorized investments attended with such disastrous possibilities.

By the decision, so rendered on appeal, it has been conclusively settled, so far as this court is concerned, that these investments were not made by the appellants as trustees, and that their holdings are not in that capacity, but in their capacity as executors, and as such they must account. This being the case, we must declare their rights and liabilities the same as though other persons than themselves had been devisees of the trust estate; and had this been so, the executors could not excuse themselves, or escape liability for bad investments upon the ground that the will authorized the trustees to make the same kind of investments, and when so made, the trustees would not have been holden for loss in so doing. They must account in the Probate Court according to the rules and principles which obtain there in the settlement of executors' accounts, and not according to rules which would obtain in the District Court upon an accounting with respect to investments which, as trustees, they have lawfully made, and where they would be liable only for bad faith or want of ordinary care.

Julia Ristow vs. John Ristow.

(District Court, Ramsey County, 56,104.)

DIVORCE A MENSA ET THORO—ANNULLMENT OF.

A decree of divorce *a mensa et thoro* is not annulled or set aside by the subsequent assumption by the parties of their marital relations. Such a decree can be annulled only by proper decree of a court of competent jurisdiction.

O. J. COOK for plaintiff. F. P. WEIDE for defendant.

The District Court of Ramsey County, upon proper cause shown, made a decree of divorce, *a mensa et thoro*, and therein directed the defendant husband to pay unto the wife, as alimony, the sum of $12.50 per month. Thereafter the parties resumed their marital relations, and cohabited together as husband and wife. Thereafter, they again separated, and the husband thereupon refused to pay the alimony previously ordered by the Court to be paid by him. Thereupon an order for him to show cause why he should not be punished for contempt for so neglecting to pay was obtained.

KERR, J. The above entitled matter coming on to be heard upon the order to show cause granted March 2, 1893, why the defendant should not be punished as for contempt, for failure to comply with the decree of this court commanding him to pay alimony to said plaintiff herein; and the defendant in obedience to said order having shown cause in said matter, as follows, to-wit: That a decree of divorce from bed and board was duly entered and rendered in said action on the 18th day of December, 1891, and at the same time an order was made,

requiring defendant to pay to plaintiff, as alimony, the sum of $12.50 per month thereafter. That afterwards, and on the 25th day of January, 1892, by mutual consent they then and there resumed their marital relations and commenced to live and cohabit together again as man and wife, and from thence forward continued to so live and cohabit together until the 20th day of November, 1892, when they again separated, and have not since said last named date resumed their marital relations. From the affidavits produced the Court is unable to say where the fault lies for the last separation. Upon the cause so shown, and the papers and the files in the case, ordered that said order to show cause be and the same hereby is discharged.

While the authorities are conflicting, the better rule in my opinion is that a decree of divorce, *a mensa et thoro* is annulled by renewing cohabitation.

Clark vs. Clark, 6 W. & S. Pa. 85.
Bavere vs. Bavere, 4 Johns. Ch. 187.
Siddell vs. Siddell, 22 La. Ann. 657.
Hokamp vs. Hageman, 36 Md. 511.
Kriger vs. Day, 2 Pick. 461.
Tiffin vs. Tiffin, 2 Bruin. Pa. 202.
McKaracher vs. McKaracher, 3 Yeates Pa. 56.
2 Bishop, M. & D., Sec. 1676.

Thereafter the attention of the court was called to Sec. 37, Title 2, of Chap. 62, Gen. Stat. 1878, whereupon the court overruled its former order, *supra*.

KERR, J. Action for limited divorce, defendant moves, upon the pleadings, and admissions in open court, that the said action be dismissed. It was admitted in open court by the parties that the so-called decree filed in the clerk's office, No. 41,360, referred to in the reply, as annulling and setting aside the decree of divorce set up in the defendant's answer, was the order of this court, dated March 23, 1893, and filed March 27, 1893, discharging an order on the defendant to show cause why he should not be punished as for contempt for not furnishing means of support to the plaintiff as required in the decree of the divorce set up in the answer herein; and it was admitted that no other action was ever had or taken by this court looking to the annullment of said decree of divorce. After examination of the papers and hearing the arguments of counsel, ordered, that this action be and the same hereby is dismissed. And upon motion of the plaintiff it is further ordered that said order filed March 27th, 1893, as aforesaid, and referred to in the reply herein, in so far as interpreted by the memorandum attached thereto it purports to annul or render inoperative said decree of divorce, be and the same hereby is annulled and vacated, and the plaintiff herein is permitted to make such motion or take such steps as may be advised touching the payment to her by defendant of money for her maintenance and support as provided in said decree of divorce upon such showing as she may be advised.

Upon the hearing of said motion for alimony, March 23, 1893, numerous authorities were cited, showing the rule and practice under the civil, canon and ecclesiastical law, and in states of this Union where there is no statutory provision upon the subject, and these authorities undoubtedly sustain the view indicated in the memorandum of the Court attached to that order.

Upon the hearing of said motion, the attention of this court was not called to the provisions of our statute, touching the revocation of such a decree of divorce, (Sec. 37, Title 2, Chap. 62, Stat.) and the order referred to was made without reference thereto.

The question here arises whether,

in view of said provision of statute, a decree for limited divorce can be annulled in this state in any other manner than by action of the court granting it, as in the provision indicated.

It is contended by counsel for plaintiff, that the method provided by statute is cumulative merely, and that in addition thereto, reconciliation and cohabitation, subsequent to the decree still operate *ipso facto* to annul the decree for separation. I am unable to agree with such view. In my opinion the method prescribed by statute is exclusive, and the only way in which a decree for limited divorce can be annulled in this state, is by action of the court as thus provided. The most eminent authorities referred to in the former order, expressed their regret that the matter was not thus regulated by law, and I think the provision referred to was enacted in this state, as it was in New York, to meet such expressions, and was intended to be of universal application.

Robert W. Turnbull vs. Joseph Crick et al.

(District Court, Washington County.)

INJUNCTION OF COURT.

Where an action is brought in the district court of another district, in which the defendant is liable to have judgment rendered against him by reason of his inability to obtain certain evidence, he is entitled to an order for injunction restraining such court from proceeding with such action pending the determination of an action for a bill of discovery brought by him in the district court issuing the injunction.

JAMES A KELLOGG for plaintiff, JOHN DAY SMITH for defendants.

Turnbull owns a saw mill on Lake St. Croix. Logs floating on said lake are cut on streams tributary to said lake, which streams embrace a large territory in Minnesota and Wisconsin.

As required by law, owners of such logs have a log mark, and in some cases an owner has many marks. The marks, as by said law required, are recorded in the surveyor general's office. When logs are delivered to owners, deputies of the surveyor general scale them. These deputies have with them a tally-man who puts down on a tally-sheet the number of feet in each log scaled under the proper mark. These tally-men are not sworn officers. The tally-sheet is left at the surveyor general's office and is there entered in the records of the office. Scale bills are made in said office showing the mark of logs and the number of feet of each mark in its proper place on the bill. These bills are delivered to the person owning the logs.

Crick represented to Turnbull that he, Crick, had logs to sell. Afterwards Crick commenced suit in Hennepin county against Turnbull to recover for logs he claimed to have sold Turnbull, which sale Turnbull denied.

Crick at the time, it is alleged, claimed to have log marks duly recorded, and these logs bore such marks.

Turnbull demanded a bill of particulars and got a certified copy of the scale bills.

These scale bills are made by law prima facie evidence of what they contain, and for that reason Turnbull claimed he was liable to pay for logs he did not receive.

To overcome the force given by law to the scale bills as evidence, Turnbull, in the Hennepin county suit, must prove that no such logs were ever cut, or ever existed. That proof was impossible to get by reason of the large territory embraced by the streams tributary to Lake St. Croix, and hence this action, being an application for an injunction and a bill of discovery, is brought in Washington county, and for the further reason that the surveyor general is not a party to the Hennepin county suit, and relief is desired concerning the said surveyor's records.

Plaintiff asks for a bill of discovery compelling Crick to disclose when and where the logs he claimed to have sold

Turnbull were cut, or from whom he purchased them. Also that Crick be restrained from prosecuting the action in Hennepin county until the determination of this action. And in this action plaintiff asks for the correction of the records of the surveyor general to conform to the facts as far as these parties are concerned, and that Crick deliver up for cancellation the certified copies of said scale bills.

It was claimed that Sec. 105, Chap. 66, and Sec. 88, Chap. 73, Gen. Stat. 1878, did away with the old chancery practice of "Bill of Discovery," and those sections are the only means now provided to compel disclosures.

Plaintiff contends that, notwithstanding, when those sections cannot afford the relief he is entitled to he has a right to a bill of discovery.

Held, that a writ of injunction issue from this Court restraining Crick from further proceedings in the Hennepin county action, or any action, until the determination of the questions involved in this action.

WILLISTON, J.

Hannah M. Osborne vs. John Fraser, et al.

(District Court, St. Louis County.)

SERVICE BY PUBLICATION—SUFFICIENCY OF AFFIDAVIT—

In an action to set aside conveyances of real estate for fraud jurisdiction of non-resident defendants may be obtained by publication of the summons.

In such an action an affidavit for publication of summons stating that plaintiff claims to have a lien on the premises alleged to have been fraudulently conveyed, and that the object of the action is to set aside certain mentioned conveyances to defendants and to have plaintiff's lien declared a paramount lien, is sufficient.

N. A. & H. G. GEARHART for plaintiff. DRAPER, DAVIS & HOLLISTER and SMITH, MCMAHON & MITCHELL for defendants.

MOER, J. Action brought by plaintiff to test the title to certain lots claimed by defendants. The plaintiff and one Robert O. are, and were at all times herein referred to, husband and wife. The husband on the 16th of May, 1890, conveyed the lands in controversy to A., and on the same day A. conveyed the lands to plaintiff. Thereafter, this defendant Fraser obtained judgment against Robert O. and the lots were sold on execution thereunder to defendant Fraser. No redemption has ever been made therefrom.

Then defendant Fraser commenced an action in the District Court against the plaintiff and her husband, praying that said conveyances to A. and from A. to this plaintiff be declared fraudulent and void, and that the lien of the former judgment be declared paramount and superior to the claim of the plaintiff herein. This plaintiff and her husband, being non-residents, service of summons was had by publication only, and judgment was rendered thereon. It is claimed on the part of the plaintiff that the statutes of the state did not authorize the service of the summons in that action by publication, and hence, that the Court acquired no jurisdiction over the plaintiff or of the lands in question, and that the judgment rendered under such service is void upon its face.

If the service of the summons by publication was authorized either under subdivisions 5 or 6 of section 64 of Chapter 66, G. S. '78, the Court acquired jurisdiction. Was it so authorized? If so authorized was the affidavit for publication sufficient? The purposes of that action were to settle and determine the rights of the parties in the real estate in question. The subject of the action was real property. The defendant Fraser claimed a lien upon the property and brought the action to enforce such lien, and to have it declared paramount to any right, title, or interest that the plaintiff might have or claim thereunder. It seems to me clear that the action was a proper one for publication of the summons under the sections of the statute just referred to, and that unless the facts appear upon the face of

the record, showing want of jurisdiction, such judgment cannot be attacked collaterally. It is further contended on the part of the plaintiff that even if such proceedings were authorized, that they were void because they did not conform to the statute, the point being made that nowhere is it stated in the affidavit for publication that the subject of the action is real estate. The affidavit for publication stated: 1. That the judgment in the case of Fraser vs. Robert Osborne, docketed in the office of the Clerk of the District Court of St. Louis Co., is a lien on said land in question. 2. That said lien be declared paramount to any and all interests of the said Hannah O. in said lands, and that the title of said H. O. be declared fraudulent as against Fraser's said lien.

If the subject of the action is real property, publication is authorized. One claiming a lien upon land would seem to have, or at least claim to have, some enforceable interest in the real estate, and if such person brings an action to have his interest declared to be a lien, is not the subject matter of the controversy real estate? The case is analogous to that of a person claiming a mechanic's lien on real estate and who brings an action to foreclose or enforce his lien. If the object of the defendant Fraser in such action was to have such lien declared paramount or superior to or above all other claims or interests of the plaintiff Hannah Osborne, is not that an action in the fullest sense of the word for the enforcement of such lien? I think the question must be answered in the affirmative. In my judgment, the affidavit is sufficient on its face. The judgment thus obtained by defendant Fraser, being valid on its face, cannot be attacked collaterally, and the relief demanded in plaintiff's complaint herein must be denied, and it will be so ordered.

C. E. Jaynes, doing business under the name One Horse Store, vs. Second National Bank of St. Paul.

(District Court, Ramsey County, 60197.)

BANKS AND BANKING—

A complaint against a bank alleging that plaintiff has been damaged by the bank's refusal to pay his check, he having funds in the bank to meet the same, and in which it further appears that the check was drawn by a third person who is not alleged to have authority to draw the same, is demurrable.

J. M. HAWTHORNE for plaintiff. C. D. & T. D. O'BRIEN for defendant.

This action was brought against the defendant to recover damages for its refusal to pay a check drawn by plaintiff against funds upon deposit with the defendant bank. The complaint alleged that the plaintiff, C. E. Jaynes, was doing business as the One Horse Store, and the check was signed "One Horse Store, F. W. Jaynes, Mgr." There was no allegation either that F. W. Jaynes was authorized to sign checks, or that the defendant knew that plaintiff was doing business as the One Horse Store. Defendant demurred.

KERR, J. The common sense construction of the check set forth in the complaint is that it was signed "One Horse Store by F. W. Jaynes, Manager;" that is, that the signature of the check drawn in the name of said One Horse Store was that of F. W. Jaynes, as manager, and this construction was not denied on the argument. There is no direct allegation in the complaint that F. W. Jaynes was the manager of said store, and it does not appear that he was authorized to draw checks in its name, or that this fact was known to the defendant by the usual course of dealing, or otherwise. Without the existence of such facts, and knowledge or notice of them on the part of the bank, it was under no obligation to pay a check as drawn against the funds of the One Horse Store in the bank. Even if the complaint should be so construed as to allow proof upon the trial that the signature "One Horse Store" was made

by the plaintiff, C. E. Jaynes, there is no allegation that the account was kept in the bank in the name of the "One Horse Store," or that the bank knew that the plaintiff was doing business under that name, or that from the course of dealing between the parties, or otherwise, checks so drawn were received and recognized by the defendant as proper drafts upon the funds of plaintiff deposited in the bank.

Demurrer sustained.

State, ex rel. Ray vs. Odin Haldin, County Auditor.
(District Court, St. Louis County.)

TAXATION, MANDAMUS—

An action in mandamus will lie to compel the County Auditor to certify the amount required to redeem land from a tax sale, even though the tax certificate has been assigned by the state.

BILLSON, CONDON & DICKINSON for Relator. JOHN JENSWOLD for Auditor.

MOER, J. This is an action in mandamus to compel the county auditor to certify the amount required to redeem lands from the tax sale of 1890. The land at said sale was bid in for the state, and afterwards, but before the commencement of this action, the certificate was assigned to one B., who assigned a half interest to one J. after notice of expiration of redemption was given. All of the land was vacant, and part of it was assessed to "Unknown." Notice of expiration of redemption was given in 1893 and served in the ordinary way. This notice concluded as follows: "And the time within which said land can be redeemed from said assessment will expire sixty days after service of this notice in manner required by section 37, Chapter 6, General Laws of Minnesota, 1877, and amendments thereto."

The defect urged was that said notice was insufficient under the ruling in the case, Kenatson (Kenatson vs. Great Northern Ry. Co., 60 N. W. Rep. 813) recently decided in the Supreme Court. In answer it was claimed that as the land was not assessed in the name of any person, no notice need be given, and also that this proceeding would not lie in this case, under the circumstances, and that title could not be tested in this way.

The Court cited in the parties claiming under the tax title, and made them parties, and gave judgment that redemption could be made.

H. H. Hoyt vs. Melvin J. Clark.
(District Court, St. Louis County.)

TAX TITLE—TITLE OF REDEMPTION—

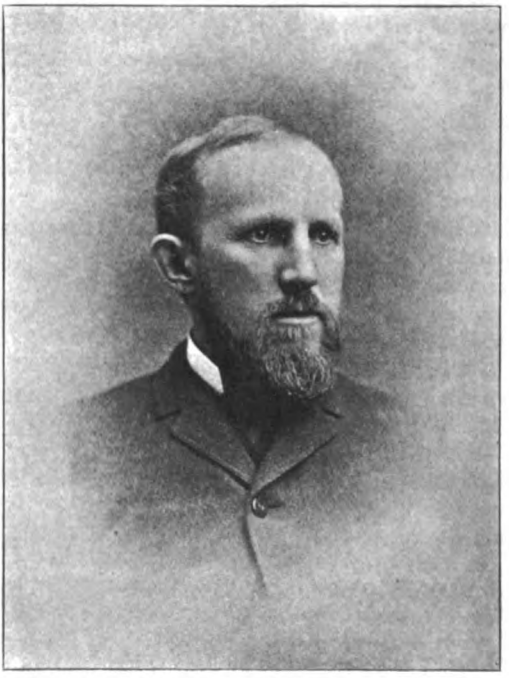
Where land is assessed in the name of "Unknown" the time for redemption can be terminated under Sec. 121 of Ch. 11, G. S. '78 the same as if assessed in the name of a person.

H. H. HOYT, attorney pro se. CASH, WILLIAMS & CHESTER for defendant.

LEWIS, J. This is an action brought by the owner of the fee of a certain lot to determine the adverse claims of the defendant thereto. The defendant is the owner of a tax certificate of the tax sale of 1884. The lot, the title of which is in question, was assessed with the owner as "Unknown." The defendant, at the proper time, under Sec. 121 of Ch. 11, G. S. '78, as in force in 1887, presented his tax certificate to the county auditor who prepared the proper notice and addressed it to "Unknown;" the sheriff made return that the land was vacant and that "Unknown" could not be found within the county, whereupon the notice was properly published for three weeks.

The contention of the plaintiff was that said section of the statute as then in force did not apply to property not assessed in the name or any particular person, and that in such a case as the one at bar the time for redemption could not be thus terminated.

Held, that, inasmuch as the legislature provided that tracts or parcels of land might be thus assessed when the owner was unknown, it was not the intention to except this class of cases from the operation of said section relating to the redemption period, and that the time of redemption would expire in such case the same as if the lot had been assessed in the name of a person. Judgment for defendant.



HON. O. B. GOULD,

District Judge, Third Judicial District.

...THE...

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THE BENEFIT—we might say the absolute necessity—to the bar of the state of such a periodical as THE MINNESOTA LAW JOURNAL was made apparent on the general term day of the April term of the Supreme Court. Previous to the term day the Court had modified Rule IX. and ordered such amendments published in certain newspapers in the large cities, which was done. Thus the amendment became known to some of the members of the bar of the larger cities, but not, apparently, to all of them. The members of the bar in the outside counties, however, were not apprised of the amendment, and many of them, by having failed to comply, were put to great inconvenience, and, in some cases, lost the term. The new rule was seasonably published in THE JOURNAL, 3 M. L. J., 26, and the subscribers thereof were all able to comply therewith.

JUDGE IVES.

The House of Representatives, by a decisive vote, has refused to return articles of impeachment against Judge Ives. The testimony which was taken before the judiciary committee not having been published, we are not able to say whether Judge Ives in his zeal to root out the iniquitous resorts in East Grand Forks overstepped the limits of the law, or did that which does not become a

judge. But, however that may be, it seemed in the debates in the House to be admitted that the motives of Judge Ives in all that he did were good. If this be true, and was proven or admitted before the Senate, we apprehend that the impeachment would fail, for the ground of impeachment in this matter being corrupt conduct in office, the Judge by such admission or proof would be acquitted of corrupt conduct, and could, at most, be found merely to have made a mistake in a matter of law, for which, of course, he could not be impeached.

The charges made against Judge Ives as to his having improperly naturalized certain persons seem to us to have been frivolous and to have weakened the case against him.

PROBATE JUDGES.

A little over a year ago THE JOURNAL urged the lengthening of the term of office of probate judge from two to at least four years, and published letters from many of the probate judges of the state all advising that such change in the term of office be made. 2 M. L. J., 34.

We are glad to observe that the efforts of THE JOURNAL in this matter are about to be successful and its advice followed, and that at the next election the judges of probate will probably be elected for a term of four years. This is as it should be. Rotation in all other offices than that of judge, and frequent elections, are doubtless beneficial, but all the reasons that can be urged in favor of a long term for the judges of the supreme and district courts apply with equal force to that of probate judge. And, moreover, as appears from the communications above referred to, there are many reasons why a probate judge should not be compelled frequently to appear before the people for re-election that do not apply to the case of the district or supreme court judges.

ELSEWHERE appears an announcement of the removal of F. P. Dufresne. Mr. Dufresne's new place of business is centrally located, and commodious, and we are of the opinion that his reading room, or club room, will become a popular resort for the members of the bar.

The steady and constant growth of this young business house gives promise that in the near future it will become one of St. Paul's great legal publishing houses.

LIABILITY FOR ESCAPE OF ELECTRICITY.

The following interesting and timely article on the respective rights and liabilities of telephone and electric street car companies, from the pen of Mr. E. W. Huffcut, formerly of the Minneapolis bar, now lecturing in the School of Law of Cornell university, appeared in Vol. 1, No. 2, of the New York Law Review, a new and worthy applicant for the patronage of the lawyers:

The increasing use of electricity has resulted, as is inevitable, in a conflict of rights which it is the province of the law to balance and adjust. This conflict has appeared most sharply in the use of electricity for telephone lines on one hand and for street railways on the other. The telephone lines are invariably the sufferers, since the relatively weaker current which they employ and the greater delicacy of the instruments used for the transmission of speech, render them easy victims of the stronger currents and less susceptible machinery of the railway lines. The latter suffer little, if any, from the former. Hence, it is the telephone lines that appear as plain-

tiffs in litigation instituted to adjust the conflict. Thus far the plaintiffs have been worsted in every case save one. The following cases have decided on one ground or another in favor of the railway lines: Cumberland Telephone Co. v. United Electric Ry. Co., 42 Fed. Rep., 273, (1890); Railway Co. v. Telegraph Ass'n, 48 Oh. St., 390, (1891); Hudson River Tel. Co. v. Watervliet Turnpike Co., 135 N. Y., 393, (1892); National Telephone Co. v. Baker, 1893, 2 Ch., 186. The one case in which the telephone line was successful is that of Cumberland Telephone Co. v. United Electric Ry. Co., (Tenn.) 29 So. W. Rep., 104, (1894).

All of the cases decided in favor of the defendant were suits for injunction. The case decided in favor of the plaintiff was an action for damages. The wrong alleged in all of the cases is practically of two kinds: (1) That by paralleling the wires of the telephone company with the wires of the railway company there is induced in the former a variable current corresponding to the variations in the intensity of the current in the latter, such variation in the latter depending on the number and movement of the cars; (2) that by discharging the electricity from the railway wires into the earth, disturbances in the earth circuits are created over an area of at least half a mile which interfere with the earth circuits of the telephone lines and substantially destroy the utility of the telephone service. For the first evil there is but one known remedy, namely, to avoid the parallelism of the wires. For the second evil there is but one known remedy, namely, the abandonment by one company of the earth circuit and the employment of a return metallic circuit. The problem is, therefore, to determine whether it is the duty of the railway line to protect the telephone line against the evils complained of, or whether the latter must take at its own expense the necessary means to protect itself.

There now seems to be no doubt that the telephone line cannot enjoin the railway line. The latter is using the streets for the purpose for which streets are primarily intended, namely, for locomotion, and has, therefore, a dominant easement. To enjoin the railway line would be to defeat the very object of its existence and to prevent the public benefit derived from its successful operation. This is held in all the cases, and is admitted by the Tennessee court. This consideration has prevented a decision on the merits in every case holding with the railway lines. The defendant is creating a nuisance, but it is an authorized nuisance, and necessary to the accomplishment of a public end; therefore, the defendant cannot be enjoined from continuing the nuisance. If both lines were strictly private concerns, operated on private lands and for private ends, and needing no franchise from the public, the problem would be simplified although its solution might be rendered more difficult.

While it is conceded that injunction will not lie to prevent the injury, the question remains whether the telephone line may recover damages. Only one case has dealt directly with this question, that decided in the Tennessee court and reported in 29 So. W. Rep., 104. It is there held that the telephone line cannot recover damages for disturbances by induction caused by parallelism since it occurs through no fault of the defendant. The wires of the latter must follow the streets and if they chance to parallel the wires of the plaintiff the consequent damage is either incidental or, as is held in the Tennessee case, is due to the fault of the plaintiff itself in obstructing the street; that is, obstructing it for a purpose subordinate

to the main purpose for which streets exist. Here again the decision turns on the relative rights of the parties to the use of the streets. What would be the result if plaintiff's lines were wholly on private property?

As to damages caused by conduction the Tennessee court holds the defendant liable. Here the damage does not occur upon the public street but upon the plaintiff's private property, or the property of subscribers. The currents discharged by defendant spread to a considerable distance and, finding the earth connections of the telephone wires at the central station and at subscribers' premises, pass up these wires and play havoc with the receivers and transmitters. Both parties are using the earth for a return circuit; defendant's currents being the stronger not only jostle and assault those of the plaintiff, but actually invade the plaintiff's private property and take possession of plaintiff's private wires. This, says the Tennessee court, is a taking of private property for a public use without just compensation, since defendant has no right to the use of plaintiff's private property as an electric conductor; and to the extent that plaintiff is damaged by such use it may recover. The court disagrees with Brown, J., (42 Fed. Rep., 273) where he holds such damages to be merely incidental inconveniences. As to the question which party should apply the remedy by establishing a return metallic current, the court holds that the fact that plaintiff could apply the cheaper remedy would affect the amount of its recovery but not the question of defendant's liability. In other words, the extent to which plaintiff was damaged would be measured by the cost of protecting itself by the return metallic current.

The above case rests on the notion that the defendant is, by legislative authority, permitted to "take" the plaintiff's property for a public end, but that defendant must first make compensation. What would be the result if the parties were merely adjoining owners, exercising private rights? On this there might be three views.

First, the English courts would be likely to hold the case within the principle of Fletcher v. Rylands (L. R. 1 Ex., 265; 3 H. L., 330). Indeed it is distinctly so held by Kekewich, J., in the English case, (1893, 2 Ch. 186). He states the principle to be that, "If the owner of land uses it for any purpose which from its character may be called non-natural user, such as for example the introduction on to the land of something which in the natural condition of the land is not upon it, he does so at his peril, and is liable if sensible damage results to his neighbor's land, or if the latter's legitimate enjoyment of his land is thereby materially curtailed." Applying the principle to the facts of the case he finds no difficulty in holding electricity to fall within it, and says: "I cannot see my way to hold that a man who has created, or, if that be inaccurate, called into special existence, an electric current for his own purposes, and who discharges it into the earth beyond his control, is not as responsible for damage which that current does to his neighbor, as he would have been if, instead, he had discharged a stream of water. The electric current may be more erratic than water, and it may be more difficult to calculate or to control its direction or force; but when once it is established that the particular current is the creation of or owes its special existence to the defendant, and is discharged by him, I hold that if it finds its way on to a neighbor's land, and there damages the neighbor, the latter has a cause of action."

Second, some American courts would probably treat the question as one of nuisance, and not of absolute

liability as insurer. In this country Fletcher v. Rylands is of more than doubtful authority, yet it borders closely upon our authorities on nuisance. The distinction seems to be that Fletcher v. Rylands applies to a potential nuisance; our authorities only deal with active nuisance. But the electric cases are more than potential nuisances. The electricity is not merely stored in such quantities as to menace the safety of neighbors in the event of its escaping; it is actually discharged under conditions which inevitably result in its flowing upon the land of neighbors. Unless this can be justified it is a nuisance. This is the view taken by the New York court (135 N. Y., 393, 109) where Maynard, J., says:

"We are not prepared to hold that a person even in the prosecution of a lawful trade or business, upon his own land, can gather there by artificial means a natural element like electricity, and discharge it in such a volume that, owing to the conductive properties of the earth, it will be conveyed upon the grounds of his neighbor with such force and to such an extent as to break up his business, or impair the value of his property, and not be held responsible for the resulting injury. * * * If either (owner) collects for pleasure or profit the subtle and imperceptible fluid, there would seem to be no great hardship in imposing upon it or him the same duty which is exacted of the owner of the accumulated water power, that of providing an artificial conduit for the artificial product, if necessary to prevent injury to others."

Third, some American courts would be likely to treat the question as one of negligence instead of nuisance, and to inquire, not whether the defendant discharged electricity upon the plaintiff, but whether he used reasonable care to avoid so discharging it. This seems to have been the view of Brown, J., in the federal case (42 Fed. Rep., 284), where he says:

"Where a person is making lawful use of his own property, or of a public franchise, in such a manner as to occasion injury to another, the question of his liability will depend upon the fact whether he has made use of the means which, in the progress of science and improvement, have been shown by experience to be the best; but he is not bound to experiment with recent inventions, not generally known, or to adopt expensive devices, when it lies in the power of the person injured to make use himself of an effective and inexpensive method of prevention."

The result of the authorities to date seems to be this: An authorized street railway company cannot be enjoined by an authorized telephone company whose business it is disturbing. It is not liable in damages for disturbances caused by induction or parallelism of wires. It is liable in damages for disturbances occasioned on the property of the telephone company by the conduction of electricity discharged into the earth. The question of public authorization aside, it would seem to accord with principle and authority to hold that discharging electricity into the earth in such a way as to result in the invasion of and damage to neighboring property constitutes a nuisance for which the usual remedies could be had. But on this last point the courts have yet to speak.

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ATTORNEY GENERAL'S DECISIONS.

SWAMP LAND GRANT—RIGHT OF STATE TO MAKE SELECTION.

When a railroad which has earned a grant to swamp lands fails within a reasonable time to make selection thereof, it is the privilege of the State, and the duty of the officers thereof, to make such selection.

HIS EXCELLENCY, KNUTE NELSON,
Governor.

Sir: In your communication of the first inst. you call my attention to a deed presented to you by the State Auditor for your signature, conveying to the Minneapolis & St. Cloud Railway Company a list of lands acquired by the State under and pursuant to the Act of Congress of March 12th, 1860, known as the swamp land grant, and request me to examine into the matter of such conveyance, and to advise you, in substance, whether it is proper for the State to make a selection of lands for the said company, the time within which such selection should be made, the form of conveyance to be used and when the same should be executed.

I have the honor to advise you, in reply to your inquiries, that the law clearly confers upon State authorities the right of selection of swamp lands to fill the quota of said company.

By Chapter 3, Special Laws of Minnesota, 1885, a grant of swamp lands was made to said company lying within odd numbered sections in the several counties through or into which the said road might be constructed, not exceeding four sections per mile of said road, upon the terms and conditions prescribed in the said act. It was further provided therein that in case of deficiencies in any of the counties through which the road should run, the said company was authorized to select lands to supply such deficiency in any of the several land districts through or into which the road should pass, lying within odd-numbered sections.

By Chapter 56, Laws of Minnesota, 1869, said chapter 3 was so amended as to grant to the said company "a grant of swamp lands belonging to, or that may hereafter belong to, the State of Minnesota not otherwise granted, equal to ten full sections for each mile of the said road; provided that this grant of lands shall not prejudice or affect the rights of any other railroad company, any asylum, charitable institution or school to any lands heretofore granted." It was furthermore provided therein that "whenever any ten consecutive miles of the said railroad should be completed and ready for rolling stock, it should be the duty of the Governor to execute, on behalf of the State, a deed of conveyance to the said company, the full quota of lands for the portion of the said road so completed."

In the case of the Minneapolis & St. Cloud Ry. Co. v. the Duluth & Winnipeg Ry. Co., 45 Minn., 104, the Supreme Court of this State had under consideration the legislation hereinbefore referred to. Referring to the act of 1869 in question the Court expressed itself in the following manner: "That act is a grant of ten sections to the mile out of any swamp lands then belonging to, or that might thereafter belong to, without any limitation or restrictions as to section numbers or locality. Such a grant being one of a certain quantity out of a larger quantity, the land is what is termed in land grant law a 'float.' It will be observed that the act is silent as to who should make the selection of the land. There are two rules of law applicable to such a grant that have an important bearing on the result in this case. The first is that the right of selecting the lands to fill the

grant, not being given to the grantee, belongs to the State. The second is that such a grant does not tie up all the swamp lands in the state until the grant is actually filled. Notwithstanding the grant to the plaintiff (Minneapolis & St. Cloud Railway Company) the State could still dispose of any of its swamp lands and give perfect title to them, provided only that it had retained enough to fill plaintiff's grant." It is, therefore, obvious, not only that selections of land for the said company may be made by the State, but that it has always been within the power of the State to make selections and to convey the same to the said company as fast as earned.

Your attention is further called to the provisions of Chapter 62, General Laws of 1893, an act designed to enforce an early selection of swamp lands by railroad companies enjoying grants from the State. It may be questioned, however, whether the provisions of the last-named act apply to the grantee named in the deed of conveyance with which you have been presented. The act, in terms, applies to "railroad companies within the State to which swamp lands have been granted by the State of Minnesota, and which, by the terms of such grant, are entitled to make selections of swamp lands and receive patents thereof." Such companies are required to make selections and file lists of the same in the office of the State Land Commissioner within two years from March 24th, 1893. There is, of course, force to the view that inasmuch as selections must be made by the State to fill the quota of the St. Cloud Company, the selections should be made with reasonable dispatch; all the more so as the grant to such company is prior to the grants under which other companies claim rights of selection.

It appears from the records of the office of the State Land Commissioner that the Minneapolis & St. Cloud Railway Company is now entitled to 273,565.94 acres. The deed in question conveys only 271,365.94 acres, which, if executed, will leave a residue to the credit of the said company of 2,000 acres.

The only reasonable construction I am able to place upon Section 2 of said Chapter 56 is that it implies a selection and conveyance of swamp lands to the company therein named as fast as the lands are earned by the said company. You will note that it is therein expressly provided that it is made the duty of the Governor to execute a deed of conveyance to the said company whenever any ten consecutive miles of railroad shall have been completed and ready for rolling stock.

In this connection it may well be urged that Chapter 62, General Laws 1893, evinces a policy on the part of the State to close all such grants without unreasonable delay.

I am, very respectfully,

H. W. CHILDS.

Oct. 27th, 1894.

EDUCATION — INCOMPETENT TEACHER — REMOVAL OF.

A teacher who holds a certificate by virtue of being a graduate of a normal school of another state, may be suspended and his certificate cancelled, if he is shown to be incompetent.

HON. W. W. PRENDERGAST,
Sup't of Public Instruction.

Dear Sir: In your communication of the 28th inst. you state that a certain common school district has employed a teacher who is found to be totally incompetent, although a graduate of a Normal School of another state, and is holding a certificate by virtue of its approval of the Superintendent of Public Instruction. The Board has made a contract with her, it

appears, for nine months' service, and in view of her proven incompetency, now desire to terminate the contract. You inquire whether this may be lawfully done.

By Section 1, Chapter 34, General Laws 1893, in defining the qualifications requisite to a teacher within the meaning of the school law, it is provided that a diploma from a State Normal School of another state, approved by the State Superintendent of this state, should constitute a certificate of authorization to teach in the schools of this state.

By Section 2, Chapter 72, General Laws of 1891, provision is made to the effect that at the expiration of two years of actual teaching service, the diploma to a graduate of a State Normal School may be indorsed by the President of such school and the State Superintendent of Public Instruction, which indorsements make it a valid certificate, authorizing the holder thereof to teach school within this state. By Section 3 of the last named act it is further provided that any county or city Superintendent of Schools, under whose supervision such graduate may be employed, shall have authority to suspend such certificate for causes duly shown, such suspension to be subject to the same approval as is provided in the case of certificates issued by such city and county superintendents.

While, in terms, the provisions of Section 3 have reference to a certificate issued pursuant to the provisions of Sections 1 and 2 of the same act, it is my opinion that a certificate issued pursuant to the provisions of Chapter 34, to a graduate of a Normal School of another state, may be deemed to fall fairly within the contemplation thereof. It certainly is not within the contemplation of the statutes of this state that a district may be burdened with an incompetent teacher, with no avenue of escape therefrom.

You are therefore advised that the Superintendent of Schools of the county in question is authorized to cite the said teacher before him to answer the charge of incompetency, and if, upon proper investigation, it is ascertained that the charges are sustained, he may suspend the operation of her certificate of qualification.

I am, very respectfully,

H. W. CHILDS.

Dec. 11th, 1894.

COUNTY COMMISSIONERS — CLAIMS ALLOWED BY IN EXCESS OF LEVY.

The Board of County Commissioners has power to allow claims for highway work in excess of the amount levied therefor.

PIERCE BUTLER, ESQ.,
County Attorney.

Dear Sir: In your communication of the 26th inst. you state, in brief, that your board of County Commissioners have allowed claims for highway work to a considerable amount in excess of the fund created therefor by tax levy, and that orders have been drawn by the County Auditor and countersigned by the Chairman of the Board of County Commissioners for such excessive claims.

The statute provides that county taxes shall be based upon an itemized statement of the county expenses for the ensuing year, which shall be included in the published proceedings of the county board, and no greater levy of county taxes shall be made upon the taxable property of any county than will be equal to the amount of such expenses with an excess of five per cent of the same.

It is to be assumed that your Board complied with the law providing for its tax levy, and that, among other items named in the list prepared pursuant to the statute, was an amount deemed requisite for highway purposes.

The question presented involves the authority of the Board of County Commissioners to expend a greater sum of money for highway purposes than that which is expressed in the itemized list.

The language used by our Supreme Court in the case of Commissioners of St. Louis County v. Nettleton, 22 Minn., 359, implies that such authority has been conferred upon them. The court there say: "The authority of the County Commissioners to provide in the tax levy for such sums, as during the year they are authorized, and may find it necessary, to appropriate from the county treasury for the opening, vacating, resurveying or otherwise improving county roads, cannot be doubted. Their authority to appropriate in advance and at the time of making the estimate for the tax levy, any sum for such exclusive use—that is, to provide for such purpose a distinct and separate fund that cannot be used for any other purpose—is quite another thing. It is doubtful, although the language of Section 79 of the Act of 1874 may perhaps suggest that it may be done without they have any such authority."

In this connection it should also be noted that the Board of County Commissioners may appropriate, within a fixed limitation, moneys from the county treasury for highway purposes. The amount which may thus be appropriated is left wholly to the discretion of the Board, subject to the limitation above referred to.

All in all, it is doubtless the correct view to regard the statute requiring the itemized list, as affording a basis, merely, for the levy, without imposing restrictions as to the amounts which should be devoted to specific purposes. It certainly could not have been intended that the hands of the Board are to be so tied that it could not appropriate moneys from the treasury to meet emergencies which might, from time to time, arise.

Of course, I assume that the Board has made an appropriation for the work from the treasury. I do not wish to be understood as holding that orders may be drawn and paid for highway work in the absence of an appropriation from the county treasury of a definite amount for such purpose.

I am, very truly yours,

H. W. CHILDS.

Dec. 29th, 1894.

THE PORTRAIT.

On Jaunary 7th, 1895, Gov. Nelson appointed Ozro B. Gould, of Winona, Judge of the District Court for the Third District to succeed Hon. Chas. M. Start. Judge Gould was born in Ontario, Canada, April 17th, 1840, of New England parentage. His father dying in Toronto when the boy was five years old, the mother removed with her child to Western New York, where she died three years later. The subject of this sketch was then taken to reside with a paternal aunt on a farm in Northern Ohio. At fifteen he started out for himself, being variously employed until the outbreak of the war, at which time he was preparing for college at the Seneca County Academy, Republic, Ohio. Enlisting as a private in the 55th Ohio infantry in September, 1861, he served through the war, being discharged with the rank of Captain in July, 1865. He served in West Virginia and with the Army of the Potomac until May 2, 1863, when he was wounded and taken prisoner at Chancellorsville. Released on parole, he commanded a division of the camp of paroled prisoners near Washington during the summer of 1863 and in the autumn of that year joined the army under Grant at Chattanooga, participated in the battle of Missionary Ridge and Look Out Moun-

tain, and the following year in Sherman's campaign against Atlanta and the March to the Sea.

Judge Gould read law with Lee and Brewer in Tiffin, Ohio, and graduated from the Law Department of the University of Michigan in the class of 1867, and in the fall of that year settled at Winona, where he has ever since resided. He was resident director of the Minnesota Soldiers' Orphan Home during the existence of that institution; member of the House of Representatives in the regular and extra sessions of the Legislature of 1881; was a member of the committee of managers on the part of the House in the matter of the impeachment of one of the district judges instituted at that session, and in 1884 he was a delegate at large from the state to the Republican National Convention. January 1st, 1877, Mr. Gould became associated in practice with A. H. Snow, Esq., under the firm name of Gould & Snow, which continued until his appointment to the bench.

OF CURRENT INTEREST.

The firm of Nethaway & Gillen, of Stillwater, has been dissolved.

E. Southworth, a member of the Board of State Bar Examiners, has removed from Shakopee to Minneapolis and formed a partnership for the practice of law with W. H. Adams under the firm name of Adams & Southworth.

The office of THE JOURNAL has been removed to No. 85 East Fourth Street, where it will hereafter be pleased to receive its many friends and patrons.

The members of the Minneapolis Bar Library, at their recent annual meeting, discussed the practicability of securing quarters in the new Court House. The plan was indorsed and referred to the executive committee for further action. Officers were elected and other business transacted.

A Dakota schoolmarm sued three young men for breach of promise. Counsel for one of the defendants moved for a nonsuit, on the ground that she was too promiscuous. The court seemed disposed to grant the motion, whereupon the plaintiff asked: "Judge, did you ever go out duck shooting?" His honor's eyes lighted up with the pride of a sportsman as he answered, "Well, I should say so! and many's the time that I brought down a dozen at a shot." "I knew it," eagerly added the fair plaintiff, "That's just the case with me, judge. A flock of these fellows besieged me and I winged three of them." The motion for nonsuit was denied. —Albany Law Journal.

THE MINNESOTA LAW JOURNAL.

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DISTRICT COURT.

Charles A. Estes v. Dimon A. Roberts and C. W. Benedict.

(District Court, Ramsey County, 60822.)

APPEAL BOND—DEFENSE TO ACTION.

It is no defense to an action against the sureties on an appeal bond, where the appellant principal has become insolvent pending the appeal, to allege that if the original action had been pressed against the defendant at the time the appeal was taken said defendant would have been thereby forced into insolvency, and that thereby the plaintiff would have recovered but a small percentage on his judgment, and an answer setting up such defense is demurrable.

HOLCOMB & O'REILLY for plaintiff. WM. G. WHITE for defendant.

Action upon an undertaking on appeal. Plaintiff alleged that at the time the appeal was taken the appellant was solvent, and that if such appeal had not been taken he would have been able to have collected his judgment from the appellant, but that pending the appeal the appellant had become insolvent.

The defendants denied that the appellant was solvent at the time of taking the appeal, but alleged that its assets were then but twenty per cent of its liabilities, and that if the said judgment had at that time been enforced and execution issued thereon the appellant would then have been compelled to make an assignment, and that the plaintiff could not have recovered more than twenty per cent of his judgment.

To this answer the plaintiff demurred.

BRILL, J. It is admitted that at the time the undertaking was given, and for a long time thereafter, the Lovering Shoe Company had property, subject to taxation, greatly in excess of the amount of the judgment, and that while the bond was in force it disposed of all of its property, and has not since had any. This admitted that the undertaking preventd the entry of judgment and the issuance of execution. It is no answer to say, now, that if judgment had been entered it would have so disposed of its property, at that time, that the judgment could not have been enforced What it would have done, or what its creditors would have done, is entirely conjectural. No proceedings under the insolvency law were had, in fact. The law did not impose any additional duty on the insolvent to make an assignment; it is permissive simply; he could make an assignment within its terms, or a common law assignment, or none at all, as he chose. Demurrer sustained.

State of Minnesota ex rel., Henry W. Childs, Attorney General, v. Joseph Ehrmanntraut, Jr., and Robert N. Hare.

(District Court, Ramsey County, 56892.)

CITY OF ST. PAUL—COMMON COUNCIL OF.

Ch. 1, Sp. Laws 1874, Sec 5 of Sub. Chap. 4, providing for the election of a president of the Common Council of said city, is not repealed by Ch. 6, Sp. Laws 1891, and the powers and duties of such president are not taken away by said law of 1891.

C. J. BERRYHILL and T. R. PALMER for relator, JOHN H. IVES and J. C. MICHAEL for respondents.

Proceeding upon information and writ of quo warranto. It appeared that the respondents Ehrmanntraut

and Hare and also E. H. Milham and Alexander Lindahl were elected and qualified aldermen of the city of St. Paul; that the said respondents were on June 25, 1894, appointed members of the Joint Court House and City Hall Committee by William A. Van Slyke, the duly elected and acting President of the Assembly of said city, and also thereafter, and on December 10, 1894, by John J. Parker, the duly elected and acting President of the Common Council of said city, pursuant to Chapter 64, Sp. Laws 1889.

It further appeared that John Copeland was elected president of the said Assembly on June 5, 1894, but was not entitled to act as such president prior to July 16th, 1894; that after such appointment of the respondents by said Van Slyke, and prior to July 16, 1894, the said John Copeland, assuming to act as president of said assembly, assumed to appoint said Lindahl and Milham members of said committee. Upon these facts the Court found that the said respondents were entitled to hold and occupy the said office, and that the said writ be discharged.

EGAN, J. Section 3, Sub-Chapter 3, Chapter 1, Special Laws of Minnesota 1874, provides: "At the first meeting of the Common Council in each year they shall proceed to elect by ballot, from their number, a president and a vice-president. The president shall preside over all meetings of the Common Council." At this time and down to 1891, the Common Council consisted of but a single body, and for several years prior to 1891, was made up of one alderman from each ward, and five aldermen, elected at large.

By Chapter 6, Special Laws of Minnesota 1891, amending the law of 1874, the Common Council was made to consist of two bodies; one of aldermen to be elected from each ward, who are styled the "Board of Aldermen," and nine members elected at large who are styled the "Assembly." Section 1 of the law of 1891 provides that "on and after the eleventh day of May, 1891, the legislative authority of the City of St. Paul shall consist of the Assembly and a Board of Aldermen, which shall meet separately, save as herein provided. * * * Said two bodies shall be known as the Common Council of the City of St. Paul."

While under the law the Council is composed of two bodies required in certain instances to meet and act separately, yet the Common Council and the legislative authority remain and continue, as an entity, the same as under the law of 1874. Neither the Board of Aldermen nor the Assembly constitute the Common Council, but the two together form a third body, which is the Common Council. There being no expressed repealing clause in the law of 1891, consequently it repeals only so much of the previously existing law as is inconsistent and cannot be construed in harmony with it. Section 1 of the law of 1891 further provides that "each body shall elect its own presiding officer from its own members, and shall keep a journal of its proceedings." Even if the expression "each body" is not broad enough to include the third body, made up of the other two and known as the "Common Council," yet the laws of 1874 and 1891 can be harmoniously construed together, because the law of 1874 provides for the election of a president of the "Common Council," and the law of 1891, under the changed conditions brought about by it, provides for the election of a presiding officer for each of the separate bodies, so that each may transact business in an orderly manner while meeting separately. It is just as necessary that there should be a presiding officer when the two

bodies meet in joint session, as they are required to do in certain cases by the law of 1891, as that there should be a presiding officer of each body while meeting separately, so that in this respect there is no inconsistency between the law of 1874 and the law of 1891; on the contrary, they are perfectly harmonious, and, construed together, they provide for the necessary officers under all requirements of both laws. This position is rendered more clear by that part of Section 1 of the law of 1891, which provides that "all powers, duties and obligations held, and by law authorized and exercised by the Common Council of said city, as now composed, is, save as otherwise herein provided, hereby granted to and imposed upon the Common Council of said city, as in this act organized and provided." The election of a presiding officer of the Common Council was one of the powers exercised by, and a duty imposed upon the Common Council under the law of 1874, and it is nowhere taken away by the law of 1891. The Common Council provided for in the law of 1891 is not in any proper sense a new body having its origin in that law, but is simply a continuation of the Common Council provided for in the law of 1874, when considered as an aggregate body, and the only material departure in the law of 1891 is as to the manner of performing its duties, by dividing the Council into two branches, and requiring them to meet separately in certain cases. For these reasons, I am of the opinion that the office of president of the Common Council still exists, and that the same was not abolished by the law of 1891.

Chapter 64, Special Laws of Minnesota 1889, which regulates the manner of appointment of said committee, provides: "Three of said committee shall be appointed annually, by the president of the Common Council, from the members of said Council." This provision of the law of 1889 is still in force unless it is repealed by that part of Section 1 of Chapter 6, Special Laws of 1891, which provides: "And in such cases, as the charter of said city now provides that the president of the Common Council, ex officio * * * shall perform certain duties outside of legislative duties, such duties and powers are granted to and imposed upon the president, ex officio * * * of said assembly." I do not think this provision affects the portion of the law of 1889 above quoted, for the reason that Chapter 64, Special Laws 1889, is in no proper sense a part of the city charter. Snider v. City of St. Paul, 51 Minn., 466. And it follows that the president of the Common Council is the proper person to appoint the three members of the said joint committee to be selected from the members of the Common Council. At the city election held in May, 1894, Oscar E. Holman and Wm. Banholzer were among four candidates residing in that portion of the city lying west of Wabasha and Rice Streets and north of the Mississippi River, who received the highest number of votes for the office of assemblyman. Timothy Reardon and O. H. Arosin each resided in that portion of the city lying east of Wabasha and Rice Streets and north of the Mississippi River, but neither of them were among the four candidates residing in that part of the said city who received the highest number of votes for said office of assemblyman, but both of them received a higher number of votes throughout the city for said office than either Holman or Banholzer. None of them received any certificate of election by the canvassing board or the city clerk, and none was required by any provision of law that I have been informed of.

Section 1, Chapter 6, Special Laws

of 1891, provides: "Said Assembly shall be composed of nine members. The members of said Assembly shall be elected at large from the body of electors of said city, and four shall reside east of Wabasha and Rice Streets and north of the Mississippi River, and four shall reside west of Wabasha and Rice Streets and north of the Mississippi River, and one shall reside in the Sixth Ward of the said city." This law is mandatory in its terms, and prior to being declared unconstitutional by a competent tribunal, gave Holman and Banholzer a prima facie right, under the circumstances, to hold the office and gave them color of title to the office, and their acts in assisting in the organization of the assembly, and as members thereof, up to the time the Supreme Court held this law to be in conflict with the constitution, were valid.

W. A. Blackman v. Dakota Land and Live Stock Co., C. G. Lewis, et al.

(District Court, Ramsey County, 60112.)

NEGOTIABLE INSTRUMENTS-JUDGMENTS

A plaintiff who has caused judgment to be entered against one or more but not all of several joint makers of a promissory note, thereby exhausts his whole remedy thereon, and cannot thereafter cause judgment to be entered against the other makers thereof.

F. M. CATLIN for plaintiff. WARREN H. MEAD for defendant Lewis.

Plaintiff declared upon a promissory note against four defendants, all being, as to the plaintiff, joint makers thereof. Three of the defendants having defaulted, the plaintiff entered judgment against them. The defendant Lewis had answered, alleging that he was merely a surety on the note, and that the plaintiff had extended the time of payment to the makers. After the entry of said judgments the defendant Lewis amended his answer, setting up that the note sued on was a joint note, and that by the entry of said judgments the plaintiff had exhausted the whole of his right of recovery thereon.

KELLY, J. The promissory note in suit is the joint, not several, obligation of all the defendants. Defendant Lewis, when he wrote his name on the back of it, to give it credit, and before delivery, became, by operation of law, "an absolute maker or promissor and an absolute surety on the note." Dennis v. Jackson, 59 N. W. Rep., 98 (Minn.) The written paper is the contract, and the Court must construe it. Said defendant, being by law an absolute maker as to the payee, it is immaterial as to the other makers of the note, he may be a surety. He is a joint obligor with all the duties and rights as such. It follows, therefore, that plaintiff having entered judgment, as he did against the other joint obligors, thereby released the defendant Lewis. Black on Judgments, Sec. 770. However harsh this rule may be, it is the law, and plaintiff is charged with this knowledge.

The judgments, as entered, are perhaps irregular and defective in form, but they are only voidable, not void. Dillon v. Porter, 36 Minn., 341. Having this in mind, the Court suggested to the plaintiff's counsel that it would entertain a motion to vacate these judgments for irregularity, and for judgment in proper form against all defendants (and which the Court understood would not be opposed by defendant Lewis), but this suggestion was declined.

In re Assignment of Frank A. Lofgren.

(District Court, Hennepin County, 62374.)

PARTNERSHIP—INSOLVENCY OF MEMBERS OF.

Where one member of a partnership becomes insolvent and assigns, the solvent partner is entitled to possession of all the partnership assets for the purpose of paying the partnership debts and winding up the partnership business.

JNO. P. NELSON for assignee. HENRY J. FLETCHER for petitioner.

It appeared that prior to the 4th day of April, 1894, the said insolvent and one Peter Lofgren were partners

under the name of Lofgren Brothers; that on said day the said insolvent made an assignment; that said partner was the owner of certain real estate and personal property, the title of which was in the members of the firm. It further appeared that after the said assignment the solvent partner continued in possession of all the assets of the partnership, and proceeded to convert the same into cash, and therewith discharge the indebtedness of the co-partnership. The assignee of the insolvent partner, as such, claimed to be entitled to one-half of the cash, and the same was turned over to him under a stipulation that it should not be used by him prior to the obtaining of an order in the said matter by the District Court. It was urged by the solvent partner that he had the sole right to wind up the partnership business, and was entitled to the exclusive possession of the assets thereof for that purpose. 2 Bates on Partnership, Sec. 752 et sec.; Talcart v. Dudley, 5 Ill., 427; Hanson v.Paige, 3 Grey, 239; Schalck v. Harmon, 6 Minn., 265; and this position was sustained by the Court, and the assignee ordered to turn over to the solvent partner all of the assets of the partnership which had come into his hands.

POND, J.

Margaret Coles v. The City of Stillwater.
(District Court, Washington County.)

MUNICIPAL CORPORATIONS—CONDITIONS PRECEDENT TO AWARD OF DAMAGES AGAINST.

A provision in a city charter that one who claims damages by reason of his property having been taken for a public improvement should furnish the city an abstract of title showing himself entitled to the compensation claimed, is valid, and a complaint for such award which does not allege the furnishing of such abstract is demurrable.

J. N. SHARLES for plaintiff. H. H. GILLEN for defendant.

Plaintiff brought suit against defendant and alleged, in substance, that the defendant, under its charter, opened, laid out, condemned and extended certain streets within its limits; that compensation and damages were awarded for the taking of property necessary in making the improvements; that plaintiff owned property along the line of the improvements, part of which was taken by defendant; that plaintiff demanded payment of the damages awarded for the taking of her property, which payment was refused by the city because she did not furnish the city an abstract of title to the property taken, showing herself entitled to recieve the money. The city charter requires the furnishing of such abstract. Upon such refusal to pay plaintiff began suit against defendant and demands judgment. The defendant demurs on the ground that the complaint does not state facts sufficient to constitute a cause of action.

WILLISTON, J. Section 5, Chapter 10 of the charter of the defendant, among other things provides that "before payment of such award the owner of such property (i. e., lands taken by the city for a public use) or the claimant of the award shall furnish an abstract of the title showing himself entitled to all of the compensation and damage claimed."

Section 2, Chapter 50, Special Laws 1891, in Section 6a, being an amendment to the charter, also provides that "when an assessment has been confirmed * * * the city council shall thereupon cause to be paid to the owner of such property * * * the amount of damages, * * * but the claimant shall in all cases furnish an abstract of title showing himself entitled to such damages before the same shall be paid."

I think that the complaint should aver the furnishing of such abstract.

It is not necessary to plead that the defendant is a corporation.

Sec. 17, Chap. 11, City Charter.
Dillon's Municipal Corps., Vol. I., S. 83 (4th Ed.)
Smith v. The City of Janesville, 52 Wis., 680.

By Section 6a of Chapter 10 it is in substance provided that the amount of damages awarded the land owner shall be paid "as soon as a sufficient amount of the assessment shall have been collected for that purpose."

That is not paying or securing to the land owner the just compensation required by Section 13, Article 1 of the Constitution of this State as a condition precedent to the appropriation of private property for public use.

If that provision of the charter has any validity it is a matter of defense to be pleaded as such.

Demurrer sustained.

Mattie Miller v. St. Paul City Railway Company.

(District Court, Washington County.)

EVIDENCE—EXPERT TESTIMONY.

A physician may testify as an expert as to the physical condition of a plaintiff where his knowledge is based upon an examination of the plaintiff and upon sworn statements of the plaintiff as to his symptoms and suffering, but not where his knowledge is based, in part, upon statements made to him by the plaintiff's physician.

J. N. CASTLE for plaintiff. MUNN, BOYESEN & THYGESON, and MANWARING & SULLIVAN for defendant.

Plaintiff had a verdict against the defendant. The defendant moved to vacate the verdict and for judgment in its favor, notwithstanding the verdict, and also, in its moving papers, asked "for such other and further relief as may be proper in the premises."

On the trial plaintiff called M. and N., two physicians, as experts. Under objection of defendant these physicians testified, as experts, as to facts detailed to them by the plaintiff at the time these physicians made an examination of her condition. Their opinion was based in part on the statements made to them by plaintiff. One of the physicians' opinion was based in part upon statements made to him by the attending physician of plaintiff, which statements were made at the time of the examination by such expert into the plaintiff's condition.

The Court held that a physician may testify and give his opinion as to the physical condition of the patient after an examination, though it be based in part on statements of the patient made at the time of such examination as to his suffering and symptoms; but holds that it was error in denying the motion of defendant made on the trial, to strike out the testimony of Dr. M., for the reason, as he testified, that his opinion was based in part upon statements made to him at the time he examined the plaintiff by Dr. N., plaintiff's attending physician. Motion granted.

WILLISTON, J.

Pioneer Press Co. v. James M. Hutchinson and Frederick A. Pike.

(District Court, Ramsey County, 60301.)

JUDGMENT—ORAL ORDER FOR. APPEAL—WHEN EFFECTUAL AS STAY.

An oral order for judgment announced by a judge in open court, does not alone authorize the clerk to enter judgment.

An appeal which is not perfected by service of notice of appeal on the clerk, or by service of a bond, does not stay proceedings; and where an order for judgment has been made orally in open court, and thereafter an appeal is perfected, a formal order may thereafter be made and judgment entered thereon.

B. H. SCHRIBER for plaintiff. CHAS. CONRADIS for the defendants.

This matter arose on a motion on the part of defendant to correct the records of the Court, the motion being directed against an entry of judgment made by the clerk on an oral order made by the judge in open court, and entered by the clerk in his minutes. Other facts appear in the memorandum.

BRILL, J. This action was commenced on the 30th of November,

1894. The pleadings consisted of a complaint, answer and reply. Defendants demurred to the reply, and, the demurrer having been argued, upon February 1st, 1895, an order was made and served upon the defendants, overruling the said demurrer. February 4th defendants served upon plaintiff's attorney a notice of appeal from the order, but the notice was not served upon the Clerk of Court, nor filed with him until March 4th, 1895. A bond on appeal was given as hereinafter stated.

The case was upon the general term calendar for February, was set for trial, and upon February 28th was called for trial. The parties then appeared and the defendants moved for a continuance, which motion was denied. The plaintiff thereupon moved for judgment in its favor, upon the pleadings. The motion was argued at length, and, at the close of the argument, the Court announced its decision that the motion would be granted. Thereupon the defendants asked leave to amend their answer, and argument was had upon the application.

While these proceedings were being had, one of the attorneys for the defendants had been procuring a bond to be executed for an appeal from the order overruling the demurrer, and he had presented the bond for approval to the Judge who made the order overruling the demurrer. At the close of the argument for leave to amend, and before the Court had announced its decision upon the application, said attorney and the Judge to whom the bond had been presented appeared in court with the bond; the proceedings were interrupted; the Judge aforesaid approved the bond, and it was then filed with the Clerk. The bond was executed in due form, and contained the prescribed provisions for staying proceedings on appeal. A copy of the bond was served on the plaintiff's attorney upon March 4th. Immediately after the approval and filing of the bond the Court announced that the motion to amend the answer was denied, and called attention to the fact that plaintiff's motion for judgment on the pleadings had been granted.

The appeal was not perfected, if perfected at all, until March 4th, and no proceedings were stayed prior to that time.

An oral order for judgment, announced by a Judge in open court, does not alone warrant the Clerk in entering judgment. But if the order is entered by the Clerk in the minutes, as the order of the Court, I am of the opinion that it becomes effectual. The entry which was made by the Clerk in the minutes in the case is as follows: "Counsel for plaintiff moved for judgment as claimed in the pleadings. Granted by the Court." It is somewhat doubtful whether this entry so made is sufficient to warrant the entry of judgment.

The Clerk made in the Register of Actions, under the appropriate title, the entry which defendants ask to have stricken out. That entry imports that judgment was entered; and as no judgment has been entered (though I do not think it prejudices the defendants) it is not strictly accurate, and, it being one of the records of the Court, it is proper that it should be corrected.

The motion to strike from the record is somewhat vague and general, but taking the papers together, and the statement of counsel made at the argument, it appears that the entry in the register is the entry to which the motion is directed.

The appeal in this case does not prevent the making or filing of an order for judgment, and the entry of judgment thereon at this time. The

motion for judgment proceeded upon the theory that the answer did not state a defense or counter-claim; and the Court, after hearing counsel, took this view of the case. If this is correct it is immaterial whether it is sufficient or not. The motion for judgment conceded the truth of the allegations of the answer, and this places defendants in as favorable a position as if the demurrer were sustained. In this view of the case, and to save any question as to the effect of the entry made by the Clerk in the minutes at the time the motion for judgment was made, a formal order may be now made and filed, and judgment entered.

I have gone over the case and have given my views outside of the matters strictly involved in this particular motion; but the entire matter was gone over at the argument, and I have taken this course in accordance with the expressed wishes of counsel upon both sides.

William P. Carroll v. The Minnesota Savings Bank.

(District Court, Ramsey County, 60110.)

MORTGAGES—USURY—PARTIES.

Where the purchaser at a mortgage foreclosure sale causes the certificates to be made to a third person, as security for a debt due a third person, the relation between such purchaser and such third person, as to such certificate, is that of mortgagor and mortgagee.

Where a transaction is usurious, the remedy is to have the contract declared void, and, possibly, to recover back what has been paid or delivered.

Where a title is taken in the name of a third person, such person is a necessary party in an action to redeem or recover the land.

JAMES B. TRASK for plaintiff. P. C. STEVENS for defendant.

Plaintiff alleged that certain real estate was properly mortgaged by the owners thereof, and, default having occurred, the mortgages were foreclosed, and that he had become the purchaser at such foreclosure sale. He further alleged that at about the time of such purchase by him he borrowed of the defendant for one year the sum of $373.95, for which he executed to the defendant his promissory note for $411.34, the amount thereof with the interest to accrue thereon; and at the same time and as part of the transaction, the defendant demanded, and he promised to pay it, as additional interest, the further sum of $50. As security for such loan the plaintiff further alleged he agreed to assign the sheriff's certificates on the sales above mentioned, and that to carry out such agreement he caused the certificates to be made direct to one W. R. Wilmont, an officer of the defendant, for the defendant; that the property was not redeemed, and the title matured under the mortgage foreclosure, and that the defendant had conveyed to one Rush B. Wheeler, to the injury and damage of plaintiff. It was further alleged that the plaintiff, without waiving his right to claim the note void for usury, had tendered payment thereof and demanded a conveyance to himself of the property in the said sheriff's certificate described; that the said tender was not accepted, and that the defendant refused to account to the plaintiff in this matter. Plaintiff alleged that the value of the premises at the time of the alleged conversion thereof was $13,000; that the value of the use thereof had been $2,000; that he had been damaged by trouble and annoyance and expense by said wrongful sale and conversion in the sum of $500 and prayed for judgment for $15,500. The defendant demurred for non-joinder of necessary parties defendant, contending that Wilmont and Wheeler were both necessary parties, and upon the ground that the complaint did not state facts sufficient to constitute a cause of action.

BRILL, J. The original transaction set forth in the complaint, out of which arises plaintiff's rights, is a mortgage.

The allegations regarding the sheriff's certificate are somewhat contradictory, but their meaning seems to be that the plaintiff bid off the property and that the certificate was taken in the name of Wilmont as security for a loan made by plaintiff to defendant. If the plaintiff bid off the property, he had the right to have the certificate issued to himself. He could have compelled the sheriff to execute a certificate to himself, and it is immaterial as affecting the nature of the transaction that the certificate was taken directly from the sheriff to Wilmont. Fisk v. Stewart, 24 Minn., 97, and N. Y. cases cited. Plaintiff is in the position of a mortgagor. The remedy of the mortgagor, whether the mortgage is in ordinary form, or in the form of the title, is, primarily, to redeem, and not the recovery of damages. This action is of a dual nature. It is alleged that the loan, for which the mortgage was given, was usurious. The remedy when a transaction is usurious is to have the contracts or securities declared void, and, perhaps, to recover back what has been delivered or paid. So far as the question of usury enters into this case, it is to be considered in connection with the allegation which makes the transaction a mortgage. Where the grantee, in a deed given as security, has conveyed the land to an innocent purchaser so that the mortgagor's right to the land is cut off, an action will lie against the mortgagee for an accounting or the value of the land. In this case the certificate was taken in the name of Wilmont, and the title matured in him. He is a necessary party in an action to redeem or recover the land, unless he has conveyed. There is no allegation that Wilmont has conveyed the land. The allegation that the defendant conveyed is immaterial because the defendant did not have the title, and even if the conveyance passed the title, plaintiff's rights were not affected, because it does not appear that the purchaser took without notice. Demurrer sustained with leave to amend.

Albert L. Cox, Plaintiff, vs. L. B. Ridpath, Defendant, Chicago Great Western Ry. Co., Garnishee, and George W. Barnes, Intervenor.

(District Court, Ramsey County, 53892.)

JURISDICTION—NON RESIDENT—APPEARANCE.

A non-resident, whose funds in the hands of a resident are garnished, gives the Court jurisdiction by appearing and setting up objections or defenses to the garnishment.

H. H. HERBST for plaintiff. T. R. PALMER for defendant.

Action against a resident of the State of Iowa, and a railroad company which does business in the States of Iowa and Minnesota, as garnishee.

One Barnes filed a complaint in intervention in which he alleged, among other things, that the defendant was a resident of the State of Iowa, and the head of a family, and that sections 3072, 3078 of the statutes or code of laws of said State of Iowa, which, during all the time herein mentioned, were and now are in force, provide that if any debtor is a resident of said State of Iowa, and the head of a family, all the earnings of such debtor for his personal services, or those of his family at any time within ninety days next preceding the levy, or garnishment, are exempt from garnishment or levy. Plaintiff moved to strike out this portion of the complaint in intervention.

KELLY, J. The intervenor having appeared and pleaded generally in this action is thereby not in position to invoke the principle which he asks to have applied. He has conferred jurisdiction on this court to determine to whom the money garnished belongs, and it will decide that question by the law of the forum.

The strongest case in the intervenor's favor is Drake vs. Lake Shore &

S. Railway Co., 69 Mich., 168 (13 Am. St. Rep., 382.) In that case the Court says: "The wages of an employe, exempt from attachment by the law of the state of his residence, where his contract for services is made and performed, and where his wages are payable, and the debt contracted, are not subject to garnishment in another state, *where he has not subjected himself to the jurisdiction of the court, save by the disclosure of the garnishee.*" To same effect see page 147 of note to Mo. Pac. Ry. Co. vs. Sharret (49 Kans. 375), found in 19 Am. St. Rep. 143.

Upon the question sought to be raised, but which I do not decide, the holdings are not uniform. The cases above cited and Mason vs. Beebe, 44 Fed. 556, seem to sustain the intervenor, while Mooney vs. Union Pacific Railway Company (Iowa) 14 N. W. Rep. 343 and Lyon vs. Callopy et al., (Iowa) 54 N. W. 476, hold otherwise.

William R. Merriam v. Eugene Underwood et. al. (District Court, Ramsey County, 60871.)

INSOLVENCY—DUTY OF INSOLVENT TO MAKE ASSIGNMENT. NON-RESIDENTS—SERVICE OF AN ORDER TO SHOW CAUSE UPON ATTORNEYS OF.

It is the duty of an insolvent debtor, against whom actions have been commenced, to make an assignment before judgment has been obtained against him, and the moving creditor obtain a preference.

If actions have been commenced, and the debtor does not answer therein or assign, the court will, upon proper cause shown, restrain the entry of judgment in such action and appoint a receiver for such debtor. Where such moving creditors are non-residents the court will direct service of an order to show cause in such matter to be made upon their attorneys of record.

DAVIS, KELLOGG & SEVERANCE for plaintiff. JONES & MCMURRAN and T. R. PALMER for defendants.

This matter came on to be heard on petition of said Wm. R. Merriam that the said Eugene Underwood be declared insolvent, and that a receiver of his unexempt property be appointed. Among other things, it was represented in said petition that the defendants Thompson and Read had each commenced action against said defendant Uderwood for large sums of money; that they had filed their complaints in said actions and served the summons therein personally, and that the said Underwood had failed to compromise or settle their claims, and, although twenty days had almost elapsed since the service of the summons upon him, he had failed to answer or make an assignment for the benefit of his creditors, and that he did not intend to do so, and that by reason of said matters said Thompson and Read were about to obtain a preference over the other creditors of said Underwood.

Wherefore, said petitioner prayed that said Underwood be declared insolvent, and that said Thompson and Read be enjoined from entering judgment in said actions and taking steps to obtain a preference over the other creditors of said Underwood.

Thompson and Read being absent from the State, the order to show cause was, by order of Court, served on their attorneys of record. The Court finding the facts as set out in said petition adjudged the said Underwood to be insolvent, and entered an order restraining said Thompson and Read from entering judgment, or proceeding in said matter until after the appointment of a receiver.

KELLY, J. In Yanish v. Pioneer Fuel Co., 62 N. W. Rep., 387, the Supreme Court has construed Chapter 148, General Laws of 1891 (familiarly known as the Insolvency Law) and in particular Sections 1, 2 and 3 as amended by Chapter 30, General Laws 1889. The Court say: "Construing together the provisions of Sections 1, 2 and 3 above quoted and referred to, and other provisions of this statute, we are of the opinion that the Legislature intended to impose on the insolvent debtor the positive duty of preventing preference among his creditors. If the debt is due, and he has no

bona fide defense, it is his duty, under the statute, to prevent such a preference by making an assignment before the proceedings for the collection of the debt have reached a stage where he cannot prevent a preference. If he wilfully fails to perform this duty, it must be held that he intended the consequence of his own unlawful omission, that he intended to permit such creditor to take a preference, that he intended that such creditor should have a preference."

But it is claimed here that until the time for answering had expired in the Thompson and Read suits the insolvent Underwood still had time to assign, and could not be adjudged to have omitted any legal duty until clearly in default by lapse of this time. When Underwood was served with the order to show cause in this matter he had clear notice that his creditor, the petitioner, charged him specifically with being insolvent, and to intend to prefer his other creditors, Thompson and Read, by failure to answer to the complaint of each. If these charges were not true, it was his duty to answer in those actions and in this proceeding. He has done neither. The petitioner was not obliged to wait until Thompson and Read had entered judgment, and sue to set it aside so far as it should become a lien on real estate, as in the Yanish case. He had a right to proceed as he did, and he had clearly the power, and did not in anywise abuse it, to stay the entry of judgment in those cases until this order to show cause could be heard. It is a very ordinary exercise of the restraining power of the Court to prevent the consummation of legal wrongs. The manner of the notice given to Thompson and Read is clearly, by the law, left to the Court's discretion, and the notice given was the very best possible notice, to their attorneys of record.

John M. Warner v. City of St. Paul.
(District Court, Ramsey County, 60279.)

ASSESSMENTS FOR LOCAL IMPROVEMENTS.—NOTICE TO BE GIVEN OWNER.—PAYMENT UNDER DURESS.

A proceeding to enforce the payment of an assessment for local improvements under the charter of the City of St. Paul is a proceeding *in rem* against the property.

(Query.) A payment of a judgment obtained against property for local improvement assessment is not a payment under duress.

B. GRIBBLE for plaintiff. LEON T. CHAMBERLAIN for defendant.

Action brought to set aside a judgment obtained against certain real estate for non-payment of an assessment for local improvements, and for damages caused by the entry thereof.

Plaintiff alleged that he was the owner of record of said real estate; that by the error of the Board of Public Works and the Treasurer of said city he was not given notice of said assessment until four days before the time to redeem from sale thereunder; that he had good grounds to contest the said assessment if he had received notice thereof, and that in order to protect his rights in said property he was compelled to pay the amount of said judgment and interest and costs. Defendant demurred generally.

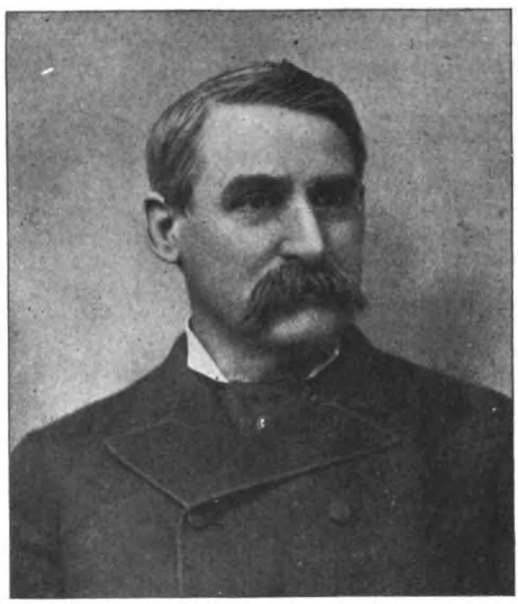
BRILL, J. The complaint is somewhat indefinite and it is difficult to know precisely what some of the allegations mean; but I take it that the complaint is based upon the fact that the city made a public improvement which it was authorized to make, and for which the Board of Public Works was authorized to make and did make an assessment upon the plaintiff's property. It was alleged "that the Board of Public Works let a contract for the opening of Fairview Street," but this was interpreted by counsel, at the hearing, as meaning that the Board let a contract for the grading of Fairview Street. If the complaint is not to be taken as setting up a proceeeding authorized by the charter, then it is difficult to understand why

the payment made by the plaintiff is not voluntary, and upon that theory plaintiff has no cause of action; but, assumed that the complaint sets forth a proceeding authorized by the charter, it appears that the assessment made by the Board was not paid and that a judgment against the property was entered therefor, and the property sold thereunder. Plaintiff redeemed from sale. It is not plain that any of the proceedings were irregular or void, except that another person than the plaintiff was named as the owner of the property; and because of this mistake in the name, the plaintiff seeks to have the proceeding set aside and to recover the amount paid by him.

So far as the failure to send personal notice to the owner is concerned, the charter expressly provides that that should not affect the validity of the proceeding; and it is settled that the actual notice to the owner is not necessary. Dousman v. City of St. Paul, 23 Minn., 394.

The proceeding is a proceeding in rem against the property. I have not been pointed to any provision which requires the name of the owner to appear in any of the proceedings, and I have been unable to find any such provision. Whenever there is any form of proceeding given in the charter, or any specific provisions as to what shall be contained in any of the written or printed proceedings, nothing is said about the name of the owner, and it was not contemplated that the name of the owner should appear at all. A mistake in the name is not jurisdictional. It must be held, notwithstanding the mistake in the name of the owner, that the Court had jurisdiction to enter the judgment against the property

It is doubtful, in any event, whether the payment made by the plaintiff can be considered as made under duress. See Shane v. City of St. Paul, 26 Minn., 543. Demurrer sustained.



HON. CHARLES D. KERR,

District Judge, Second Judicial District.

...THE...

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THE MONROE DOCTRINE.

In an article recently published in the New York Herald is a very clear and pertinent definition of the principles involved in the Monroe doctrine, written by the American historian, John B. McMaster. He divides the subject into seven parts, and sums up the meaning of this important principle of international law as follows:

"1. It must be remembered, in the first place, that the declaration on which Monroe in 1823 consulted his cabinet and his two predecessors, Jefferson and Madison, related to the meddling of the powers of Europe in the affairs of American States.

"2. That the kind of meddling then declared against was such as tended to control the political affairs of American powers, or was designed to extend to the New World the political system and institutions of the old.

"3. That the declaration did not mark out any course of conduct to be pursued, but merely asserted that interposition of the kind mentioned would be considered as dangerous to our peace and safety, and a manifestation of an unfriendly disposition toward the United States.

"4. That this doctrine has never been indorsed by any resolution or act of congress, but still remains the declaration of a president and his cabinet.

"5. Nevertheless, it was and is an eminently proper and patriotic doc-

trine, and as such has been indorsed by the people of the United States, and needs no other sanction. The people, not congress, rule this country. It is not of the smallest consequence, therefore, whether congress ever has or ever does indorse the doctrine, which very fittingly bears the name of the first president to announce it.

"6. The Monroe doctrine is a simple and plain statement that the people of the United States oppose the creation of European dominion on American soil; that they oppose the transfer of the political sovereignty of American soil to European powers, and that any attempt to do these things will be regarded as 'dangerous to our peace and safety.' What the remedy should be for such interposition by European powers the doctrine does not pretend to state; but this much is certain, that when the people of the United States consider anything 'dangerous to their peace and safety' they will do as other nations do, and, if necessary, defend their peace and safety with force of arms.

"7. The doctrine does not contemplate forcible intervention by the United States in any legitimate contest, but it will not permit any such contest to result in the increase of European power or influence on this continent, nor in the overthrow of an existing government, nor in the establishment of a protectorate over them, nor in the exercise of any direct control over their policy or institutions. Further than this the doctrine does not go. It does not commit us to take part in wars between a South American republic and a European sovereign when the object of the latter is not the founding of a monarchy under a European prince in place of an overthrown republic. In the present instance, therefore, the doctrine does not apply so long as England does not hold the ports of Nicaragua longer than is necessary to secure the payment of the sum she is determined to extort. Should she attempt to hold Nicaragua forever, the Monroe doctrine would apply, and our duty and policy would be resistance."

DECISION OF THE UNITED STATES CIRCUIT COURT OF APPEALS.

[Reprinted from Chicago Legal News.]

Robert W. Workman v. City of New York, and James A. Gallagher.

(U. S. Circuit Court of Appeals, Second Circuit.)

MUNICIPAL CORPORATIONS—WHEN LIABLE FOR NEGLIGENCE OF FIRE DEPARTMENT.

The City of New York is not responsible for the negligence of members of its fire department committed while attempting to extinguish a fire within the corporate limits.

This rule is not affected by the fact that the suit, based on that negligence, is brought in a court of admiralty instead of a common law court, and that the negligence complained of consisted in the improper navigation of a boat in the service of the fire department. Although in such a case the boat may have been the direct instrumentality in effecting a marine tort, neither the vessel nor the owners can be held responsible by reason of that circumstance alone.

Officers selected by municipal corporations to perform a public service for the general welfare of the inhabitants or of the community, in which the corporation has no private interest, and from which it derives no special benefit or advantage in its corporate capacity, are not to be regarded as the servants or agents of the municipality and for their negligence or want of skill it can not be held liable, even though their duties are defined and their offices created by the charter or organic law of the municipality and such officers are selected, employed and paid by the corporation itself.

In selecting and employing such officers and agents, the municipality merely performs a political or governmental function, the duties entrusted to them do not relate to the exercises of corporate powers, and hence they are the agents and servants of the public at large. (Reversing 63 Fed. Rep., 298.)

Appeal by the mayor, aldermen and commonalty of the City of New York and James Gallagher from a decree of the District Court of the United States for the Southern District of New York, that the libelant recover damages from the respondent for injuries sustained by a vessel belonging to libelant by reason of the collision

with that vessel of the fireboat the New Yorker.

On June 11, 1893, a fire broke out on the water front of New York city, on the East river, and both the fire boats, the New Yorker and the Havemeyer, were summoned by telegraph to assist in extinguishing the fire. The New Yorker, coming up the East river with the tide and attempting to enter the slip in which was the barkentine, the Linda Park, of the libelant, came into collision with the Linda Park (as was claimed by the respondents, by being caught by the eddy between the piers and swept against the barkentine).

A libel was filed, and as amended was against the board of fire commissioners of the City of New York, the pilot of the New Yorker, one Gallagher, and the mayor, aldermen and commonalty of the City of New York.

The case was tried in April, 1894, before Hon. Addison Brown, Judge of the District Court, and that court thereafter decreed that the libel be dismissed as against the fire department of the City of New York, but rendered a decree for damages against the mayor, aldermen and commonalty of New York and against James A. Gallagher, the pilot.

From this decree the present appeal was taken by both of the respondents, the mayor, etc., and James A. Gallagher.

WALLACE, C. J.: The evidence in the record adequately supports the conclusion of the court below that the injuries caused by the libelant's vessel by the impact of the fire boat were caused by the negligent manner of the fire boat while the latter was trying to reach a convenient location to play upon a burning building near the pier at which the libelant's vessel was moored. The case then presents the legal question whether the municipal corporation, the mayor, etc., of the City of New York, is responsible for the negligence of the members of its fire department, committed while attempting to extinguish a fire within the corporate limits.

That the suit is brought in a court of admiralty instead of a common law court, and that the negligence consisted in the improper navigation of the vessel, are considerations which cannot affect the conclusion. Although the vessel may have been the direct instrumentality, the offending thing, in affecting a marine tort, neither the vessel nor her owners can be held responsible by reason of that circumstance alone. The common case of a collision of a vessel in tow of another, and a third vessel, produced by the negligence of the towing vessel, is a sufficient illustration. If the vessel in tow is free from negligence, neither she nor her owner is liable for the injury. Accountability, either personally or on the principle of agency, must concur with injury to give a cause of action in any tribunal, equally in admiralty as at common law. If the City of New York would not have been liable if one of its steam fire engines, manned by the members of the fire department, had, by want of due care, while endeavoring to reach a conflagration, injured an individual or his property, it cannot be liable in the present suit.

It is familiar law that the officers selected by a municipal corporation to perform a public service for the general welfare of the inhabitants or the community, in which the corporation has no private interest, and from which it derives no special benefit or advantage in its corporate capacity, are not to be regarded as the servants or agents of the municipality, and for their negligence or want of skill it cannot be held liable. This is so, notwithstanding such officers derive their

appointment from and are paid by the corporation itself. In selecting and employing them the municipality merely performs a political or governmental function; the duties intrusted to them do not relate to the exercise of corporate power, and hence they are the agents or servants of the public at large. Upon this principle it has uniformly been decided by the courts that municipal corporations are not liable for the negligence or wrongful acts of the officers of the police or health departments committed in the course of their ordinary employment. Unless the duties of the officers of the fire department are of a different complexion, and they are the servants of the municipality because they are engaged in performing one of its corporate functions, the same principle must extend immunity to the municipality for the negligent acts of these officers and their subordinates.

A municipal corporation, like a private corporation, is liable to any person who has sustained injury in consequence of its neglect to perform a corporate duty; but because the duties of municipal corporations in respect to protecting its citizens from the dangers of fires are governmental, and not corporate, they are not liable to the owner of property injured by fire in consequence of their neglect to provide suitable fire apparatus, or to provide and keep in repair public cisterns or the failure of their firemen to use proper efforts: Wheeler v. Cincinnati, 19 Ohio St., 19; Batch v. Covington, 17 B. Mon., 722; Brinkmeyer v. Evansville, 29 Ind., 187; Waitman v. Washington, 1 Black, 39, 49; Kies v. Erie City, 135 Pa. St., 144; Heller v. Sedalia, 53 Mo., 159; Robinson v. Evansville, 37 Ind., 334. So uniform and numerous are the authorities against the proposition that a municipal corporation is liable for the negligent acts of these officers that to discuss it as an original question would seem to be inappropriate. In one of the most recent text books on the law of municipal corporations the rule is thus stated: "Municipal corporations are not liable for the negligence of their firemen although they may be appointed and removed by the city, and the performance of the duties are wholly subject to its control." Tiedman on Municipal Corporations, Section 333.

A reference to the following adjudicated cases, in which the rule has been applied, will suffice to show how universally it obtains in the courts of this country: Hafford v. New Bedford, 16 Gray, 297, in which a hose carriage, on its way to a fire, ran over the plaintiff; Fisher v. Boston, 104 Mass., 87, in which the injury was caused from the bursting of a hose; Burrill v. Augusta, 78 Maine, 118, in which a horse was frightened by escaping steam from an engine left in the street; Wild v. Patterson, 47 N. J. Law, 406, in which the injury was caused from a defect in the brake of an engine; Hayes v. Oshkosh, 33 Wis., 314, in which damage was sustained by the negligent management of an engine in allowing the escape of sparks; Wilcox v. City of Chicago, 107 Ill., 334, a case of collision with a hook and ladder wagon; Edgerly v. Concord, 58 N. H., 78, a case of the negligent testing of a hydrant; Howard v. San Francisco, 51 Cal., 52, a case of collision with an engine; McKenna v. St. Louis, 6 Mo. App., 320, a case of the negligent management of hose carriage; Jewett v. New Haven, 38 Conn. 368, a similar case; Grube v. St. Paul, 34 Minn., 402, a similar case; Welsh v. Rutland, 56 Vt., 228, a case of injury of slipping on ice caused by the escape of water from fire hydrant; Greenwood v. Louisville, 13 Bush., 226, in which plaintiff was negligently run over on the sidewalk by an engine; Freeman v. Philadel-

phia, 7 W. N. C. Pa., 45, and Knight v. Philadelphia, 15 W. N. C. Pa., 307, cases of careless driving of fire engine; Dodge v. Granger, 17 R. I., 664, a case of injury by the negligent projection of a ladder from an engine house; Simon v. Atlanta, 67 Ga., 618, a case of injury from a rope stretched across the street by the fire department.

It is quite immaterial that the duties of these officers are defined and the officers created by the charter or organic law of the municipality; the test of corporate liability for the acts of the officers of the municipality depends upon the nature of the duties with which they are charged; if these, being for the general good of the public as individual citizens, are governmental, they act for the state, if they are those which primarily and legitimately devolve upon the municipality itself, they are its agents. Thus in Mead v. New Haven, 40 Conn., 72, the city, pursuant to its charter, appointed an inspector of steam boilers and passed a by-law which imposed a penalty on any person who should use a boiler without having it tested by an inspector. In a suit for the negligent act of the inspector the court said: "The duty of inspection of boilers is governmental. The object of the inspection is to protect all citizens from danger who may come in contact with the boiler, or may be exposed in any way to danger from its unsafe condition. The city, as such, has no pecuniary or individual or private interest in the matter, and although the power of the city over the subject is conferred by the charter, and not by the general law, yet the city must, we think, be regarded as the agent of the government, and acting for the state, and not for itself, in making the appointment of inspectors, and therefore not liable for the inspectors' negligence."

The fire department of the City of New York derives its origin and defined powers from the same organic law as do the commissioners of charities and correction, and the department of public instruction, and the officers of each are constituted by the appointment of executive officers of the city. Of the commissioners of charities and correction the Court of Appeals said in Maximillian v. The Mayor, 62 N. Y., 160: "It is seen at once that the powers and duties of the commisioners of charities and correction are not to be exercised and performed for the special benefit of the defendant. It gets no emolument therefrom nor any good as a corporation. It is the public, or individual members of the comunity who are interested in the due exercise of these powers and the proper performance of their duties. * * * These chief officers, though in a sense its officers, as having no power unless after appointment by it, and as mainly confined within its territorial boundaries, are yet officers of the state government, in the sense that they perform its functions within a designated political division of the state." Of the department of public instruction the Court of Appeals said in Ham v. The Mayor, 70 N. Y., 459: "Although formally constituted a department of the municipal gevernment the duties which it was required to discharge were not local or corporate, but related and belonged to an important branch of the administrative department of the state government." It was held in each of these cases that the City of New York was not liable for the negligence of an employe of one of these departments. And in Thompson v. The Mayor, 52 Super. Ct. Rep., 427, it was held that the city was not liable for the negligent conduct of the employes of the fire department as at present constituted.

We entertain no doubt that the city

was not liable for the negligent management of the fire boat in the present case, and that the libel against the mayor, etc., should have been dismissed by the District Court.

It is accordingly ordered that the cause be remanded to the District Court with instructions to dismiss the libel against the mayor, etc., with costs of this court and of the District Court, and to affirm the decree against the respondent, Gallagher, with costs.

COMMERCIAL COURTS OF LONDON.

The following letter from the London correspondent of The American Lawyer is of interest to the Minnesota lawyer. The condition is rapidly becoming the same in the larger cities of the state as that described, and some remedy will undoubtedly soon have to be found. Our procedure is no more simple than that of the English courts, under the Judicature Act, and the delays are now very inconvenient and burdensome in the trial of commercial cases, and have already been instrumental in driving a great deal of business from the courts to the loss of the profession as well as to the parties, who prefer a poor settlement to a tedious and worrysome litigation, even though finally attended by just judgment and decision.

"For many years past it has been patent to the mind of every thinking lawyer in England that our law courts no longer retain the confidence of the commercial community. The reasons are not far to seek. Business men find law slow, when it ought to be speedy; rigid, when it ought to be flexible; technical, when it ought to be simple; obscure, where it ought to be plain; costly, when it ought to be cheap. While the steamship, the railway, the penny post, the telegraph and the telephone have at one and the same time opened up new realms to commerce and enormously facilitated and increased old and new forms of business, law has dragged along in much the same leisurely, old stagecoach manner, until it is hundreds and hundreds of miles behind the times, and it is doubtful whether it will ever overtake commerce again. For it is impossible satisfactorily to apply to the legal working of the complicated, ever-expanding and flexible commercial machine of modern times, with its high velocity and its million and one new forms of business and combinations of circumstances, only those few somewhat rigid, principles which worked so admirably when applied to the slow, cumbrous, legal commercial machine of a hundred years ago. One might as well attempt to regulate, control and keep up the motion of one of the very latest forms of locomotive steam engines by applying to its working as a whole, those, and only those, scientific principles which need to be taken into account in running a stagecoach. Lawyers have been slow to see this, and in deference to the modern prejudice against judge-made law even the few of our judges who were capable of so doing have shrunk from boldly grappling with the difficulty. Even where the legislature did its best to remedy the evil, as, for example, by the Factory acts, the courts, by their extremely narrow rules of interpretation, almost rendered the acts useless. The consequence has been that the mercantile community, finding it hopeless to expect anything from the judges and the legislature, have themselves taken the matter in hand by establishing arbitration as the general method of settling commercial disputes. Each line of business soon had a number of upright and competent business men willing to act as arbitrators. The advantage of going before a man who, from his own knowledge of business, at once grasped the real point at issue, and

who firmly declined to attempt to unravel the subtle technicalities which judges so delight in, was soon obvious. The parties obtained at a comparatively slight expense a speedy decision, which fairly squared with their own mercantile notions of right and wrong, whereas, had they gone to law, it was very likely that their case would have come before a judge totally ignorant not only of the meaning of the commercial words, documents and usages of the particular business, but even of the very elements of mercantile law; so that so much time, trouble and money would have been wasted that the ultimate decision would have benefited and pleased neither party. The new rage for arbitration culminated in 1892 in the establishment of the City of London Chamber of Arbitration, under the joint auspices of the Lord Mayor and Corporation and the London Chamber of Commerce. The distinctive feature of this tribunal is that business men are the judges and that they have a lawyer to act as legal assessor. Mean time, the judges of the Queen's Bench Division began to realize that a considerable portion of Othello's occupation had gone, and bethought themselves that the discontinuance of the Guildhall sittings must be the cause, and they concluded that if those sittings were begun again commercial law business would again return to the courts. Accordingly, the Judicature act of 1891 was passed and sittings thereunder again held at the Guildhall, but they have utterly failed to achieve their object, and have now been discontinued. As was said at the time by an eminent Queen's counsel: "One reason for their failure is that the judges who were appointed to sit at Guildhall were not always men with special qualifications for determining commercial disputes. A selection ought to have been made of judges specially versed in mercantile matters."

"Profiting by the lesson inculcated by this failure, the judges of the same division, on the 24th of May, 1894, passed the following resolution: "That it is desirable that a list should be made of commercial causes to be tried at the Royal Courts of Justice by a judge alone, or by jurors summoned from the city, and that a commercial court should be constituted of judges to be named by the judges of the Queen's Bench Division." In accordance with this resolution the judges of that division issued a notice on the 9th of February, 1895, giving effect to that resolution by ordering that a new and special tribunal for the trial of commercial causes should come into existence on the 1st of March, 1895, and that Mr. Justice Mathew should be the judge. Everything has been done in the direction of simplifying procedure, with a view to enable parties, if they so desire, getting a speedy and final judgment. The order further defines what are commercial causes and orders a separate list of such causes to be kept, but no cause is to be entered in such list for trial except by direction of a judge charged with commercial business. After writ, or originating summons, application for his judgment on a point of law may be made to the judge, who is also empowered, at any time after appearance and without pleadings, to make such order as he thinks fit for the speedy determination in accordance with existing rules of the questions really in controversy between the parties. Without going further into the matter, everything has been done to bring the court abreast of modern commercial requirements, and it starts with a judge who possesses the confidence of the whole of the mercantile community. Not only that, but lawyers here expect a great deal from the genius of the new Lord Chief Justice of England—Lord Russell of Kil-

lowen—and so far they have not been disappointed. It is felt that if these two judges cannot lure commercial causes back to the courts that nobody else can, and lawyers look for the result of the attempt with mingled feelings of anxiety and hope, in which, however, hope decidedly predominates. At present Mr. Justice Mathew is dealing with commercial causes chiefly in Chambers, but on the 11th of March he will commence his sittings in court. The same eminent commercial lawyer whose words we quoted above is also reported to have said: "Commercial cases can easily be tried by judges who have gone through a proper training for the work at the bar. Mr. Justice Mathew, for instance, is pre-eminently qualified to discharge the duties of the special court which the judges have established by their resolution."

BANKS AS BORROWERS—STARE DECISES.

The Banking Law Journal, in an editorial called forth by the decision of the Supreme Court of the United States in Western National Bank v. Armstrong, 14 U. S. Sup. Ct. Rep., 572, strongly sets forth the great injury done by courts of last resort in overruling their former decisions which have been acted upon as established law. The case cited holds contrary to the former rulings of the Federal Courts, that it is not within the ordinary and legitimate course of banking business to borrow money and, therefore, that one lending to a bank must show that the officer procuring the loan had special authority to borrow the money.

The editorial says, in part:

"Up to the time of the rendition of this decision it had been largely the practice of banks, who made loans to other banks, to rely on the soundness of this last named rule, * supported as it was by many decisions, and to deal with the proper officers of borrowing banks on the assumption of their full authority to bind their institutions for the money loaned. When, therefore, the contrary decision of the Supreme Court was made, it came as a bombshell to many conservative banks whose money had been loaned to other banks without the production of special authority, in cases where the defense of want of authority was made or intimated, in bar of recovery. In the very case in which the decision was made a loss of the enormous sum of $200,000 was entailed upon a New York bank by the sudden and unexpected overturning of the previously established rule. In another case, reported in the present Journal, the still larger sum of $300,000, advanced by a New York bank upon the faith of existing law, is put in jeopardy, and its recovery will depend upon the ability of the bank upon a new trial, to prove special authority, or ratification of the officer of the borrowing bank. In other cases now pending, involving similar transactions made before the decision was rendered, has the same defense of want of special authority been interposed.

"This decision forcibly illustrates the enormous power for disaster lying dormant in the courts until given expression in the change of some rule of law judicially established—a power greater than that possessed by any law-making body. No legislature can make any law impairing the obligation of existing contracts; future contracts only are governed by any change in statutory law. But contracts entered into in view of existing judicial law, it is reasonable to say, may have their sanctity invaded and their value taken away, whenever the judiciary experience a change of view upon a given subject.

"Upon the merits of the new doc-

*That borrowing was within the ordinary course of banking business.

trine that the borrowing of money is outside of the ordinary function of banks, we think the reason and common sense of the question are on the side of the line of courts that have held it to be an ordinary and usual function. As a matter of abstract theory, the doctrine is unobjectionable, but law is designed to regulate actual facts, and as matter of fact, the borrowing of money by country banks, by way of re-discount with their city correspondents (admitted by the Supreme Court to be legal), is a very usual transaction. The deposit of money with a bank is in itself a form of loan to, or borrowing by, the bank; yet no one would claim that every depositor who hands in his cash to an Aymar or a Grady must inquire for his special authority to receive it, or else suffer loss by its deposit in pocket instead of till. Equally in the case of re-discounts, it is difficult to see a good reason for a requirement of special authority to the officer who acts for the bank. If borrowing by way of re-discount were an unusual transaction, the rule would be proper; but the transaction is a very frequent one. It is a method by which the banks in the cities loan a portion of their funds in the country districts. The loan, primarily, is made by the country bank, but it has an understanding with its city correspondent, that in case it runs short of cash, the city bank will advance the amount upon the security of bills receivable. The city bank is thus enabled to loan its money upon paper which has already passed the judgment of the country bank and in addition, has the security of the latter's guaranty. The loan, therefore, is a desirable one for the city bank, and the transaction is so frequent and usual all over the country as to be regarded as falling within the ordinary functions of banks. That occasionally a dishonest officer should appropriate the money borrowed for his bank, would not seem to make the general practice of borrowing money by way of re-discount illegitimate or call for a change of rule, any more than would the appropriation by a bank cashier or bookkeeper of a cash deposit handed in by a customer."

BOOK REVIEWS.

THE HORNBOOK SERIES. A Series of Elementary Treatises on all the Principal Subjects of the Law. Published in regular octavo form, and sold for the uniform price of $3.75 per volume, delivered. West Publishing Co., St. Paul, Minn.

A little over a year ago the West Publishing Company annnounced and began the issue of a series of books under the above title, planned to ultimately cover every important subject of the law, and prepared for the special use of students, although adapted to the lighter services of actual practice. It was the first systematized attempt to provide a literature designed, in method and matter, primarily for the instruction of the neophytes of the law. It threfore attracted no small degree of attention and was promptly judged by many of those entitled to express an opinion on the movement, either as destined to finally fail as a comprehensive scheme of primary text-book literature, or, at best, to succeed to but a limited extent. Others passed judgment upon each book as it appeared, regarding it solely in its character as an individual, distinct work, and overlooking the important fact that it was put forth as one of a growing group of volumes, all fashioned to meet a single idea, and intended to fit symmetrically into a general scheme of which it was a component. Because we believed it would be unfair, if not, indeed, unjust, both to the publisher and those to whom the series was particularly di

rected, to overlook or ignore the element of unity in these volumes, and, more especially, because, if the announced design was measurably attained as the series developed, a distinct, valuable and lasting benefit to the momentous cause of legal education would inevitably result, we chose to delay our judgment until such time as the series had disclosed its real character, and we might be able to form an opinion as to its practicable serviceableness in its chosen sphere.

At this writing the following volumes have been issued in the order named: "Norton on Bills and Notes," "Clark's Criminal Law," "Shipman's Common Law Pleading," "Clark on Contracts," "Black on Constitutional Law," and "Fetter on Equity." With these six works before us, we proceed to their examination, first as parts of a body of literature claiming to possess in common special attributes, whereby the study of law is facilitated without the surrender of any essential knowledge of its primal principles; and, second, as to the intrinsic quality of each author's labor.

It is quite generally known that the method of treating the law adopted by this series embraces (1) A succint statement of leading principles in black letter type; (2) A more extended commentary, elucidating the principles; (3) Notes and cititions of authorities; and (4) Problems and hypothetical cases to test the student's knowledge. It may as well be stated here that, except for Norton on Bills and Notes, the problems and hypothetical cases are printed separately in pamphlet form, and furnished to purchasers when desired. As to the other features, they form the body of the several works, and give them a distinctive characteristic. And this characteristic is something more than mechanical. It is a plan whereby the learner, or the perplexed practitioner, can secure the exact statement of a principle of law without a search through a mass of dissertation or of accumulatd judicial opinion, and in connection therewith find the leading cases upon which it is founded. Or, if this be not sufficient for his purposes,there follows, in a different type, an amplification of the condensed statement wherein is summarized, with authorities stated, the conclusions of the several courts passing upon the principle, either upholding, modifying, extending or disputing it. Thus, the student gets all that is requisite in the initial stages of his study, and the practitioner finds his knowledge clarified, and an accurate guide to the fuller founts of information, if a farther inquiry is necessary. It would be hard to suggest improvements upon the method described, in the matter of facilitating a search for the elementary rules of the law, and its practice. We have only words of cordial praise for the enterprise which devised and the skill which is guiding this series of elementary treatises to a place of importance as well as of prominence in our literature. At the same time we believe that if the series, in its entirety, was given a more rigid editorial supervision in the direction of the highest possible measure of scientific analysis of its several parts, each of which must, under the master hand of the editor co-operating with the several authors, attain the ideal set for the series by the publishers, namely, the creation of a standard line of purely elementary books of the law, the invaluable element of homogeneity would be enhanced and preserved. In short, to secure and retain to this series the full measure of its ambition the work of the different writers must conform more uniformly than is now the case, not only mechanically in the paragraphing, but scientifically, in the area and method of its structure, to the peculiar field it has wisely pre-empted. This, be it remembered, is spoken of the series as a whole.

NOTES OF RECENT CASES.

The fact that both parties were violating the Sunday law when one shot the other by accident while hunting is held in Iowa case of Gross v. Miller, 26 L. R. A., 605, not sufficient to prevent a right of action for the injury.

A married woman's estate is held liable to execution for the collection of fines against her on conviction of a misdemeanor. Gill v. State (W. Va.), 26 L. R. A., 655. The court elaborately discusses the liability of the estates of married women for torts.

The easement of a highway is held not to be merged on purchase of the fee by the state, in the California case of People, Hart, v. Marin County, 26 L. R. A., 659. A very elaborate review of the decisions on the effect of an abandonment of a highway is found in a note to the case.

The right of a passenger to choose his route when the carrier has more than one way is denied in the South Dakota case of Church v. Chicago, M., & St. P. R. Co., 26 L. R. A., 616, where the carrier according to its rules and regulations required the passenger to take the shorter route.

A promise to accept an order of another person, made to give credit, is held in the Oregon case of Allen v. Leavens, 26 L. R. A., 620, to be within the statute of frauds. The annotation to the case reviews many authorities on the validity of a parole promise to accept such and order or bill of exchange.

An important insurance case holds that refusal by an appraiser for an insurance company to accept as umpire any person in the locality of the loss, and his insistence on an umpire from a distance, justify the insured in regarding the appraisement as abandoned. Brock v. Dwelling House Ins. Co. (Mich.), 26 L. R. A., 623.

Land constituting the bed of a public street is held not to be a lot lying upon another street which passes in front of it, for the purpose of an assessment for paving. Schenectady v. Union College (N. Y.), 26 L. R. A., 614. The court says an open public street cannot be a lot within the meaning of the statute as to such assessments.

Liability for damages caused by fumes of a fertilizer factory is sustained in the South Carolina case of Frost v. Berkeley Phosphate Co., 26 L. R. A., 693, on the ground that the use of land for business which would necessarily or probably injure other property would create a liability, even if reasonable care was used.

Personal liability of the regents of the University of California, who constitute a corporation and are expressly declared by statute not to be public officers, in case of negligence respecting telegraph and telephone poles and wires, is denied in the case of Lundy v. Delmas, 26 L. R. A., 651. The peculiar character of the corporation makes the case somewhat unusual.

The bed of an unnavigable lake of considerable size is held in the Iowa case of Noyes v. Collins, 26 L. R. A., 609, not to belong to riparian owners. This is contrary to the doctrine now generally established, as shown in a note to Gouverneur v. National Ice Co., 18 L. R. A., 695, and the late Michigan case of Grand Rapids Ice & C. Co. v. South Grand Rapids I. & C. Co., 25 L. R. A., 815.

The prohibition by a Missouri statute of the transportation of Texas, Mexican, Cherokee, or Indian cattle infected with microbes or parasites by which Texas fever may be communicated to other cattle, is held in Grimes v. Eddy, 26 L. R. A., 638, to be an unconstitutional regulation of commerce so far as it applies to passage through the state by railroad or steamboat, but

valid as to the bringing of such cattle into the state or moving them from one part of the state to another. The annotation to the case reviews all the decisions as to the validity and construction of statutory regulations as to infected animals.

The right to attach property in the hands of an assignee for creditors is asserted in the North Dakota case of *Re* Enderlin State Bank, 26 L. R. A., 593, on the ground that an assignment for creditors does not place the property in custody of law. A different doctrine is established in some of the states, as shown by the annotation to the case, and some of the cases construe the statutes as putting the property in custody of the law when assigned for creditors.

A reservation, in an advertisement for bids on a public contract, of the right to reject any or all bids notwithstanding a rule to let contracts to the lowest bidder, is held, in the Missouri case of Anderson v. Public Schools, 26 L. R. A., 707, to prevent any right of action by the lowest bidder for awarding the contract to another even if it was done arbitrarily and capriciously and through favoritism. Numerous cases are collected in the note to the case touching the right of the lowest bidder on a public contract.

FACTS AND FANCIES.

That the Bar of this state is already well advised of the literature of the law, from the acumen of Shakespeare to the lettered versatility of the Hon. John W. Willis, of the Ramsey County District Bench, was again aptly evidenced at the close of a recent case before the gentleman last mentioned.

The cause had been before him some timee. The atmosphere in the court room teemed with germs of ripe and over-ripe thought, as well as other germs and bacilli; the jury sat in waiting for the remains, and the chance of either party was about to be submitted to its fate. Counsel had summed up—and down, and across, it seems—when the learned Court interposed the following encore, a product known to every student of the law as that of the Hon. Justice Joseph Story, of the United States Supreme Court:

"Be brief, be pointed; let your matter stand
Lucid in order, solid, and at hand;
Spend not your words on trifles, but condense;
Strike with the mass of thoughts, not drops of sense;
Press to the close with vigor once begun,
And leave (how hard the task) leave off when done;
Who draws a labor'd length of reasoning out,
Puts straws in lines for winds to whirl about;
Who draws a tedious tale of learning o'er,
Counts but the sands on ocean's boundless shore;
Victory in law is gained as battles fought,
Not by the numbers, but the forces brought.
What boots success in skirmish or in fray,
If rout or ruin following, close the day?
What worth a hundred posts maintained with skill,
If these all held, the foe is victor still!
He who would win his cause, with power must frame
Points of support, and look with steady aim;
Attack the weak, defend the strong with art,
Strike but few blows, but strike them to the heart;
All scattered fires but end in smoke and noise,
The scorn of men, the idle play of boys.
Keep, then, this first great precept ever near:
Short be your speech, your matter strong and clear;
Earnest your manner, warm and rich your style,
Severe in taste, yet full of grace the while;
So you may reach the loftiest heights of fame,
And leave, when life is past, a deathless name.

Man born of woman is full of microbes and his name is Pants. In the morning he feeleth his oats and paweth in the valley, and at night there is no button where his suspenders ought to be. He holdeth his head high, but his wife spends the money, and the children mock him when he gets a haircut. Surely there shall be only desolation and homelessness by his fireside, where he biteth his finger nails and bewails his wife's cooking.

ATTORNEY GENERAL'S DECISIONS.

COUNTY SUPERINTENDENT OF SCHOOLS —SALARY OF.

The salary of a County Superintendent should not be allowed to fall below the minimum fixed by statute; and where by the creation of new districts during his incumbency it would fall below such minimum, he is entitled to an increase during the year.

HON. W. W. PRENDERGAST,
Sup't of Public Instruction.

Dear Sir: You ask whether the salary of a County Superintendent of Schools, when once fixed by the Board of County Commissioners, is fixed for the year; or, in case of an increase of school districts in the county, is his salary proportionately increased.

The statute prescribes both a minimum and a maximum limitation in respect to the salary of that office. It shall not fall below "the rate of ten dollars for each organized district in the County to be reckoned *pro rata* for the year *from the time of the commencement of the first school in the district;*" nor shall it exceed the sum of eighteen hundred dollars per annum. It is evident that the salary, subject to the limitations named in the statute is left to the discretion of the Board of County Commissioners. The law expressly provides that it "shall be fixed" by that body, and it contemplates that it shall be fixed early in the term. When once so fixed it continues the same, unless subsequently changed. It is to the determination of the Board in such action that the County Auditor looks in drawing his warrant. The action of the Board will, of course, be based upon the number of districts in existence in the County. But I am of the opinion that the creation of new districts inures to the advantage of the Superintendent, and deem it the proper course, where the maximum limit is not reached, for the Board to fix the salary in the terms of the statute at the rate of ten dollars per district instead of a gross sum.

It may be questioned, however, whether the Superintendent would be entitled, in case of the creation of a new district, to more than such proportionate part of ten dollars as the time elapsing after the commencement of a school therein bears to the whole year. The compensation should, in such case, "be reckoned *pro rata* for the year from the time of the commencement of the first school in the district." Section 10, Comp. School Laws.

I am, very respectfully,
H. W. CHILDS.

Jan. 14, 1895.

COUNTY SURVEYOR—DUTIES OF.

It is the duty of the county surveyor to make and keep a complete record of all official surveys by him made.

MR. CHAS. A. MCPHERRIN,
Ass't County Attorney,
Duluth, Minn.

Dear Sir: Your favor of 9th inst. is at hand.

Sections 232 and 233 of Chap. 8, General Statutes 1878, make it the duty of the Couty Surveyor to execute all surveys that may be ordered by any Court, by the Board of County Commissioners, Town Supervisors or other public officer within his county, or upon application of any individual or corporation; and also that he shall keep a "correct and fair record of all surveys made by him or his deputies in a book to be provided by the County Commissioners." It also provides that he shall preserve a copy of the field notes and calculations of each survey, and that the same shall be furnished by said surveyor to any person requiring the same.

It is the undoubted intent of the

law that there shall always be in the office of the County Surveyor complete records of the business transacted by him in his official capacity, including the field notes. These should be transmitted by him to his successor in office.

I am very truly yours,

H. W. CHILDS.

Jan. 15, 1895.

COUNTY TREASURER—BOND OF.

The Board of County Commissioners have no authority to extend the time fixed by statute for a County Treasurer elect to present his bond for approval.

If the bond be not presented within such time, the board may declare the office vacant and fill it by appointment.

C. M. JOHNSTON, ESQ.,
County Attorney,
Detroit, Minn.

Dear Sir: You state in substance that your County Commissioners will meet the 15th inst. for the purpose of approving the bond of the County Treasurer, who is his own successor, and you ask if at that time he does not furnish a sufficient bond, can the Board of County Commissioners extend time beyond that fixed by law and allow further time, or must they then and there declare the office vacant and appoint a person to fill same. You also ask in case of an appointment would the old officer hold until the appointee had qualified.

In answer thereto I have to say that it will be necessary for the person elected County Treasurer to present his bond on January 15th for approval; that the Board of County Commissioners cannot extend the time beyond that fixed by law. The Board would have the right to appoint a person County Treasurer to succed the present County Treasurer after March 1st, who would hold the office until his successor is elected and qualified. See County of Scott v. King, 29 Minn., 404.

I am very truly yours,

H. W. CHILDS.

Jan. 12, 1895.

PROBATE JUDGES—APPOINTMENT OF IN NEWLY ORGANIZED COUNTY.

The Governor is not authorized to appoint a Probate Judge for a county newly organized until the next general election.

Query—Whether the Board of Commissioners of such county are so authorized.

HIS EXCELLENCY,
KNUTE NELSON,
Governor.

Sir: Calling attention to the recent organization of the County of Roseau from territory formerly embraced within the County of Kittson you enquire whether the office of Judge of Probate therein is to be filled by an appointment by your excellency or otherwise. The office in question is constitutional and judicial. Unquestionably a vacancy exists in such office from the moment it is created until an incumbent is appointed. The authority of the Governor to fill vacancies is derived from Section 4, Article 5, and Section 10, Article 6, of the State Constitution. The present case does not, however, in my judgment, afford a case in which you are authorized to act. That such authority is not derived from Section 4, Article 5, is definitely settled by the case of Crowell v. Lamber, 9 Minn., 267 (Gil.)

Section 10, of Article 6, contemplated a vacancy arising subsequent to an election, and therefore does not confer authority to fill a vacancy arising before an election. If authority resides anywhere to fill the vacancy in question, it is in the Board of County Commissioners, as provided by Section 10, Chapter 143, General Laws 1893.

But I refrain from expressing any opinion as to the authority of the said Board to act, for the reason that I am advised that the Board of County Commissioners have already assumed to fill the vacancy by appointment.

I am, very respectfully,

H. W. CHILDS.

Jan. 16th, 1895.

PUBLIC LANDS—REDUCTION OF INTEREST—GENERAL LAWS 1885, CHAPTER 201, SECTION 1.—GENERAL LAWS 1893, CHAPTER 106.

Under General Laws 1885, Chapter 201, Section 1, and General Laws 1893, Chapter 106, when an application has been made for a patent on a land certificate, interest should be charged against the certificate at the rate of five per cent per annum only from the date of theendorsement thereon of the Land Commissioner.

HON. R. C. DUNN,
State Auditor.

Dear Sir: I beg to acknowledge receipt of your communication of the 11th inst., in which, calling my attention to the provisions of General Laws 1885, Chapter 201, Section 1, and General Laws 1893, Chapter 106, you state that application has been made to you "for a patent on a land certificate on which the interest has been reduced," under the first named law, and inquire whether you "should charge the holder of the certificate the two per cent per annum from date of reduction of interest on his certificate to the present time, to the date of the passage of the act of 1893, or if the latter law wipes out the two per cent additional on all contracts on which the interest has been reduced."

The purpose of the law of 1885, cited by you, was to reduce the rate of interest from seven to five per cent on such contracts only as should receive the endorsement of the Land Commissioner as therein provided. The effect of the endorsement, properly made, was to reduce the rate of interest, as per contract between the state and the holder of the certificate, to five per cent and thereafter neither of the parties, without the consent of the other, could change the rate as so agreed upon, so long as the conditions should be observed. Chapter 106, General Laws 1893, is in recognition of this view, as it expressly provides "that all outstanding contracts bearing seven per cent, *or contracts on which the interest has been reduced to five per cent under certain conditions shall* hereafter draw interest at the rate of five per cent, without any restrictions whatever."

So far as a certificate bearing such endorsement is concerned, the only effect of the law of 1893 is to remove the conditions or restrictions imposed by the law of 1885.

You are therefore advised that interest should be charged against the certificate at the rate of five per cent from the date of the endorsement thereon.

I am, very respectfully,
H. W. CHILDS.

Jan. 14, 1895.

SHERIFF—COMPENSATION—TAKING CONVICT TO REFORMATORY.

A Sheriff is not entitled to compensation for taking a convict to the state reformatory.

SAME—FAILURE TO ARREST.

Where a Sheriff in good faith makes an unsuccessful attempt to make an arrest, he is entitled to mileage for the distance actually and necessarily traveled by him in an effort to make such arrest.

COUNTIES—REVIVING REJECTED CLAIM.

Where a bill has once been disallowed by the Board of County Commissioners and the claimant fails to appeal from such disallowance within thirty days, the claim cannot be revived by the presentation of a new bill at some future time, either before the same or some other board of the same county.

MR. A. H. ANDERSON,
County Auditor,
Redwood Falls, Minn.

Dear Sir: A Sheriff is not entitled to compensation out of the County Treasury for taking a convict to the State Reformatory. Compensation for such service is governed by General Laws 1889, Chapter 254, Section 29. See also General Laws 1870, Chapter 39. Where the Sheriff makes an attempt in good faith to arrest a party and fails to make the arrest, he is entitled to mileage for the distance actually and necessarily traveled by him while engaged in an ear-

nest effort to make such arrest. (Op. Attys. Gen., 403).

Where a bill has been once disallowed by the Board of County Commissioners, and the claimant fails to take his appeal from the order of disallowance within the thirty days prescribed in the statute, the claim cannot be revived by the presentation of a new bill at some future time, either before the same or another Board of the same county. (Op. Attys. Gen., 329).

I am very truly yours,

H. W. CHILDS.

Jan. 13, 1895.

THE PORTRAIT.

HON CHARLES D. KERR was born in Philadelphia in September 1835. Early in childhood Judge Kerr's parents removed from Philadelphia to Jacksonville, Ill., where he grew to manhood and received his education. In 1857 he graduated from Illinois College, having taken a full classical course; in 1859 he entered the law office of the Hon. Samuel Miller at Keokuk, Iowa, where he read law for two years, and in 1861 was admitted to the bar at Carthage, Hancock County, Illinois.

Almost immediately thereafter he enlisted in Company D, Sixteenth Regiment of Illinois Volunteer Infantry, and, by a series of promotions for meritorious service, before the close of the war he attained the rank of Colonel.

After the war Col. Kerr came to Minnesota, and located at St. Cloud, where he successively was the partner of Hon. James McKelvey, Mr. W. S. Moore and Hon. L. W. Collins. In 1873 he removed to St. Paul, where he was engaged in active practice until his elevation to the District Court bench in 1888. His appointment gave general satisfaction, which has increased constantly during his judicial career.

OF CURRENT INTEREST.

The firm of Penny, Welch and Hayne, of Minneapolis, has been dissolved, Mr. Penny having retired.

Mr. Robertson Howard has been appointed assistant corporation attorney for the city of St. Paul.

J. C. Michaels and D. F. Peebles have formed a partnership for the practice of law, with offices in the Pioneer Press Building.

Mr. W. H. Tripp, of Duluth, has removed to Minneapolis and opened a law office in the Guaranty Loan and Trust Building.

Albert H. Hall's term as Special Assistant County Attorney for Hennepin County having expired, he has resumed private practice in Minneapolis.

Mr. Henry B. Wenzell, of the St. Paul bar, has been appointed Reporter of the Supreme Court to succeed Mr. C. C. Wilson, of Rochester, who recently resigned.

Frank Palmer and T. J. McElligott, of Madison, Minnesota, have formed a partnership for the general practice of law under the name of Palmer & McElligott.

Mr. T. E. Kepner, of Minneapolis, has removed his law offices from the Minnesota Loan and Trust Building to Rooms 404-406 Phoenix Building, on the corner of First Avenue South and Fourth Street.

All orders for and communications concerning The Encyclopedia of Pleading and Practice should be sent to F. P. Dufresne, 85 East Fourth Street, St. Paul he having the exclusive agency of that work for the State of Minnesota.

Our many subscribers are informed that the office of THE MINNESOTA LAW JOURNAL is now located at 85 East Fourth Street. We shall expect any of them who visit St. Paul to drop in and see us in our new and cozy quarters.

THE MINNESOTA LAW JOURNAL.

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DISTRICT COURT.

New England Mutual Life Insurance Co. v. Augustus R. Capehart, et al.

(District Court, Ramsey County, 60221.)

MORTGAGES—EXTENDING TIME OF REDEMPTION—SECOND MORTGAGES—FRAUD—CLOUD ON TITLE.

Where a mortgagor conveys the property mortgaged, and causes a large number of mortgages on said premises, without consideration, to be executed to him as mortgagee, and after foreclosure of the mortgage given by him, himself files notices of intention to redeem as mortgagee from the foreclosure sale, and thereby extends, apparently, his time of redemption for a long period after the year allowed him by statute, such mortgages and notices of intention to redeem thereunder, and the records thereof, will be cancelled as a cloud upon the title of the foreclosing mortgagee.

In 1889 the defendant, Augustus R. Capehart, was the owner in fee of certain real estate situate in the City of St. Paul, and on December 9th of that year he mortgaged the same to plaintiff. This mortgage was foreclosed November 25th, 1893, and the property was bid in for $18,924.58, and no redemption from such sale has been made.

On or about October 14. 1893, defendant Capehart executed to the defendant Cornelius Williams, a deed of said premises, which deed was without consideration, and was made upon the understanding that Williams should hold the title of said premises for the sole use and benefit of said Capehart.

On November 13, 1894, at Capehart's request, Williams gave a contract of sale of said premises to the defendant, McIntire, and thereafter, on November 22, 1894, pursuant to such contract, he conveyed said premises to said McIntire. Such contract and deed were both without consideration.

Thereafter McIntire, at Capehart's request, executed and delivered to said Capehart one hundred separate and independent mortgages upon said property, and one hundred promissory notes secured by said mortgages; but there was an oral understanding and agreement between Capehart and McIntire that McIntire should not be held personally liable upon said notes.

On November 24, 1894, Capehart, assuming and claiming a right of redemption from said foreclosure sale by virtue of the mortgages so executed to him by McIntire, filed in the office of the Register of Deeds one hundred separate notices of intention to redeem as mortgagee from said foreclosure sale; and by virtue of said notices Capehart claimed the right to redeem from such foreclosure sale at any time within five hundred days from and after the expiration of the year of redemption from such sale given him by statute as owner. The prospective value of the premises so sold at foreclosure sale was $30,000.00.

Upon the facts aforesaid the court determined that the said contract and deed to McIntire, and the mortgage from him to Capehart, are each wholly inoperative and void so far as they relate to or purport to affect said

premises. That they constitute a cloud upon plaintiff's title, and that it is entitled to a judgment annulling and cancelling said instruments, and the record thereof, so far as they purport to affect plaintiff's title.

FLANDRAU, SQUIRES & CUTCHEON for plaintiff. A. R. CAPEHART and OTIS & GODFREY for defendants.

OTIS, J.: To sustain defendant Capehart's contention with reference to this extraordinary transaction as I have found it to have been made, would, in my opinion, be a gross perversion of the statute relating to redemption, and enable him to consummate a cunning, barefaced fraud under the guise of the law. What defendant Capehart could not lawfully do in a direct manner he would not be permitted to do by indirection. He is the real party for whose benefit this transaction was made, and was so made for him as owner; but because he could not accomplish his ends in such capacity he attempts to masquerade as a mortgagee like the traditional wolf in sheep's clothing. I am aware that great reliance is placed upon the case of Lumber Co. v. Tucker, 48 Minn., 223. I do not think the principles there declared are to be extended a hair's breadth beyond the facts of that particular case, which in several respects differ from the facts here found.

It seems to me the case at bar conclusively shows that the Court fell into error in its statement of the law. When the Court says that the prior mortgagee in the case was not prejudiced by the giving of a subsequent mortgage, and, therefore, could not question the *bona fides*, it could not have contemplated that the principle would be invoked in a case where subsequent mortgages would operate to extend the redemption period for nearly two years, as in this case; and if for two years or less, why not for twenty years or more? This feature of the case is not referred to in the decision relied on, and was doubtless not considered or called to the attention of the Court.

Henry F. Reed, v. W. E. Hallowell et al. (District Court, Ramsey County, 56761.)

MORTGAGES—FORECLOSURE—PARTIES—JUDGMENT—INDORSER OF NOTE.

In an action to foreclose a mortgage and recover a personal judgment for any deficiency after sale of the property, an indorser of the mortgage note is a proper party defendant, although no judgment can be entered against him except for the deficiency.

PROMISSORY NOTE—PROTEST—WAIVER OF NOTICE OF PRESENTMENT AND DEMAND OF PAYMENT.

Waiver of notice of protest is not a waiver of presentment and demand of payment, but is a waiver of notice of nonpayment.

Suit to foreclose mortgage and recover deficiency judgment.

G. J. LOMEN for plaintiff. E. R. HOLCOMB for defendant.

BRILL, J.: This action is brought to enforce payment of the note by foreclosure of the mortgage and personal judgment for the deficiency. Defendant Holcomb is liable on the note as indorser. The statute, Section 56, Chapter 66, General Statutes 1878, provides that persons severally liable upon the instrument, including parties to bills of exchange and promissory notes and sureties on the same instrument may be joined in the same action. Holcomb is interested in the foreclosure to the extent of seeing that as much should be realized out of the sale of the property as possible, and I think it is proper to join him in the action, although, of course, judgment cannot be entered against him personally except for the deficiency.

Waiver of notice of protest was not a waiver of presentment and demand, but it is a waiver of notice of nonpayment. The complaint alleges presentment and demand. The allegations regarding the release of a part of the property was not sufficient to show that Holcomb was released.

In re Estate of Flavia B. Whiting.
(District Court, Ramsey County, 60101.)

ESTATES OF DECEDENTS—CLAIM MATURING AFTER EIGHTEEN MONTHS—PROBATE CODE, SECTIONS 102, 104, 107.

A son by the terms of his father's will became entitled to a legacy when he arrived at the age of twenty-six years. His mother, as residuary legatee and devisee, and sole executrix, gave the bonds required by the statute to pay all debts and legacies, and took the whole estate. She died, and her estate in 1890 was administered in Ramsey County, and the notice to creditors limiting the time to file claims against her estate was duly given. In 1894 the son became twenty-six years old and presented his claim for payment of his legacy to the Probate Court of Chisago County, where the will had been probated. His claim was allowed, but the administrator *de bonis non* of his father had no funds. He then presented his claim against his mother's estate in the Probate Court of Ramsey County. *Held*, that whether such claim was to be considered as a claim arising on contract, or as a contingent claim, it was forever barred by the limitation of eighteen months prescribed by Section 102 of the Probate Code.

Appeal from Probate Court of Ramsey County.

H. N. SETZER for appellant. J. R. S. MCMILLAN for respondent.

KELLY, J.: The claim of the appellant arose under the will of Erasmus B. Whiting, deceased. The eleventh item thereof reads as follows: "I give and bequeath unto Sanford B. Whiting, son of the said deceased brother, Charles B., the sum of $4,000 upon his arriving at the age of twenty-six years." Flavia B. Whiting, mother of the appellant, was the residuary legatee and devisee of the above named testator, and his sole executrix. She qualified as executrix, gave bonds as then provided by statute to pay all debts and legacies, and took the whole estate. As it appears, she did pay all the debts, and all of the legacies except the one in suit. Flavia B. Whiting died in 1890, and her estate was probated in this county in June, 1890, and the notice to creditors limiting the time to present claims against her estate, provided for in Sections 102 and 103, Probate Code, (Chapter 46, General Laws 1889,) was then given. The appellant, Sanford B. Whiting, reached the age of twenty-six years on the 15th of September, 1894, and immediately presented his claim for this legacy of $4,000 to the Probate Court of Chisago County in the estate of Erasmus D. Whiting, deceased, in which county said will was probated. The Court allowed the claim and the administrator *de bonis non* of Erasmus D. Whiting had no funds to pay with. It also authorized suit to be brought on the bond of Flavia B. Whiting, the late executrix, to enforce the claim.

The claim was then presented as a claim against the estate of Flavia B. Whiting in the Ramsey County Court, and disallowed on the sole ground that the claim was barred under Sections 102 and 104 of the Probate Code, the claim not having been presented within eighteen months after the giving of the notice to creditors, etc. In this the learned court was right. Whatever the hardships of the law, the Court gave it the only possible construction. It seems to me immaterial whether this is to be regarded as a claim arising on a contract or whether it was or was not a contingent claim. It is sufficient for the purposes of this decision that the legislature has provided for the presentation of the class of claims mentioned in Section 104 of the Probate Code, and for none other, and no claim of any kind having been presented within the time limited by law, the Court had no discretion to open the case at the time.

Section 107 does not enlarge or impair the force of Section 104. Hill v. Nichols, 47 Minn., 382.

Those sections (46 to 49 of Chapter 53, General Statutes 1878) which seem to have provided for just such a condition of facts as this case presents have been repealed and nothing has been enacted instead, unless said Section 104 takes their place. What rem-

edy, if any, remains to the appellant I will not undertake to suggest.

There ought to be a way that a just claim against a decedent's estate, which, by its terms, could not accrue or become absolute until after the time limited to present claims had passed, may be enforced. Whether the way was by suit against the executrix, with an allegation of assets, or by proceedings upon the bond given in the E. D. Whiting matter, or whether there is any remedy left, I leave to the ingenuity of counsel to determine. This, for obvious reasons, that either of these apparent ways seems open to grave objections and dangers, and much may be said to sustain the contention that this claim is barred forever.

Vincent J. Hawkins v. Margaret E. Beadle, Defendant, and Germania Bank, Garnishee.
(District Court, Ramsey County, 60316.)

SUMMONS—ISSUANCE OF—SERVICE.

When a summons is placed in the hands of a person empowered to make service with the *bona fide* intention that it be served, and this is immediately with an effort in good faith to make service, the summons is issued within the meaning of the statute.

It appeared that at the time of the filing of the affidavit for garnishment and serving the summons upon the garnishee, a copy of the summons and notice to the defendant were given to a person empowered to serve the same, with directions to do so. That service was immediately attempted to be made on defendant, but that she could not be found until one week thereafter.

Upon the return day of the garnishee summons in the above entitled action at special term appeared the plaintiff and garnishee, and defendant appeared specially by S. P. Crosby, and moved to dismiss the garnishee proceedings.

I am unable to agree with all that was said by the court in granting the motion to dismiss in case of Press v. Wesley, and the Edison Electric Co. v. Garnishee. The statute provides that service may be made by any person not a party to the action, and I am of the opinion that when a summons is placed in the hands of a person empowered make service with the *bona fide* intention that it be served, and this is followed, immediately, with an effort in good faith to make service, the summons is issued within the meaning of the statute. I am informed that it has been so held by another Judge of this Court in the case of Clifford v. Peterson. This ruling seems to be in harmony with what is said by the Court in Blackman v. Wheaton, 13 Minn., 326, and in Houghland v. Wilcox, 60 N. W. Rep., 376. The Court in Mills v. Corbett, 8 How. Prac., 500, expressly holds upon a similar statute and upon a similar state of facts that the summons had been issued. It is proper to say that the affidavit of the facts submitted by the plaintiff with his brief has been considered, defendant having admitted the service of the same and raising no objection.

The Columbian Market Co. v. The Union National Bank, et al.
(District Court, Hennepin County.)

BANKS AND BANKING—ASSIGNMENT OF DEPOSIT BY CHECK—ASSIGNMENT FOR BENEFIT OF CREDITORS.

A check upon funds on deposit in a bank, subject to check, operates as an equitable assignment of such funds to the amount of the check. Payment of such check to a holder thereof for value cannot be stopped by the assignee in insolvency of the drawer.

The defendant Gibbs, on April 2, 1894, gave a check to plaintiff drawn on the defendant, the Union National Bank, and on April 3d, 1894, made an assignment for the benefit of his creditors. The check was presented for payment on April 4th, 1894, but the bank refused to pay it, although Gibbs had on deposit with it, subject to check, a larger sum than the amount of the check, and stated as its reason for such refusal that Gibbs had made an assignment for the benefit of his

creditors, and that notice of such assignment had been served upon it, and that it, therefore, was bound to turn all of the funds in its hands belonging to Gibbs over to his assignee.

JONES & BABCOCK for plaintiff. KITCHEL, COHEN & SHAW for defendants.

SMITH, J.: There is great conflict of authority upon the question as to whether or not a check drawn on the bank against the indebtedness due from the bank on account of moneys deposited therein by the maker of the check operates as an assignment to the payer or holder of the check of that portion of the indebtedness arising from such deposit as is represented by the amount of the check, and such as to authorize the holder of the same to maintain a suit against the bank for the amount of the draft.

These cases may be said to cover the issues, to a certain extent, involved in this case. If the check did not operate as an assignment, either legal or equitable, of the portion of the indebtedness represented by the check, of the bank to the depositor, no right of action could exist in favor of the holder of the check against the bank. Some cases holding that a check holder cannot sustain an action against a bank on such check, base their decisions on the ground that a check did not constitute a legal or equitable assignment of the portion of the indebtedness of the bank to the depositor represented by it. Carr v. Bank, 107 Mass., 45; Bank v. Clark, 134 N. Y., 368; Covert v. Rhodes, 480 Ohio St., 66; Bull v. Bank, 123 U. S., 105. Other authorities base their decisions on the ground that there is no privity of contract between the bank and the holder of the check. Bank v. Millard, 10 Wall, 156. Others have held that a check holder cannot sustain an action against the bank, and base their decisions on the ground that in their opinion the weight of authority is against it, without giving any further reason. Such are Cushing v. Bank, 46 N. J. L., 255; Bank v. Miller & Co., 17 Alb., 168; Bank v. Cook, 73 Pa. St., 483. On the other hand other courts have held that where a deposit of money is made in a bank, with the understanding at the time between the bank and the depositor that it is deposited for the purpose of being checked out in the ordinary course of business in small amounts, that it constitutes a privity of contract between the bank and the holder of the check issued by the depositor, and that the issuing of such check operates as an assignment, either equitable or legal, of that portion of the indebtedness due from the bank to the depositor to the holder of the check which is represented by it. Munn v. Bank, 25 Ill., 21; Bank v. Bank, 80 Ill., 213; Roberts, assignee, v. Austin et al., 26 Iowa, 315; Farmer v. Smith, 47 N. W. R., 632, and cases cited in the opinion of the Court. These cases seem to hold that the check operates as a legal assignment of so much of the debt as arises from the deposit as is represented by the amount of the check, provided it does not exceed the amount due the depositor.

There are other cases that hold that a check drawn on funds in a bank, deposited for the purpose of being drawn out on check, operates as an equitable assignment of the amount represented by the check and the drawer cannot stop the payment of the check, and that he or his assignees are estopped to say that such an instrument is not an equitable assignment. Bank v. Bank, 80 Ill., 213; Pease v. Lanesur, 68 Wis., 20-28 and 31 and cases cited in the opinion. The Court holds, upon reason and upon authorities cited in Pease v. Lanesur, that as between the drawer of the check and the holder

thereof for value, the drawing and delivery of the check operates as an equitable assignment of the account or fund on which it is drawn to the amount of the check, and, as a consequence, such equitable assignment is binding on the drawer and he cannot arrest it except for some good cause. * * * "To withdraw the funds before the check was presented would be a fraud on the holder of the check."

In this case Gibbs had a deposit in defendant's bank to check against. He drew a check, for value received, payable to the plaintiff, on said bank. Before the check was presented for payment Gibbs made an assignment to the defendant Trust Company for the benefit of his creditors, of which fact the bank had notice before the check was presented for payment, but at that time had on hand of the money so deposited sufficient to pay the check and refused to pay it.

We think the law is well settled that the defendant Gibbs would have had no authority to stop the payment without some valid reason before the check was presented. If he could not have done it the assignee could not. He had no greater rights than Gibbs, the maker of the check, and that notice was immaterial. Graham v. Kimball et al., 5 Minn., 352; Coats, assignee, v. Bank, 31 N. Y., 20.

The bank should have paid the money to the plaintiff when the check was presented. It seems unnecessary under the facts in this case to determine whether or not the check was a legal assignment of the amount thereof of the funds in the hands of or due from the bank to Gibbs, so that an action at law could be maintained by the plaintiff against the bank for the amount of the check. There can be no question but that a court of equity would enforce the payment, all parties in interest being made parties to the action. 68 Wis., supra. Forms of action are abolished by our statutes. All parties in interest are made parties to this action, and it is immaterial whether you call it a legal or equitable action. This Court has jurisdiction to render proper judgment, such as the facts warrant.

P. M. Helary v. Great Northern R. R.
(District Court, Hennepin County. 64146.)

SERVICE OF SUMMONS—RAILROAD COMPANIES—TICKET AGENTS OF.

One who is not in the employ of a railroad company, but who is furnished with such company's tickets for sale, and who sells them, and from day to day makes reports of his sales of tickets over such company's road, is so far an acting ticket agent of such company that service upon him for such company of a summons in an action against the company is good service.

FRANK H. MORRILL for plaintiff. W. E. DODGE for defendant.

JAMISON, J.: The summons in this action was served upon one V. E. Jones, who, at the time of such service, was engaged in the occupation of selling railway tickets at the Union Depot in the City of Minneapolis. The defendant, the Great Northern Railway Company, appeared specially, and moved for an order setting aside such service. The affidavit offered by the respective parties upon the hearing of this motion disclosed that the Union Depot, where such summons was served, is the property of and is operated by the Minneapolis Union Railway Company, a corporation of this state; that a number of lines of railway entering the City of Minneapolis use said depot for general depot purposes, among the lines so using the same being this defendant, the C., St. P., M. & O., the N. P., the Eastern Minn., the C., B. & N. and the Wis. Cent.; that said Minneapolis Union Ry. Co. had a contract with each of said lines of railway whereby, for compensation paid to it by each of said railway companies, it furnishes to each of said companies trackage facilities into and through said Union Depot, transfers railway cars, trans-

fers and delivers baggage and express matter, furnishes accommodations for all passengers arriving and departing, and also sells tickets for each of said companies, maintaining for such purpose a ticket office in said depot where tickets are sold regularly at all hours of the day; that the said Minneapolis Union Ry. Co. employs the ticket agents employed in the sale of said tickets at the said depot, and the said agents are responsible to the said company, and are under bonds to the said company alone for the faithful performance of their duties, which consist chiefly in the sale or disposal of tickets over the several lines of road herein mentioned. Said affidavits also disclose that one H. L. Martin is one of the ticket agents of said Union Ry. Co. regularly engaged in the sale of tickets at said depot, and that V. E. Jones, upon whom said summons was served, is an employe of said Union Ry. Co., employed as an assistant ticket agent, performing the regular duties of selling tickets at said depot, and as such assistant ticket agent for the last two years has daily sold tickets over the lines of road mentioned, including the lines of this defendant; that the said H. L. Martin had for the last ten years, as such ticket agent, sold over the lines of said defendant tickets issued by said defendant and supplied from time to time to said Martin by the General Passenger and ticket agent of said defendant company; that said tickets so delivered are not purchased by said Union Railway Co., but the proceeds for the sale of the same are accounted for by the said Martin, as the employe of the said Union Co.; that said Martin also makes a daily report of all tickets sold for said defendant to the General Auditor thereof, said report being made on printed blanks headed "Minnneapolis Union Station." The contention of defendant is that service of said summons upon V. E. Jones was not such service as is authorized by the laws of the state, and hence the same should be set aside. On the other hand plaintiff claims that service upon V. E. Jones was proper service, and under the laws of this state was binding on the defendant. Section 62 of Chapter 66, General Statutes of 1878, is as follows: "The service of all process and papers in any civil action before any Justice of the Peace, or in a District Court, against any railway company within this state may be made upon any acting ticket or freight agent of such company within the county in which the action or proceeding shall be commenced, and shall be taken and held in all cases a legal service; provided, that whenever any railway company has appeared in any action by an attorney, thereafter such service shall be made upon the attorney of record."

It seems to me that this statute should be construed as authorizing service of summons upon any person engaged in the usual business of selling tickets ostensibly as agent of the company against which suit is brought. The words "acting ticket agent" should be construed as meaning any one whom the defendant company permits to appear to be its agent, and who is regularly engaged in the sale of tickets belonging to the company. It is significant that the word "acting" is used in connection with the words "ticket agent." This word was evidently used advisedly, at least partially for the purpose of relieving the party bringing the suit from the burden of proving the relationship between the defendant road and the party upon whom the service was made. It hence makes no difference whether V. E. Jones was, in fact, the technical agent of defendant, he having been permitted by defendant com-

pany to act ostensibly as its agent, and to dispose of its tickets from day to day, he falls within the meaning of the words "acting ticket agent" used in the statute. For the foregoing reasons I have denied the defendant's motion.

John Simpson v. The St. Paul City Railway Co. (District Court, Ramsey County, 36721.)

HUSBAND AND WIFE—ESTOPPEL—JUDGMENT AGAINST ONE.

Under the statutes of this State there is no such privity between husband and wife that separate judgments for or against one of them are conclusive as an estoppel against the other.

Mary Simpson sued the St. Paul City Railway Company to recover damages for personal injuries alleged to have been caused by the negligence of the company, and judgment was rendered in favor of the company.

The plaintiff, as the husband of Mary Simpson, also brought an action against the company to recover for the loss of his wife's services resulting from such injuries.

Defendant, after entry of the judgment against the wife, moved for leave to file a supplemental answer setting up such judgment as a bar to the husband's action.

S. P. Crosby for plaintiff. Munn, Boyesen & Thompson for defendants.

KERR, J.: Aside from the technical objections to the time when and the manner and circumstances under which said supplemental answer was interposed, I am satisfied that the answer should be stricken out on its merits.

Under the statutes of this state there is no such privity between husband and wife that separate judgments for or against the one are conclusive as an estoppel against the other. The husband, plaintiff here, was not a party to his wife's litigation referred to, nor had he any right to shape or control the force or conduct of the same, and it is difficult to see upon what principle he was bound by its result in a jurisdiction where the law separates husband and wife as distinctly as any other persons so far as the right to sue and be sued is concerned. The matter of this answer is a fair illustration of *res inter alias acta*.

HON. CHARLES E. OTIS,

District Judge, Second Judicial District.

...THE...

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THE JOURNAL'S THIRD YEAR.

With this number the Minnesota Law Journal enters upon its third year. From a small beginning, and with a few subscribers only, it has steadily advanced upon the road of usefulness and prosperity, until today it can congratulate its many readers upon the fact that it is no longer an experiment, but an assured success.

The many letters containing expressions of good will and promises of future support, received by the present publisher, show that his efforts to make the Journal worthy of the patronage of the bench and bar of Minnesota are appreciated, and in the future, as in the past, no pains will be spared to merit their support.

One of its most valuable features is the reporting of District Court cases, especially those in which points of practice and pleading are decided. We most earnestly request our subscribers to assist us in obtaining and reporting such cases. At the head of the department devoted to these decisions we give the names of the gentlemen who act as our reporters in the various districts throughout the state, and when a subscriber or reader of the Journal is interested in the trial of a case, if he will write out a statement of the facts involved and the points made by counsel, with the authorities cited to sustain them, and furnish the reporter in his district with such mat-

ter, we will guarantee a full and accurate report of the case. Without such information it is, however, almost impossible to report cases at nisi prius. Help us in this matter, and you will benefit yourselves, and the bench and bar of our state.

THE JUDGE.

Who He Ought to be, and How We Ought to Make Him.

American jurisprudence is a lineal and direct descendant from England, and for a long series of years after the achievement of our independence we followed in the footsteps of our ancestor without material deviation. The great state of New York constructed its Court of last resort upon the plan of the British final Court of Appeals, by adding the members of the Senate to the Judges, and called it the Court for the Correction of Errors, thus substituting the Senate for the House of Lords, and in this way introducing both the appointive and elective systems into the selection of judges, the Senators being chosen by the people, and the judges appointed by the Executive, with life tenure. This plan worked very well for a long series of years, the appointed Judges being generally chosen by honorable and patriotic governors from the most prominent and eminent members of the bar, and the Senate being a small body (thirty-two, I think,) each representing a large constituency and occupying a distinguished position in his district. The decisions of this court will bear favorable comparison with those of any court of any country, many of the strongest and most learned opinions being delivered by the Senators.

But it must be remembered that this condition of things existed at a time when, and in a country where, law and order were quite generally respected by the people, and the government and courts were regarded as institutions entitled to the reverence and unquestioned support of everybody. Foreign immigration had not brought its socialistic and anarchical ideas into the land; and labor organizations had not grown to their present proportions.

It was about the year 1846 that New York adopted a new constitution and introduced the feature of an elective judiciary with limited terms of service, accompanied by the abolition of the Court of Chancery as an independent tribunal, amalgamating law and equity in the same courts. This change in the administration of justice was at once so generally approved that subsequent imitations of the New York system, or code of practice, as it was called, adopted the elective system of the judges along with the code without much discussion; the one carried the other through, and in nearly all the new states the New York system has been adopted bodily with few variations, and the choice of judges with limited terms, high and low, by the people has become almost universal in the several states of the Union.

Has the elective system for the choice of Judges been a success? and does the future outlook indicate the wisdom and safety of its continuance? The latter branch of this question is daily becoming more and more a vital factor in the success of our govern mental system. I answer yes and no. The people have, in many instances, when an unworthy candidate has been presented for their suffrages, and nothing was at issue but the qualifications of the man, acted with great wisdom and intelligence, and rejected him, proving to be true, what I have always thought, that the mass of the voters when uninfluenced by any extraneous considerations will choose the best men, re-

gardless of party or politics, for their Judges. But I have seen the system work the other way. In many elections very exciting questions are involved, the solution of which may largely depend on the political bias of the Judge, instead of the application of appropriate legal principles. In such instances the people are, and a very large element of them will always be, swayed in their votes for a Judge by their partisan desires, and therein rests the danger of the elective system. A ship may prove a very safe vehicle as long as she sails in smooth water, but it is the storm that tests her strength. No system of government is safe that will not endure through the worst of trials. We are almost too young as a nation to decide this question from experience, and especially as the federal judiciary, high and low, is all under the appointive system, with terms for life or during good behavior, which has so far proven a sheet anchor in all the storms we have been as yet subjected to.

There can be no doubt at all that the Judge who sits upon the bench in the calm security that no matter what party, individual or organization his judgment may antagonize, his position is beyond their malice or attack, will act more fearlessly and independently than the Judge who feels that his decision of today, no matter how correct, may prove his official death warrant tomorrow. There are men who no doubt can rise above such considerations, but where one will stand the test many will fail. It is cruel to subject men to such pressure.

When the constitutional convention of Minnesota was in session, the report of the committee on judiciary presented quite an experiment. It essayed to try both methods by providing for the appointment of the Supreme Judges and the election of the District Judges, giving each a term of seven years. It failed to pass in that way, and all judges were made elective. I think it is better as it is, if the term of the Supreme Judges is to be a limited one. No better results can be expected in securing non-partisan Judges under an appointment by a partisan Governor than by an election by the people; and my experience leads me to believe that as a general thing, and under normal conditions, a selection by the people is by far the safest of the two methods. What could be expected of Judges appointed by Governor Waite of Colorado, Governor Penoyer of Oregon, or Governor Altgeld of Illinois? It would be a calamity to have such Judges imposed on a state for the life of the incumbent. The appointing power might as well be conferred on Mr. Debs. The only solution of the question is to make the highest Judges elected for life,and the minor ones for a shorter term, not less than ten or twelve years. The fact that their decisions are subject to the revision of a tribunal divorced from all extraneous influences will serve to keep them in order, and we will get our law filtered of all the agrarian cranky notions that have found a lodgment in the jury box, and by irresistable reflex influences reached the bench in many instances, as it is at present constituted.

There is nothing in the world that depends for its action upon the human mind, or the working of machinery, that will not at some period go astray, no matter how perfect it may be in its origin, and no system of making Judges will ever be perfect; but about as near as we can come to it is to make the best selections possible and then remove them from all dependence of any character. This can only be done by paying adequate salaries, and giving life tenures to those having ultimate decision.

CHAS. E. FLANDRAU.

STUDY OF LAW BY LAWYERS.

Study of law is the constant habit of every good lawyer. How to study has perplexed many. The general rules of justice are few and simple. A lawyer of broad and cultivated mind seldom fails to recognize them when stated in the abstract. But the task is the correct application of them to the complicated facts in a client's case. To be able to make correct application of general rules to the facts in a client's case is the object of legal study. This application of general rules is going on in the courts around us constantly. The reports of the adjudged cases furnish examples. A systematic study and analysis of these adjudged cases is, it would seem, the best exercise to fit a practicing lawyer to rightly analyze the case of his client and to foresee the probable result. The current reports of the cases in our state courts should have our first attention. One or more of these cases should be studied each day of the year. By early rising, or late sitting at night, this may be done. The study should be: First, to master the facts in the case; second, to ascertain concisely the exact question or questions in controversy between the two parties; third, the grounds on which the decision is rested by the Court; and lastly, to weigh and consider the arguments on either side as given by the Court or by the counsel in the case.

To further profit by this labor the reader should determine to what particular branch of the law the case belongs, where it would be placed in a digest or cited in a text book. He should then take his copy of the General Statutes and turn to the same subject matter in them and make a concise note, stating the result. An interleaved copy of the statutes will supply space for these notes. If this be continued from day to day a practicing lawyer may keep up with the current decisions. The notes will grow, his knowledge of the statutes will grow as well, and in a few years he will be practiced in the application of legal rules to new cases, and his copy of the statute will become his index to the adjudged cases. This demands unflinching labor and acute attention. If he lack resolution to do this or something equivalent, he must be content with subordinate rank in the profession.

Often the cause of a client will depend, perhaps indirectly, upon the correct interpretation of some statute which no case in our state reports has elucidated. It will be found useful in such a case to learn, (1st) at what time this statute was first enacted in this state, (2nd) from what source it was borrowed, (3rd) what states have the same or a similar statute, and to look through their reports for the coveted decision. The larger part of our statutes were taken from New York or Massachusetts. Emigrants from those states in the first half of the present century settled in Michigan Territory and there re-enacted bodily the code of statute law with which they were familiar. Michigan then included all the Northwest Territory from Detroit to St. Paul. When the eastern portion was admitted as a state January 26, 1837, the body of laws previously enacted remained by Act of Congress the statute law of the new Territory of Wisconsin. 5 U. U. S. Stat., p. 15, Sec. 12. Wisconsin in turn was admitted a state of the Union May 29, 1848. Minnesota was created a territory on March 3, 1849, and the laws in force in the Territory of Wisconsin at the date of its admission as a state were, by Act of Congress, continued as the statute law of the new Territory of Minnesota. 9 U. S. Stat., p. 407, Sec. 12. When Minnesota framed its constitution it was provided therein that all laws in force in the

territory should remain in force in the state until altered or repealed by the legislature. Const. Schedule, Sec. 2. The interpretation of these statutes by the courts of Massachusetts and New York prior to their enactment in Michigan and by the courts of the Territories of Michigan and Wisconsin are authoritative expositions in this state, and should be studied and cited as such. Innumerable alterations have since been made, and the present text should be compared with the old before relying upon the old decisions. That a slight alteration in the statute may make a great change in the practice is shown in McKusick v. Seymour, Sabin & Co., 48 Minn., page 168 et seq.

In studying the reports care must be taken to distinguish what is said in the opinion by way of reason or illustration from what is said in decision of the issue. The latter only is authority in a subsequent case. The practice of stating tersely the exact matter decided in the case under study will foster brevity and precision in style and help to fix in the mind the point decided. A lawyer of very moderate ability will, if he patiently follow this course, probably become a safe and fairly successful practitioner.

CHAS. C. WILLSON.

THE PORTRAIT.

HON. CHARLES EUGENE OTIS was born in Prairieville, Barry county, Mich., in 1847. He was raised in that state and graduated from the State University. In 1871 he came to St. Paul, and entered into partnership with his brother, Hon. George L. Otis, one of the ablest lawyers in the State. Mr. Otis by his indusary, integrity and talents soon acquired a prominent position in his profession, as well as an enviable standing in the community as a public-spirited citizen. He served as a member of the St. Paul Board of Education, and was for two terms a member of the City Council. He has always been a democrat, but has never been an active politician. After the death of his brother he continued in practice, associating with him his younger brother, Arthur G. Otis. On July 20, 1889, he was appointed District Judge of Ramsey County by Gov. Merriam to fill the vacancy caused by the death of Judge Vilas, and in 1890 he was the unanimous choice of both parties to succeed himself. On the bench Judge Otis has been distinguished for the same clear mindedness, fairness and courtesy that won him success as a practitioner.

DEATH OF HON. CHAS. H. BENEDICT.

A cablegram to Washington from Vice Consul Knight at Cape Town announces the death of Hon. Charles H. Benedict, United States consul at that place. The cause of Mr. Benedict's death is not stated, but it is presumed that it was Bright's disease, as he was suffering from that dread disease at the time he accepted the post.

Mr. Benedict was a resident of St. Paul at the time of his appointment. He came here from Rochester some twelve years ago and engaged in the practice of law. He was a good lawyer, an accomplished gentleman, and one of the leading lights of the democratic party. He was very popular with everybody, and republicans as well as democrats rejoiced when he received the appointment.

It was predicted by all that he would make a good consul, and the dispatches from Washington indicate that the predictions have been verified, and that he was a most efficient officer.

Mr. Benedict was appointed to the position by President Cleveland in June, 1893, and the chief reason for his accepting the position was that the physicians had told him he must leave this climate.

ATTORNEY GENERAL'S DECISIONS.

SCHOOL TEXT BOOK FUND.

Moneys belonging to the School Text Book Fund cannot be diverted to the Internal Improvement Fund.

HON. A. E. ROBBINS,
Ch'n Com. on Appropriations,
House of Representatives.

Sir: In your communication of the 9th instant you inquire in effect whether moneys now belonging to the School Text Book Fund may lawfully be carried to the Internal Improvement Fund. You also inquire, with a view to expressing yourself in a different form, whether moneys belonging to the General Revenue Fund may be carried to "another and entirely distinct fund."

The two forms of your question are not, in my opinion, convertible expressions, and will, therefore, be separately considered.

The respective funds known to the State Auditor's and the State Treasurer's departments are, with not to exceed three exceptions, of statutory origin, and when so derived constitute no barriers to legislative action. The exceptions are enacted by the Constitution, one of which is the Internal Improvement Land Fund (Art. 4, Sec. 32 b); another is the fund which may be created by the issuance and negotiation of bonds to aid in the construction of certain public buildings (Art 9, Sec. 14 a); another is the fund created for the purpose of defraying extraordinary expenses (Art. 9, Sec. 5). The Constitution prohibits the diversion of moneys belonging to either of the last named funds to other purposes than those expressly authorized. All other funds are clearly within legislative control.

It therefore follows that the School Text Book Fund may be abolished or carried to another fund within the discretion of the legislature, save the limitation thereinafter pointed out.

The Internal Improvement Fund, sometimes confounded in the popular mind with the Internal Improvement Land Fund, arises from moneys derived from a donation from the Federal government of "five per centum of the net proceeds of sales of all public lands lying within the state." (Act authorizing State government, Sec. 5, Par. 5.) Moneys derived from this source are paid to the State for "the purpose of making public roads and internal improvements as the legislature shall direct." They are, in short if the State is to keep faith with the Government, to be devoted to purposes of internal improvements, as those terms are employed in the Constitution. The State is prohibited by Sec. 5 of Art. 9 of the Constitution from being "a party in carrying on" works of internal improvement, "except in cases where grants of lands or property shall have been made to the State especially dedicated by the grant to specific purposes."

That roads and bridges are works of internal improvement can no longer be doubted in view of the language used by the Supreme Court of this State in the case of Rippe v. Becker et al., 57 N.W. Rep., 31. It is, therefore, obvious that the only purpose sought to be subserved by carrying moneys from the School Text Book Fund to the Internal Improvement Fund is to render them available for a use which is clearly prohibited by the Constitution.

The first form of your request is, therefore, answered in the negative.

Very respectfully,
H. W. CHILDS.

Feb. 11th, 1895.

ANIMALS—RUNNING AT LARGE—TOWNS.

Save where a special law otherwise provides, the electors of a town may at any annual meeting, or at a special town meeting called for the purpose, determine by by-law adopted thereat, that horses, cattle, mules and asses shall be permitted to run at large, and prescribe the time and manner thereof.

SAME—CATTLE—SHEEP—SWINE.

The term cattle does not include sheep or swine, or any domestic animals not exceeding the size of sheep or swine.

SAME—NOTICE BY CLERK.

The town clerk should indicate the proposed submission of the matter of such animals running at large in the notice of the annual meeting, but such notice is absolutely essential when action is to be taken at a special meeting.

SAME—VOTE NOT REVOKED.

A vote once determined in favor of allowing cattle to run at large continues thereafter until revoked by subsequent action.

SAME—FENCES.

Where a vote at any such meeting has been taken in favor of cattle running at large, cattle may run without restraint in the day time, and the owner of property destroyed by them cannot recover damages until it shall be proved that his lands were enclosed by a lawful fence.

MR. JOHN WILSON,
Parent, Minn.

Dear Sir: The several provisions of the statute touching the question of cattle running at large are so confused as to have given rise to many inquiries. The general law has been greatly modified by special legislation applicable to certain localities, so that the law applicable to a particular county or township can never be stated without a previous study of such special legislation. I have, therefore, deemed it advisable to present in answer to your inquiry, and for future reference, a few general principles deduced from our legislation upon the subject, which will serve in a measure to render it intelligible.

The general law briefly provides that "the electors of the town have power at their annual town meeting * * * 6. To determine the time and manner in which cattle, horses, mules, asses or sheep are permitted to go at large, provided that no cattle, horses, mules, asses nor sheep be allowed to go at large between the 15th day of October and the 1st day of April." (G. S. 1878, Chap. 10, Sec. 16.)

"All votes regulating the time and manner of running at large of cattle, horses, mules, asses or sheep within the several towns of the State of Minnesota shall be by ballot, either printed or written, or partly printed and partly written, and shall be in these words, 'in favor of restraining cattle,' or 'against restraining cattle,' and shall be placed in the same ballot box with the votes cast for town officers, and be canvassed and returned in the same manner in which other ballots are now required to be canvassed and returned." (Id. Chap. 19, Sec. 27.)

The foregoing provisions of the general law as to cattle running at large must be read in connection with other provisions thereof regulating the question of impounding beasts doing damage. The original law is as follows: "In all cases arising under the provisions of this act, the statutes to which this act is amendatory in towns where a majority of the voters at any town or special town meeting, called for the purpose, shall determine by by-law of such town, that horses, cattle, mules, and asses shall be permitted to run at large in accordance with Subdivision 6, Section 15, General Statutes 1866, no damage shall be recovered by the owner of any lands for damage committed thereon by any such beasts during the daytime, until it shall be proved that said lands were enclosed by lawful fences and every three-rail fence four feet high, constructed of such materials and in such manner as to constitute a good and sufficient fence, as against cattle, horses, mules or asses one or more years old, that are not broachy, or any fence equal thereto in sufficiency, shall for the purpose of

this act be deemed a lawful fence; but the word cattle, as used in the act shall not be so construed as to include either sheep or swine, or any other domestic animal not exceeding the size of sheep or swine." (Id., Chap. 19, Sec. 37.)

To this provision are appended a number of provisos covering a variety of subjects, some general, others special, some including and others excepting counties, towns and even senatorial districts. In addition our statutes contain twenty-seven special herd laws.

From this great mass of legislation I have deduced the following general rules:

1. Save where a special law otherwise provides the electors of a town may at any annual town meeting, or at a special town meeting, called for the purpose, determine by by-law adopted thereat, that horses, cattle, mules and asses shall be permitted to run at large and prescribe the time and manner thereof. The term "cattle" does not include sheep or swine, or any other domestic animals not exceeding the size of sheep or swine.

Note.—The foregoing rule has no application to the following subdivisions of the State. (a) The Counties of Wabasha, Dodge, Stele, Lac Qui Parle, Martin, Yellow Medicine, Lyon and Polk (except the town of Fossum), Winona, Goodhue, Kandiyohi (save five specified townships therein), Brown and Dakota. (b) The north half of the town of Pilot Mound in Fillmore County; the towns of Cocato and Stockholm in Wright County; Chanhasson in Carver County; the townships in range 22 and 23 in Freeborn County. (c) The 27th, 28th, 29th, 30th, 31st, 32d, 35th 36th senatorial districts, the 39th senatorial district except Stevens County, the 41st, except Otter Tail, Wilkin and Polk Counties. (d) The following townships do not appear to be affected by the said proviso: Marsham, Ravonna and Hastings, in Dakota County; Deerfield, Medford and Aurora, in Steele County. (e) In excluding certain senatorial districts from the operation of the law reference is had to the districts as they existed at the time the proviso was adopted.

2. While it is my opinion that the statute clearly confers upon electors at an annual town meeting authority to vote without previous notice upon the question of allowing cattle to go at large (G. S. 1878, Chap. 19, Sec. 16, Sub. 6), it is advisable that the clerk either upon his own motion, or at the instance of several freeholders of the township, indicate the proposed submission of the question in the annual notice of the town meeting. Certainly such notice is essential to valid action in the case of a special town meeting. Whenever the clerk is properly apprised that a special meeting is desired to vote upon the question, it is his duty to give notice thereof.

3. It had been held by this office that a vote once determined in favor of allowing cattle to run at large continues thereafter until revoked by subsequent action. I have adhered to this view with hesitation; but recommend that the question be annually submitted, especially where action in favor of cattle running at large was had at the last preceding meeting, annual or special.

4. Where a vote at any such meeting has been taken in favor of cattle running at large, cattle may run without restraint in the daytime, and the owner of property destroyed by them cannot recover damages "until it shall be proved that said lands were enclosed by a lawful fence."

5. It must not be overlooked that the foregoing observations are based wholly upon the general law.

I am, very respectfully,

H. W. CHILDS.

Feb. 5th, 1895.

CONSTITUTION — ART. 9, SEC. 5—INTERNAL IMPROVEMENTS — DRAINAGE — ROADS—BRIDGES.

The legislature has no power to appropriate money for the purpose of draining wet lands and for constructing bridges and roads in the absence of grants of land or property to the State for such purposes.

HON. FRANK A. DAY,
President of the Senate.

Sir: I beg to acknowledge receipt of the resolution of the Honorable Senate adopted on the 28th ult. requesting my views "as to the constitutionality of appropriating any money whatever, and if so, what money, for the purpose of draining wet lands and for constructing roads and bridges."

The question presented by the resolution involves an inquiry into the purport of the following provision contained in Article 9 of Section 5 of the State Constitution.

"The State shall never contract any debts for works of internal improvement, or be a party in carrying on such works, except in case where grants of land or other property shall have been made to the State especially dedicated by the grant to specific purposes; and in such cases the State shall devote thereto the avails of such grants, and may pledge or appropriate the revenue derived from such works in aid of their completion."

At the outset, it may be said as an incontrovertible proposition that roads and bridges and a system of drainage are internal improvements within the contemplation of the above provision of the Constitution; and it therefore follows that the State cannot, in the absence of appropriate donations to it for such purposes, either contract debts therefor or be a party in carrying them on.

(Rippe v. Becker, 57 N. W. Rep., 331.)

What is thus plainly prohibited cannot be overcome by indirection. In whatever guise the legislature seeks to commit the State to the support of such enterprises by devoting or pledging to them, whether legally or morally, directly or indirectly, the public revenues, it is equally offensive to the Constitution.

This is all the more apparent when the evils sought to be forestalled are borne in mind. In adopting their Constitution the people of the State sought to so tie the hands of their legislatures as to forever guard against the financial ruin which had overtaken several of her sister states, which had adopted improvident policies of internal improvement. The provision in question, as construed by our Supreme Court, embraces in its scope a great variety of objects. The language of the court is so instructive in this respect that I take occasion to make the following excerpt therefrom:

"The far reaching consequences of restricting this constitutional inhibition to highways for travel and commerce can readily be foreseen. It would leave the State, through its legislature, at liberty in every period of invasion or excitement, to embark in any and every other sort of enterprise outside of its legitimate governmental functions, which might be deemed of public benefit. It would admit not only the building of grain elevators, but also of engaging in schemes of drainage, irrigation, developing water powers, building grist mills, public creameries and cheese factories, establishing stock yards and packing houses and other like enterprises without limit. Certainly to engage in such enterprises as these at the expense of the taxpayers of the State is quite as much within the mischief aimed at by the Constitution as to engage in the construction of highways for commerce."

The legislature is therefore prohibited from extending the aid of the State to any of the objects suggested

by the court, unless it has been the recipient of lands or other property therefor. When the legislature devotes the revenues of the State to the construction of a public elevator, public bridge or public ditch without a previous grant, the Constitution is thereby violated, nor do I perceive how this prohibition can be overcome by donations from the public treasury to a municipality for such an object. If any other doctrine is to obtain, an avenue is at once afforded for the certain defeat of the purposes sought to be effected by the framers of the Constitution.

But while conceding the force of these views it may be urged that an appropriation for a system of drainage can be justified upon one or the other of the following grounds:

1. That the lands acquired by the State pursuant to the act of Congress of March 12, 1860, is impressed with a trust that the State should employ them or the proceeds derived from their sale, as far as necessary, in constructing levees and reclaiming them to useful purposes.

2. That the State may improve its own lands.

3. That a system of public drainage may be undertaken as a police regulation for sanitary purposes. The question is one of so grave importance that I deem it proper to present my views somewhat at length as to each of the above named contentions.

Notwithstanding the explicit terms in which the said act is drawn (Rev. St. U. S., Sec. 2479), it is yet left to the discretion of the State to determine for itself what disposition shall be made of its swamp lands derived from such a source. "As the application of the proceeds to the named objects is only prescribed 'as far as necessary,' room is left for the exercise by the State of a large discretion as to the extent and necessity." (Am. Emigrant Co. v. Adams Co., 100 U. S., 161; Mills Co. v. Burlington R. R. Co., 107 U. S., 578.)

The application of the proceeds of such lands to the purposes of the grant rests upon the good faith of the State. Clearly, the proceeds of the sales of such lands, whether in money or other subjects, may be properly devoted to any of the purposes named in the grant. But where the State has so bestowed them as to preclude any returns therefrom into its treasury, as has generally been done by the several grants made to certain of its beneficiaries, it must be deemed to have determined that necessity did not require their devotion to levee or reclamation purposes. Such disposition of them is wholly incompatible with a reserved purpose to carry on a system of drainage on account of the federal bounty, and an acknowledgment that the State had thereby exhausted its powers with regard to them. The grants so made by the State are in the nature of gifts resting upon no other consideration than contemplated benefits to the public at large, flowing from the enterprises that were designed to foster. In pursuing such a course the State may indeed have betrayed the trust confided to it by the Federal Government; but, in such event, the reparation must be effected, if at all, by the people and not the legislature. I am therefore unable to subscribe to the first contention.

Can the State improve its own lands? Undoubtedly it may do so as to lands requisite for the purposes of government, as the sites of public buildings, and perhaps it would be likewise true even as to the wild lands of the State in those cases where public policy requires their improvement by suitable drainage. But if this were conceded, I am as yet clearly of the opinion that the constitutional inhibition against internal improvements ap

plies with equal force as well when improvement to such lands is only incidental, as when the question of such benefits is not involved. The prohibition as defined by Justice Mitchell, in Rippe v. Becker, supra, is very sweeping, and, if any exception in such a case had been intended, it would have been clearly so provided.

That the State enjoys the right of protecting through its legislature, by suitable police regulations, the lives and health of the citizens, is undeniable. Moreover, it remains with the legislature to determine what measures are requisite for such purposes. If swamps, marshes and other low lands are deemed prejudicial to life and health, adequate provision may be made for the correction of the evil either by the construction of levees or drains. appropriations for such purposes are clearly within the contemplated power of the legislature; but it is equally obvious that the constitution is as much violated when the improvement is made under the mere guise of police regulation, as when its real purpose is clearly expressed upon the face of the appropriating act Courts never hesitate to look through disguises and adjudge measures according to their manifest purposes.

Minnesota v. Barber, 136 U. S., 313.

If, therefore, the revenues of the State are employed in fact for internal improvements under the semblance of a sanitary regulation, it is in plain violation of the terms of the Constitution.

I have already had the honor to advise one of the committees of the House of Representatives during the present session of the legislature that appropriations to aid in the construction of bridges and highways, in the absence of grants of land or property therefor, are authorized.

I am, very respectfully,

H. W. CHILDS,
Attorney General.

NOTES ON RECENT CASES.

Commitment of Criminals to Religious Institutions at Public Expense.

The case of Farmer v. The City of St. Paul and the House of the Good Shepherd, recently argued before Judge Kerr of the District Court of Ramsey County, involves questions of great public importance.

The suit was brought by plaintiff, in behalf of himself and other taxpayers, to enjoin the City of St. Paul from paying to the House of the Good Shepherd a claim of $71.50 for board for the month of April of certain prisoners committed to it by the Municipal Court of the City of St. Paul; from allowing or paying any other claims for board of prisoners so committed to it; from allowing or paying any claims except for boarding and keeping prisoners in the City Workhouse at Lake Como, and to prohibit any further commitments to the House of the Good Shepherd.

The city charter as amended in 1868 empowered the City Council to "establish a workhouse," and until the establishment of such workhouse "to use the county jail as a workhouse."

On April 9th, 1869, the Common Council passed an ordinance designating the jail as a workhouse, and also an ordinance declaring and establishing the House of the Good Shepherd "a workhouse for female prisoners, under the charter and ordinances of said city."

In 1881 the legislature passed a special act authorizing the city to establish, erect and maintain a workhouse, and to issue bonds to the extent of $30,000 to purchase the necessary land and pay for the erection of the building. In pursuance of this act land was purchased and a building erected near Lake Como in said city, and such building has since been used as a city workhouse.

From the passage of the ordinance of 1869 to the present time the Municipal Court has been in the habit of committing fallen women to the House of the Good Shepherd, and the city has been paying every month a certain weekly rate for the board of each prisoner so committed. The plaintiff's contention was that all such payments by the city were illegal, and contrary to Article I, Section 16, and Article VIII, Section 3, of the State Constitution.

On the hearing of the order to show cause why the restraining order should not be made perpetual, Charles Butts, the attorney for the plaintiff, claimed that the city had no power to make the House of the Good Shepherd a place of punishment for fallen women, because its charter conferred no such power on it. He further contended that if the charter did give it such power it was unconstitutional, because it delegated the power to punish criminals to a mere private institution; because it apropriated public funds to the benefit of a private corporation; because it appropriated funds drawn from the treasury to a mere religious corporation; because the House of the Good Shepherd was, in fact, a sectarian school, and the public money could not be donated to it; because the House of the Good Shepherd had no power under its charter to make a contract with the city to board the women committed to it by the Municipal court; and because the inmates of the House of the Good Shepherd were compelled to take part in religious services, and that such treatment amounted to a cruel and unusual punishment, which was prohibited by Article I., Section 5, of the Constitution.

Robertson Howard, in behalf of the city and city comptroller, claimed that none of the constitutional objections to the ordinance or the charter were valid, and argued that the city had full power to make the House of the Good Shepherd a workhouse for females; that it simply executed the power given it by its charter, and separated the females from the males by the passage of two ordinances on the same day for the general welfare of the public, and in the exercise of its power to "preserve peace and order and punish crime."

That whether the state or the city had power to impose a tax or make appropriations or expenditures of public moneys depended upon the purpose for which the money appropriated was to be used, and not upon the character of the corporation that was made the agent of the state for the administration of the fund, or the performance of the public purpose to be carried out.

He cited the ordinance naming the House of the Good Shepherd as a workhouse for females to show that it created a contractual relation between the city and the institution, under which no money could be paid out until the city authorities were satisfied that the institution had performed its full duty and earned such money, and that the city retained a supervision and control over the institution, so far as prisoners committed to it were concerned. That as the superior was required to make full monthly reports to the council, and the council could at any time, by resolution, order the discharge of any prisoner, the ordinance in effect made the House of the Good Shepherd, for the purpose of punishing fallen women who had violated the ordinances of the city and been committed to it for such viola tions, a municipal agency. That as the punishment of crime and preservation of peace and order in the community was a public purpose, for which money raised by taxation could be expended, the fact that the House of the Good Shepherd was a private corporation did not prevent the city from designat-

ing it as its agent to carry out this public purpose, and the institution having under the ordinance earned the money, the city could not refuse to pay it.

Thomas D. O'Brien and John D. O'Brien concluded the argument in behalf of the House of the Good Shepherd, contending that, under the authorities cited by Mr. Howard, there was no question that the restraining order should be dissolved; that all of the equities of the case were with the defendants, and that the case should be decided at once in their favor.

At the conclusion of the arguments Judge Kerr announced his decision as follows:

"I do not propose to decide this case upon the merits now. The order to show cause is discharged as to all future actions or commitments from the city to the House of the Good Shepherd. The only difficulty that I have in the matter is to know just exactly what order I should make as to the $71.50 now in the city treasury.

"Under the rules governing actions of this sort it seems to me that the $71.50 should be held in the treasury until the final decision of this action. These rules require that when the refusal of a preliminary injunction would involve the entire defeat of the plaintiff's claim the matter should be left in statu quo until the controversy can be decided upon its merits. In this particular case it can do no harm to the defendants to permit the matter to remain in statu quo, so far as the $71.50 is concerned, until the determination of the case. My only objection to adopting this course is that it might be considered by some an intimation of my views in this case. I desire most emphatically to disclaim any such thing.

"If I was to decide this case upon broad humanitarian and Christian principles, I would find no difficulty, for I know of my own experience that there is no nobler institution in the city than the House of the Good Shepherd. Its work has been of incalculable benefit to the city and this community, and it would be a positive calamity that its usefulness should be in any way impaired, or that the unfortunate persons who are committed to its care by the Municipal Court should be forced into the county jail or city workhouse. The order is discharged except as to the $71.50 now in the treasury."

Since this decision the plaintiff has served an amended complaint, alleging that the House of the Good Shepherd is a sectarian school, for the benefit or support of which money raised by taxation cannot be appropriated.

The case will probably come on for trial on the amended pleadings at the October term of the District Court.

The Right of Self-Defense.

The Supreme Court of the United States just before adjournment handed down a decision which establishes the principles of the right of self-defense. The decision was given on the appeal of Babe Beard from a judgment of conviction and sentence of eight years' imprisonment for manslaughter. The facts of the case, it seems, were that Beard had three brothers-in-law who came to his house with the express determination of driving away a cow, the ownership of which was in dispute between the parties. One of the brothers-in-law advanced upon Beard, who had a gun in his hands, and made a motion as if to draw a revolver from his pocket. Beard struck this brother-in-law over the head, inflicting a wound from which he died. On the trial the judge instructed the jury in regard to the law of self-defense, and said that Beard was compelled by that law to avoid danger at the hands of

the person who threatened him by going away from the place; that the only place where he need not retreat further was his dwelling place. Judge Harlan, in delivering the opinion of the court, says that the charge was defective in point of law on several grounds, and, in discussing this question in his opinion, he says:

"The court, several times in its charge, raised or suggested the inquiry whether Beard was in the lawful pursuit of his business—that is, doing what he had a right to do—when, after returning home in the afternoon, he went from his dwelling house to a part of his premises near the orchard fence, just outside of which his wife and the Jones brothers were engaged in a dispute—the former endeavoring to prevent the cow from being taken away, the latter trying to drive it off the premises. Was he not doing what he had the legal right to do when, keeping within his own premises and near his dwelling, he joined his wife, who was in dispute with others, one of whom, as he had been informed, had already threatened to take the cow away or kill him? We have no hesitation in answering this question in the affirmative. * * * In our opinion, the court below erred in holding that the accused, while on his premises, outside of his dwelling house, was under a legal duty to get out of the way, if he could, of his assailant, who, according to one view of the evidence, had threatened to kill the defendant, in execution of that purpose had armed himself with a deadly weapon, with that weapon concealed upon his person, went to the defendant's premises, despite the warning of the latter to keep away, and by word and act indicated his purpose to attack the accused.

"The defendant was where he had the right to be when the deceased advanced upon him in a threatening manner and with a deadly weapon; and if the accused did not provoke the assault and had at the time reasonable grounds to believe, and in good faith believed, that the deceased intended to take his life or to do him great bodily harm, he was not obliged to retreat, nor to consider whether he could safely retreat, but was entitled to stand his ground and meet any attack made upon him with a deadly weapon, in such way and with such force as, under all the circumstances, he, at the moment, honestly believed, and had reasonable grounds to believe, was necessary to save his own life or to protect himself from great bodily injury.

"As the proceedings below were not conducted in accordance with these principles, the judgment must be reversed and the cause remanded, with directions to grant a new trial."—Albany Law Journal.

A street railway case lately decided in the Federal Circuit Court of Appeals holds that the consent by a city to the use of streets for street railways constitutes a typical easement, and that the right created thereby is an interest in realty, being an incorporeal hereditament. Detroit Citizens' Street R. Co. v. Detroit, 26 L. R. A., 667. This is opposed to the doctrine of the Supreme Court of Illinois, in Belleville v. Citizens' Horse R. Co., 26 L. R. A., 681, and that of the Maryland Court of Appeals in Lake Roland Elevated R. Co. v. Baltimore, 20 L. R. A., 126. A decision of the Circuit Court of the United States, in Baltimore Trust and G. Co. v. Baltimore, 64 Fed. Rep., 153, made by a divided court, agrees with the Detroit case, but is now in the Supreme Court of the United States.

Sections 104, 107 and 110 of the Probate Code, Laws of 1889, Chapter 46, construed and held, that a contingent claim, arising on contract against the estate of a decedent, which does not become absolute and capable of liquidation before the time limited for creditors to present their claims to the Probate Court for allowance, is not barred because it was not presented, and the holder of such claim after it becomes absolute may maintain an action against the heirs, next of kin, legatees or devisees to whom the residue of the estate has been distributed to recover such claim to the extent of the estate received by them.

Held, further, that a claim against the estate of deceased sureties, on the bond of a guardian, whose account as such had not been allowed and settled by the Probate Court when the time expired for presenting claims against their respective estates, is such a contingent claim.

In an action upon a guardian's bond the complaint does not fail to state a cause of action because it omits to allege that permission to prosecute the bond has been obtained from the Judge of Probate. Orders reversed.

(Hautzch v. Massoit, Supreme Court of Minnesota, June 17, 1895.)

The owner of land, across which there is a private way for passage only, has the right to protect his fields by such a gate or other structure as will not unreasonably obstruct the use of the way. Hartman v. Fick (Pa.), 31 Atl. Rep., 342.

A novel case enforcing a contract to pay a pecuniary consideration for the privilege of taking a grandson and educating him is that of Enders v. Enders (Pa.), 27 L. R. A., 56, in which the contract was between the grandfather and the mother of the child, and was sustained against the objection that it was against public policy as an attempt to shift the burden of parental obligation by sale of the child. No other case of collecting pecuniary consideration on such a contract seems to have been decided, but the annotation shows a large number of cases as to the validity of contracts transferring parental responsibility or authority.

The superintendent of a street railway is held, in Central R. Co. v. Brewer (Md.), 27 L. R. A., 63, to have no implied authority to cause the arrest of a passenger on the charge of attempting to pay his fare in counterfeit coin. The case seems hardly to agree with that of Palmeri v. Manhattan R. Co. (N. Y.), 16 L. R. A., 136, in which a railroad company was held liable for an attempt to arrest on a similar charge on procurement of a ticket agent.

The refusal of an injunction on the ground that it might injure the public interest is illustrated in Dashiell v. Grosvenor, 27 L. R. A., 67, in which the United States Circuit Court of Appeals denied an injunction against the alleged infringement of a patent in the manufacture of cannon in the navy yard, where the defendants were using the invention only on behalf of the United States.

The fundamental doctrine that taxation must be for a public purpose is sharply illustrated in Baltimore & E. S. R. Co. v. Spring (Md.), 27 L. R. A., 72, in which a statute providing for the issue of county bonds for the benefit of an insolvent railroad company, with a provision that the proceeds shall be first applied to pay claims of residents of that county, is held unconstitutional.

The second initial of a name is held to be a material part of the name in State v. Higgins (Minn.), 27 L. R. A., 74, which was a case of forgery by chang ing the middle initial.

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DISTRICT COURT.

*Town of Pine City v. Anna Munch, et al.
(District Court, Pine County.)

HIGHWAY—OBSTRUCTION—SPECIAL DAMAGES.

A town cannot recover special damages in an action to abate an obstruction in a public highway.

NUISANCE—SLUICING DAM—PUBLIC LICENSE.

Where a sluicing dam properly operated and maintained under a license issued in pursuance of General Statutes of 1878, Chapter 32, Title 8, floods a highway, a town cannot abate such dam as a public nuisance.

CONSTITUTIONAL LAW—LICENSE — CONTRACT.

A license issued by the Board of County Commissioners under General Statutes of 1878, Chapter 32, Title 8, to maintain and operate a sluicing dam is a contract, and the Board cannot revoke it during the term of years for which it is issued.

EASEMENT—PRESCRIPTION—ADVERSE USER—FLOWAGE.

Where lands have been continuously and uninterruptedly flooded for more than twenty years by the operation of a dam, without any objection being made by the owners of such lands, a prescriptive right of flowage will be acquired by the owner of the dam.

SAME—CONTINUITY OF USER.

Where the owner of a dam for sluicing logs so operates it only during the sluicing season of April, May and June of each year for twenty years, that it causes adjoining lands to be overflowed during those months, and the owners of such lands make no objection to such flowing, he will thereby acquire a prescriptive right of flowage.

SAME—INTERRUPTION OF USE—LEAKAGE OR DESTRUCTION OF DAM.

The owner of a dam who has acquired a prescriptive right to flow lands, will not lose that right by reason of a lowering of the water caused by leakage or destruction of the dam, when it is repaired or rebuilt within a reasonable time, and the former stage of water thus restored.

*See Matthews v. Stillwater Gas & Electric Light Company, post page 118.

This suit was brought by the Town of Pine City to remove and abate as a public nuisance the Chengwatona sluicing dam on Snake river, on the ground that it raised the water in said river every spring, during the sluicing season, and submerged and washed away portions of a public highway that had been laid out by the Town in 1887. The Town also demanded judgment for $1,000 as special damages, and $659.50, which it was alleged it had been compelled to expend in repairing said highway between the years 1888 and 1893.

The answer of defendants set up the license to maintain said dam referred to in the decision of the court, and alleged that the dam had always been operated in the manner required by such license.

For a second defense it was alleged that for more than thirty years before the location of the road defendants had, during the months of April, May and June of every year, so operated the dam that the land over which the road was located had been continuously and uninterruptedly submerged and overflowed, adversely to the owners thereof, under a claim of right, and without objection by said owners.

The answer also contained a general denial, and alleged that if any damage was done to said highway it was the result of its location by the Town authorities below the water level as

established by the operation of said dam, and not by reason of any wrongful or unlawful acts of defendants.

A few months before the institution of the suit by the Town, the Board of County Commissioners passed a resolution declaring the license issued to defendants, which did not expire by its terms until 1896, revoked, and served a copy of such resolution on them.

On the trial defendants objected to the admission of any evidence of special damage, on the ground that the Town was not entitled to special damages by reason of the obstruction of travel over the public highway. This objection was sustained by the court.

Robert C. Saunders, for plaintiff.

The right of the Town to maintain the action must be conceded. Township of Hutchinson v. Silk, 44 Minn., 536.

The license is no defense, as it did not, and was not intended to, authorize defendants to flow the lands of others. This would be a taking of private property without compensation, and if such a construction is given to the statute it is clearly unconstitutional. The sole purpose of empowering the Commissioners to grant a license to maintain a dam is to enable the owner to collect toll for sluicing logs, which, without such license, he could not do. In other places the statutes provide specifically how authority may be obtained to flow a highway. Gen. St. 1878, Chap. 31, p. 23 et seq. Chapter 32, Title 8, of Gen. St. 1878, simply empowers the Commissioners to license the maintenance of a dam upon the licensee's own land, and the licensee is not licensed to trespass on others' property. It may be true that the legislature can authorize the maintenance of a nuisance, but it cannot authorize the taking of property without compensation.

The defendants have failed to prove any prescriptive right to flow the lands. The flowage was neither exclusive nor uninterrupted. It was interrupted during nine months every year and ceased entirely during one year, while the dam was being rebuilt. If the flowage was justified by the license it was not adverse, and, if not, there was no shadow of claim of right. There never was any continuous flowage of the land. For nine months every year it was entirely dry. Carlisle v. Cooper, 19 N. J. Eq., 256, is conclusive upon this point.

Moreover, the defenses of license and of prescription are inconsistent.

Robertson Howard and S. G. L. Roberts, for defendants.

The public license granted to the defendants is a complete defense to this suit by the public authorities to abate the dam as a public nuisance. People v. Law, 34 Barb., 514; People v. N. Y. Gas Co., 64 Barb., 55, 69-70; Fletcher v. R. R. Co., 25 Wend., 464; First Baptist Church v. R. R. Co., 6 Barb., 313-318; Davis v. Mayor, 14 N. Y., 506, 524-525; Crittenden v. Wilson, 5 Cowan, 167; Stoughton v. State, 5 Wis., 271; Com. v. Reed, 34 Pa. St., 275; Harris v. Thompson, 9 Barb., 364; Rex v. Pease, 4 B. and Ad., 30; Danville R. R. Co. v. Com., 73 Pa. St., 29, 38; Lewis v. Behan, 28 La. Ann., 130; People v. Detroit Plank Road Co., 37 Mich., 195; Miller v. Mayor of N. Y., 109 U. S., 385, 393-394; Patterson v. Duluth, 21 Minn., 494; Village of Pine City v. Munch, 42 Minn., 342.

The evidence shows that the flooding of the road complained of was the natural and necessary result of the maintenance and operation of the dam "for the purpose of raising a sufficnent head of water to sluice logs," as authorized by the license, and the license is a perfect defense. Patterson v. Duluth, 21 Minn., 494; Village of Pine City v. Munch, 42 Minn., 342.

Whether the statute is unconstitutional or not, because it authorizes the taking of private property without

compensation, cannot be considered, as the Town has no property rights that have been invaded. The owners of the lands are the only persons who can raise that objection. Antoni v. Wright, 22 Gratt. (Va.), 857; De Garnett v. Haynes, 23 Miss., 600, 603; Williamson v. Carleton, 51 Maine, 453; Jones v. Black, 48 Ala., 540, 543; Smith v. Inge, 80 Ala., 283, 286; Com. v. Wright, 79 Ky., 22-24; Sullivan v. Berry, 83 Ky., 198; Burnsides v. Lincoln Co. Court, 86 Ky., 424; Wellington, Petitioner, 16 Pick., 87, 96; Hingham v. Norfolk Co., 6 Allen, 353, 356, 357; People v. Rensselaer & S. R. R. Co., 15 Wend., 113, 130, 131; 30 Amer. Dec., 33; County Commissioners v. State, 22 Fla., 55; 12 Amer. St. Rep., 183, 185-187.

The board of County Commissioners had no power to revoke the license, because it was, in effect, a contract between the state, in whose behalf the Commissioners acted, and defendants, and the statute contains no provision authorizing a modification or a revocation of a license, issued in pursuance thereof, during the term of years for which it is issued. McRoberts v. Washburn, 10 Minn., 23 (Gil. 8).

That the defendants acquired a prescriptive right to flow the lands is clearly proved by the evidence.

This defense is not inconsistent with the defense of a public license to flow the lands. Hammond v. Zehner, 21 N. Y., 118; 23 Barb., 473.

The use of an easement for twenty years unexplained will be presumed to be under a claim of right and adverse, and will be sufficient to establish title by prescription. A party disputing the right must rebut the presumption of a grant by proving that the user was by actual license or permission. Cox v. Forrest, 60 Md., 79, 80; Williams v. Nelson, 23 Pick., 141, 147; O'Dowd v. O'Daniel (Ky.), 10 S. W. Rep., 639; Blake v. Everett, 1 Allen, 248; Hammond v. Zenner, 21 N. Y., 118; Eckerson v. Crippen, 110 N. Y., 593; Bolliver Mfg. Co. v. Neposit Mfg. Co., 16 Pick., 241; Colburn v. Marsh, 22 N. Y. Supt., 990, 993; Olney v. Fenner, 2 R. I., 211; Esling v. Williams, 10 Pa. St., 126; Garrett v. Jackson, 20 Pa. St., 33; Wagner v. Hippler (Pa.), 13 Atl. Rep., 81; Grace Church v. Dobbins (Pa.), 25 Atl. Rep., 1120; Rogerson v. Shepard (W. Va.), 10 S. E. Rep., 632, 635; Polly v. McCall, 37 Ala., 21, 30; Perry v. Garfield, 37 Vt., 310; Union Water Works v. Crary, 25 Cal., 509; School District v. Lynch, 33 Conn., 334; Carmody v. Maroney (Wis.), 58 N. W. Rep., 1110; Costello v. Edson, 44 Minn., 135; Village of Glencoe v. Wadsworth, 48 Minn., 402; Dean v. Goddard (Minn.), 56 N. W. Rep., 1060.

The owners of the lands must have known that the dam was being operated and flowed their lands. Knowledge is presumed in such a case. Perrin v. Garfield, 37 Vt., 311; Arbuckle v. Ward, 29 Vt., 551.

What constitutes a requisite continuity of enjoyment to gain thereby a prescriptive right to an easement depends upon the character and nature of the right claimed. 2 Greenleaf Evid., Section 544; Carr v. Foster, 3 Ad. and Ell. (N. S.), 581; Bodfish v. Bodfish, 105 Mass., 317; Cox v. Forrest, 60 Md., 79; Winnepiscogee Lake Co. v. Young, 40 N. H. 436; Alcorn v. Saddler (Miss.), 14 So. Rep., 444.

Defendants flooded the lands every year during the sluicing season (April to June), when they had occasion to raise the water, and therefore acquired a prescriptive right to flow the lands.

Nor did the rebuilding of the dam in November, 1877, and the repairing of the dam in December, 1889, during which months it was not necessary to keep up a full head of water, interrupt or break the continuity of the use of the easement here claimed. Wood v. Kelly, 30 Maine, 47; Gerauger v. Sum-

mers, 2 Ired. 229; Hoag v. De Lorm, 30 Wis., 591, 595.

The prescriptive right to flow the lands was a valuable property right acquired by defendants, and they could not be deprived of that right by the location of the road by the Town without compensation. Nor can the Town do this indirectly by this suit. Arnold v. Hudson River R. Co., 55 N. Y., 661; Lock and Canal Co. v. Nashua & Lowell R. Co., 10 Cush., 385; Alcorn v. Saddler (Miss.), 14 So. Rep., 444.

It was the duty of the Town authorities in constructing the road to do it in such a manner that defendants' right to flow would not be interfered with. Com. v. Ruddle (Pa.), 21 Atl. Rep., 314; Haynes v. Town of Burlington, 38 Vt., 350; Marsh v. Portsmouth R. Co., 17 N. H., 379; Row v. Addison, 34 N. H., 306.

The Town, by the negligence of its officers, contributed to the damage complained of, and cannot ask equitable relief. Edwards v. Alluez Ming. Co., 38 Mich., 52.

The court will consider the slight inconvenience the alleged obstruction of the road has caused, or will cause, and the small expense the Town will incur by building a new road in a proper location, in comparison with the value of the property to be destroyed, and the magnitude of the public interests to be injured, and refuse plaintiff any equitable relief whatever. High on Injunctions, Sec. 742 n. 4, p. 570; Fox v. Holcomb, 32 Mich., 494; Hall v. Rood, 40 Mich., 46, 49; Edwards v. Alluez Ming. Co., 38 Mich., 46.

CROSBY, J. Having duly considered the evidence adduced by the respective parties in this action and the arguments of counsel, I FIND AS FACTS:

That the plaintiff is a municipal corporation, as alleged in the complaint.

That within the township limits of the plaintiff there is a public highway, as alleged in the complaint.

That at the time of the location and construction of said public highway in the year 1887 a license had been theretofore granted to the defendants by the Board of County Commissioners of said Pine County, under and by virtue of Title 8 of Chapter 32 of the General Statutes of 1878 of the State of Minnesota to maintain the dam mentioned in the complaint for the purpose of raising a head of water sufficient to sluice logs, timber and lumber upon Snake river, and that said dam has ever since the granting of said license been maintained and operated by authority thereof.

That in order to sluice said logs, timber and lumber successfully, and as required by said statutes and the terms and conditions of their bond, duly executed by them to said Board of County Commissioners in accordance with the requirements of Section 87 of said statutes, it is necessary, during the months of April, May, June and July of each year, to have and maintain a full head of water for said work, and that only such head of water as was absolutely necessary for said dam has ever been maintained by the defendants in operating said dam or otherwise.

That the dam mentioned in the complaint was erected in 1849 and has ever since been maintained and operated, and that for more than thirty years prior to 1887, in which year the said road described in the complaint was laid out and constructed, said dam had been so maintained and operated by the defendants.

That during all of said time the waters of Snake river were raised by said dam and set back so as to cause the lands over which the said public highway was laid out and constructed to be continuously and uninterruptedly during that portion of each year when

said dam was full of water, being during the sluicing season and constituting about three months in each year, to be submerged and overflowed.

That said lands were so submerged and overflowed by the defendants adversely to the owners thereof, and under a claim of right so to do, and without objection by the owners thereof.

That said public highway was during portions of the seasons of 1888, 1889, 1890, 1891, 1892 and 1893 flooded and overflowed by reason of the maintenance of said dam and the flowage therefrom and portions thereof washed away and the plaintiff was compelled to, and did by reason thereof, expend the sum of $300 to repair the same.

That the defendants still maintain said dam and intend to continue the maintenance thereof as they heretofore have done.

As CONCLUSIONS OF LAW I find that the plaintiff is not entitled to judgment for any relief in this action, and that the defendants are entitled to judgment against the plaintiff for their costs and disbursements herein.

Note—The maintenance of the dam is authorized by a license granted under the laws of the State; that is, it is authorized by the State. It is a branch of the State government that seeks to abate the dam. What the State authorizes it cannot prosecute or abate as a nuisance by itself or by any branch of its government. What the State cannot do directly it cannot do indirectly.

Geo. E. Hayes v. C. H. Douglas.
(District Court, Crow Wing County.)

SUMMONS—PROOF OF SERVICE.

Proof of personal service of summons may be filed *nunc pro tunc*.

LEON E. LUM for plaintiff. True & Price for defendant.

HOLLAND, J.: Defendant moved to vacate judgment on the ground that no proof of service of summons was filed. The plaintiff thereupon moved for leave to file proof of personal service *nunc pro tunc*. Plaintiff's motion granted and defendant's motion denied. (Following Burr v. Seymour, 43 M., 401, which, however, allowed defective affidavit of publication to be corrected).

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*James Mathews v. The Stillwater Gas and Electric Light Company.
(District Court, Washington County.)

NUISANCE—PLEADING—PRESCRIPTION.

Where an easement by prescription is relied on as a justification of acts amounting to a nuisance it must be pleaded.

SAME—LENGTH OF TIME OF USER.

While the right to maintain a nuisance may be acquired by adverse use, he who claims the right must prove the user for such length of time as is required by the statute of limitations, to enable occupants of lands to defeat the title of the true owner.

SAME—NATURE OF USER.

Such user must also be shown to have been continued, uninterrupted, and adverse, that is under claim of right, with the acquiescence and knowledge of the owner, for the requisite period.

SAME—ACQUIESCENCE—REMONSTRANCE.

Where the user has been the subject of frequent controversies between the parties, or the owner has remonstrated against the use, or denied the right of the party exercising the right to do so, although he has not resorted to ctual violence to resist the use, no right will be acquired.

SAME—LICENSE—CHARTER AND FRANCHISE OF GAS LIGHT COMPANY.

The charter of a gas and electric light company will not protect it in the commission of a private nuisance arising from the emission of dense smoke, and the creation of offensive and noxious gases and smells, in the operation of its plant.

SAME—INJUNCTION REFUSED.

Considering the inconvenience which would be experienced by the public should an injunction issue, and the fact that the Gas Light Company can at slight expense remove, or materially diminish the cause of complaint, and offers to do so, the injunction is refused.

J. N. CASTLE, for plaintiff. CLAPP & MCCARTHEY, for defendant.

For more than twenty years plaintiff's dwelling house has stood on the top of a high bluff in Stillwater. In 1874 defendant erected a gas plant in the ravine at the foot of the bluff, and

*See Town of Pine City v. Munch, ante page 114.

the plant is about 150 feet from the dwelling house. From time to time since 1874 defendant has made additions to, and improvements in and about its plant, one being a change in the method of making gas. Plaintiff claims that during all the time since 1874 defendant has caused gas and other noxious and offensive smells and odors from its plant to be cast in and upon plaintiff's premises, and since 1887 has caused smoke, cinders, soot and dust from its smoke stack to be cast in and upon plaintiff's premises. That by reason of such acts of defendant, plaintiff's furniture and inside furnishings of his home have been greatly damaged, and he and the several members of his family suffered in health and comfort. After the erection in said plant of the electric light apparatus, plaintiff claims to have beed exceedingly annoyed by the noises and vibrations of that portion of the plant, especially during the night.

All these claims and allegations were denied by defendant, and defendant also set up a "fifteen year prescriptive right" as to the offensive smells and odors, and also took shelter under the ordinance of Stillwater granting it its franchise. On the trial plaintiff testified that he had always protested and objected to the maintenance of the plant; protested against the escaping of the gas, smoke, soot, cinders, smells, etc., upon and over his premises, and particularly at those times defendant was engaged in making enlargements and improvements in its works, and the superintendent of defendant also testified that plaintiff had at various times made such complaints and protests to him. Plaintiff alleged in his complaint that the plant of defendant was a continuing nuisance and prayed for injunction restraining it from continuing its unlawful acts. "And as conclusions of law the Court finds that said acts of said defendant for six years and more next preceding the commencement of this action constituted and were as to said plaintiff a continuing nuisance." Judgment ordered for plaintiff.

WILLISTON. J.: That the defendant is exercising a lawful business is not questioned.

The evidence clearly established the fact that in the prosecution of such business the defendant has so conducted the same as to seriously invade the rights of the plaintiff, to such an extent that as to him such business has for years been a nuisance, consisting in the permitting of noisome smells and smoke to escape from its premises to the injury of the plaintiff, and also by permitting upon its lands noises which are an annoyance and injury to the plaintiff.

That the smells complained of were at all times offensive to the senses; that at times they produced sickness and actual physical discomfort; and at all times materially interfered with the comfortable enjoyment by the plaintiff and his family in his dwelling house and his and their home established by the evidence.

For the defendant it is claimed, that as to such smells they have existed and been created and thrown upon the plaintiff's house at all times during a period of more than fifteen years, during all which time the plaintiff has been in the possession of his property but has taken no steps to prevent the escape of the smells upon his premises, by reason of which acts of omission no action can now be maintained by him for the recovery of any damages sustained by him from, or by reason of, the acts of the defendant.

The defendant does not plead an easement by prescription as a justification of its acts in creating such smells and permitting the same to annoy and injure the plaintiff.

No point however is made by the plaintiff upon the pleadings.

The burden of establishing such prescriptive right is upon the defendant.

Wood on Nuisances, (3d Ed.) Secs. 712-717, both inclusive.

Assuming that the right to maintain a nuisance can be acquired by adverse use, he who claims the right must prove the user for such length of time as is required by the statute of limitations to enable occupants of lands to defeat the title of the true owner, and further that such user was continued, uninterrupted, and adverse, that is under claim of right, with the acquiescence and knowledge of the owner.

Sargent v. Ballard, 9 Pick., 251 (254), and authorities cited. "Again in order to acquire a title by prescription, the user must be peaceable and uninterrupted, and must be *acquiesced* in by the owner of the land. Therefore where the user was the subject of frequent controversies between the parties, or if the owner *remonstrated* against the use, or denied the right of the party exercising the right to do so, no right is acquired. It is not necessary that the owner of the land should resort to actual violence to resist the use, but any act which shows his positive dissent thereto, to the knowledge of the person exercising the use, will defeat the acquisition of the right by defeating the presumption that arises from acquiescence."

Wood on Nuisances, (3d Ed.) Vol. 2, Sec. 718.
Powell v. Bagg, 8 Gray, 441.
C. & N. W. Ry. Co. v. Hoag, 90 Ill., 339 (348).
Campbell v. Seaman, 63 N. Y., 568 (584).
See also cases cited in Wood and 90 Ill.

It appears from the evidence that the plaintiff has not acquiesced in the defendant's user of plaintiff's rights; this from not only the testimony of the plaintiff, but from that of the superintendent of the defendant.

The charter of the defendant does not protect it in the commission of a private nuisance.

"That which is authorized by the legislature, within the strict scope of the power given, cannot be a *public* nuisance, but it *may* be a *private* nuisance, and the legislative grant is no protection against a private action for damages resulting therefrom."

Wood on Nuisances, Vol. 2, Sec. 757.

Again the ordinance of the city of Stillwater granting the franchise under which defendant acquired the right to manufacture and sell gas within said city among other things provides: "That such persons * * * and assigns * * * shall be responsible to the city or individuals by reason of any negligence of themselves * * * in respect to the construction, management or maintenance of such works."

Considering the inconvenience which would be experienced by the public should the injunction prayed for by the plaintiff issue, and believing that the defendant at a comparatively small expense to itself, can remove, or materially diminish the plaintiff's cause of complaint, and that it will in good faith endeavor so to do, such injunction will not be allowed.

OF CURRENT INTEREST.

Below we print the list of graduates of the Law Department of the University of Minnesota. The class contains many young men of great promise:

Alair, Walter Ellsworth, St. Paul;
Alderson, Charles Francis, Minneap-

olis; Appleton, Geo. Holmes, Minneapolis; Baker, Lucy Lloyd, B. L., Minneapolis; Bartholomew, Lee Bradley, Chariton, Iowa; Begg, William Reynolds, A. B., St. Paul; Benson, Henry Nathaniel, St. Peter; Benton, Andrew Arthur, Madelia; Blackman, Wilbur Palmer, B. L., Winona; Brand, Archie Mack, Faribault; Brand, Norton Franklin, Faribault; Burness, Bernard, Minneapolis; Carr, Clarence G., B. S., Minneapolis; Carroll, Walter N., Minneapolis; Christello, Albert, Minneapolis; Chute, Frederick Butterfield, B. L., Minneapolis; Cleveland, Frank Hannay, St. Paul; Cormany, Montgomery L., Minneapolis; Cudhie, George, Willow City, N. D.; Dickey, Joel Mark, Minneapolis; Dolliff, Alfred Cookman, Wood Lake; Faning, William David, Madelia; Farnham, Charles Wells, St. Paul; Felt, Oscar Alexander, Norseland; Foot, Fred Warner, Red Wing; Fosseen, Manley Lewis, Minneapolis; Galbraith, John Alexander, B. L., St. Paul Park; Gardiner, Harris Wells, St. Paul; Gibson, George Porter, Atwater; Glover, Newton Lemuel, Minneapolis; Gemmell, William Henry Miller, St. Paul; Griggs, Frank Hammond, B. A., St. Paul; Hammer, Henry H., Minneapolis; Hartley, Heber Lindon, B. A., Minneapolis; Hays, Richard Murray, Minneapolis; Hertig, Wendell, Minneapolis; Higgins, William Martin, Minneapolis; Holman, William Jennings, Jr., Minneapolis; Hultquist, Charles Constantine, Center City; Hunt, William Franklin, St. Paul; Jewett, William Parker, St. Paul; Johnson, Victor Ludwig, Lindstrom; Keefe, George Lenfestey, B. A., St. Paul; Kirwin, William Thomas, Spring Valley; Kirkpatrick, Tollen Frank, Dundas; Kranz, John Valentine, Minneapolis; Kyle, Harry Thompson, Platteville, Wis.; Loughran, Henry Arthur, St. Paul; McDonald, William E., Minneapolis; McGregor, Benjamin F., Mapleton; Mason, Alfred Finley, St. Paul; Merrill, George Coston, Minneapolis; Mesick, Oliver Elton, Gettysburg, S. D.; Michelet, Simon Themstrup, Minneapolis; O'Brien, James Edward, B. A., Lake City; Olson, Samuel, Willmar; Osborne, George Marshall, Minneapolis; Oyen, Jacob W., Minneapolis; Pattridge, Samuel Carr, Pleasant Grove; Pratt, Albert Fuller, Anoka; Prendergast, Louis W., St. Paul; Privet, Walter Nichols, Caledonia; Richardson, Norman C., Minneapolis; Roise, Axel Hildor, Willmar; Sanders, M. T., St. Paul; Shaughnessy, Michael, Henderson; Siemers, Julius Andrew, Minneapolis; Simons, Luman Clendenin, Glencoe; Somerby, Charles Wood, A. B., Minneapolis; Southerland, A. Haus; Southwood, Walter Newton, Shakopee; Spicer, Mason Willmar, Willmar; Storing, Charles Chester, Minneapolis; Taylor, Benjamin Chandler, B. S., Minneapolis; Tenneson, Bernt Gilbert, Tacoma, Wash.; Tufte, Benjamin, Minneapolis; Van Valkenburg, Jesse, B. A., Canby; Wallace, Thomas Freeman, B. A., Minneapolis; Webb, Arthur Markham, Arcadia, Wis.; Weiss, Harry, St. Paul; Wheeler, Howard, St. Paul; Williams, Henry White, Minneapolis; Wilson, Mark Ernest, Minneapolis; Young, Arthur Linus, Gotha.

Mr. S. A. Flaherty has left Morris, Minn., to establish himself permanently in Minneapolis in partnership with Mr. M. A. Spooner in the practice of law. Mr. Spooner is the brother of the well-known general attorney of the Deering Harvester company's Western office at Chicago. Mr. Flaherty was county attorney and also village counsel for Morris. He was held in high esteem there for his abilities as a student and lawyer and acknowledged integrity.

Mr. Stiles W. Burr and Mr. T. S. Tompkins have removed to rooms 503-4 New York Life building, St. Paul. Tel. 1467.

M. Roach and William M. Edson recently passed the state bar examination in St. Paul. The former has his office in the Chamber of Commerce building in Duluth, and hereafter he will have charge of the reporting of cases from Duluth for the JOURNAL. Mr. Edson is employed by Edson & Hanks, of Duluth.

The firm of Clay & Reifsnider, attorneys and proprietors of the Hutchinson Law, Loan, Collection and Insurance Agency, of Hutchinson, Minn., announce its dissolution, Mr. G. V. Reifsnider retiring. Clay & Odquist succeed to the business.

H. J. Grannis, of Duluth, has accepted a position with the firm of Draper, Davis & Hollister, and has removed his office from the Palladio building to the First National Bank building.

Judge A. Barto, who lately resumed practice of law at St. Cloud, Minn., has formed a co-partnership with W. H. Crowell, under the name of Barto & Crowell, with offices in the Land Office block.

O. E. Hammer has removed from Spring Valley to Stewartville, Minn., and formed a partnership with Mr. Whitney, under the firm name of Hammer & Whitney.

H. S. Lord and John H. Norton, formerly of Lord & Norton, have dissolved partnership, and the latter has opened his office in the King building in Duluth.

F. D. Rice, of the late firm of McCaffery & Rice, of Duluth, has returned to St. Paul, and is now in the office of Kueffner & Fauntleroy.

Attorney A. J. Thomas, of Ely, Minn., called at the JOURNAL office last week to renew his subscription. Come again.

FACTS AND FANCIES.

The Judge (severely): This poor man says that you, prisoner, hypnotized him into committing the crime. What have you to say for yourself?

Prisoner: He's right, your honor. Another man hypnotized me into hypnotizing him.—Ex.

† † †

Several years ago, in the town of Greenwood, lived an eccentric old gentleman with an impediment in his speech. He was a witness in a lawsuit that his father, then deceased, had left $1,000 to have continued. The old man's father was noted for the many lawsuits he had been through, and the opposing counsel asked the witness: "How many lawsuits has your father been in since he left this world?" "N-n-not b-but one," said Uncle Joe; "f-f-for he went all o-over H-h-heaven, but c-c-couldn't find a lawyer." Even the lawyers smiled.—Lewiston Journal.

† † †

Judge Caldwell, of North Carolina, was slow to see the point of a joke. On trying a case on one occasion the solicitor called in vain for a witness named Sarah Mooney. As she did not answer he informed the Court that he could not proceed without 'ceremony.' The bar laughed, but the judge looked puzzled. Some weeks after that, when at home, the point dawned on him and he broke into a loud laugh. Upon his wife's inquiring the cause he explained that the solicitor had called Sallie Mooney, and when she did not answer he had said that he could not proceed without ceremony. The wife said she did not see the point. The judge said it had taken him three weeks to find it, but when she did see it it would be very funny. —Chicago Law Journal.

HON. THOMAS S. BUCKHAM,

District Judge, Fifth Judicial District.

...THE...

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JOHN A. LARIMORE, . . . EDITOR

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STREET RAILROADS AND THE LAW OF FELLOW SERVANT.

The decision of our Supreme Court in the case of Funk v. St. Paul City Railway Company, holding that the Act of 1887 which made railroad companies liable for injuries to their employes caused by negligence of co-employes, does not apply to street railroads is reported in full on page 129 of this number, in advance of any other publication.

As similar statutes are in force in other states, this decision will no doubt be followed in those states whenever such statutes are invoked as changing the common law rule of liability of a street railroad for negligence of an employe who is, in fact, a fellow servant of the party injured.

The reasoning of the Court is clear and forcible, and its conclusion is in accordance with the true principles of statutory construction. Since the introduction of electricity as a motive power street railroads have many features in common with railroads operated by steam, and, upon any other theory of construction than that adopted by the Court, electric roads, at least, would seem to be within the spirit of the legislative enactment, and controlled thereby.

SUSPENSION OF RULES OF COURT.

In Gillette-Herzog Manufacturing Company v. Ashton, 55 Minn., 75, the Supreme Court decided that any District Court can suspend the District Court rules in any particular case, and hence such suspension is not *per se* cause for reversal. It is true that the Court fastens on this rule the qualification, "if the questions involved are rightly determined;" but this is no part of the rule, because "if rightly determined" the decision rests on the *right* or *wrong* of the case, and not on the suspension. If rightly decided the ruling of the District Court will not be reversed; hence the fact of suspension is no part of the rule, because reversal is refused on the ground that the ruling is right on the question of principle. Nor can this ruling rest on the fact that the rule involved was made by the Court which suspended it, because in any case it is the rule of the Court. The simple rule, therefore, announced by this decision is reduced to one sentence, to-wit, that any District Court—and *a priori* any Court—can suspend its rules in any particular case.

Is this true? The Constitution, Art. 6, Sec. 5, gives the District Court "original" and appellate jurisdiction, but not "general" jurisdiction, as other state constitutions read. Original jurisdiction in all civil cases where the amount in controversy exceeds one hundred dollars, and in all criminal cases where the punishment exceeds three months' imprisonment or fine of more than one hundred dollars, means that such cases must begin—originate—in the District Court. If the law-making power had not provided machinery for putting this beginning into operation and bringing it to an end, there would be no courts, because this constitutional grant cannot operate *propri vigore*, for the reason that no machinery for its operation and execution is provided within itself—that is, it is a naked grant. It therefore follows that the District Courts have no power or authority but that which the legislature has given or gives, consistent with this naked grant, because the people, by the Constitution, lays down the rule within which the law-making power must operate, and that is that such cases must originate—must begin—in these Courts and be conducted as provided by this law-making power.

The law of 1862, Ch. 16, provided that the judges of the District Court throughout the State should meet and adopt rules of practice not inconsistent with the Constitution and laws of this State or of the United States, as will secure a uniformity of practice. The law-making power did not provide any other means for making rules; hence no rules could be made for these Courts but by the judges in such convention. The General Statutes of 1866, Ch. 122, repealed this law without putting anything in its place, on the probable assumption that all Courts have the *inherent* power to make rules. The law of 1875, Ch. 44, re-enacted the principle and almost the language of the law of 1862, Ch. 16, and provided by means of a proviso "that in any case in furtherance of justice the rules may be relaxed or modified, and a party may be relieved against the effect thereof on such terms as may be just."

It was different with respect to the Supreme Court, because the law empowering that Court to make rules, Gen. Stat., Ch. 63, Sec. 2, was enacted contemporaneous with the creation and organization of that Court.

The District Court rules as lately adopted by the District Court judges under the law of 1875, Ch. 44, do not provide that any District Court can suspend such rule or rules, and the proviso in that act does not operate *propri vigore* and exclusive of the

action of the rules, because the meaning is—and that is the office of a proviso—that the judges in such convention can make such rules, and can provide that the same "may be relaxed or modified" by any District Court "in any case in furtherance of justice," and also provide for relieving a party from the effect thereof on such terms as may be just. But the rules must provide for this relaxing or modifying, because a law which provides for the making of rules and the relaxing or modifying of such rules means that the power which makes them shall also provide for relaxing or modifying them and, if not so provided, it is presumed that the making power did not deem it proper to provide for the suspension. In other words, the creation of a power to *make and suspend* a rule vests in that power the right to make *or* suspend, and if it does not exercise the power to suspend there can be no suspension, because the power which makes has *alone* the power to provide for the suspension.

Now, then, the law-making power says that the judges in convention *shall* make rules which may be relaxed or modified as they provide, and the Supreme Court says such rules can be relaxed or modified, although the rules do not so provide. Which rule of action should be followed, the rule laid down by the law-making power, or the rule of the judiciary?

JNO. F. KELLY.

UNIFORM STATE LEGISLATION.

A valuable article upon this subject appears in the "Annals of the American Academy" for May, from the pen of Frederic J. Stimson, of Boston, who has achieved distinction by his comparative compilation of the statute laws of all the States. Mr. Stimson shows that we are living under a fourfold system of law; there is in every State (1) the common law of the State as interpreted by its courts; (2) the common law as interpreted by the United States courts; (3) the statutes of the State, and (4) the statutes of the United States. It is the hope of Mr. Stimson, that, without touching the system of State and Federal government, or the Federal constitution, or altering that great principle of local self-government under which the sovereign States legislate for themselves on their own affairs, the several States may, by voluntary and simultaneous action, be gradually brought to enact the same statutes on all purely formal matters, on most matters of trade and commerce, and in general on all those subjects where no peculiar geographical or social condition, or inherited custom of the people, demands in each State a separate and peculiar statute law. He thinks that the confusion which results from contradictory statutes, may in large measure be obviated without any great modification in the statute law in any one State by merely passing, under the general head of "acts to promote general uniformity of law" new and simple chapters of law in cases where the uniform law is different from the law as already existing in the State.

Most interesting is his elaborate statement of how the diversity of statute law has arisen, going into the separate fountain springs of the law in every State, a subject which it is impracticable to even summarize here. That the task is not as difficult as might first appear were the statute law of forty-six States and Territories wholly different upon any subject, Mr. Stimson shows "upon making a complete and careful examination and comparison of the laws of all the States, that we usually find not more than three or four *different* statutes, in them all upon any one subject." He says:

"You will commonly find some twen-

ty States, mostly northern and northwestern, following the lead of the State of New York, and having the same law. The New England States, with Ohio and Oregon, will usually form another group. The Western and Pacific slope States, under the lead of California, will form a third; and while there may be two or three States with anomalous statutes on any one point, you will not commonly find more than three, or, at the most, four differences, if the Southern States happen to be different, upon any one section of a statute in the whole Union."

The yearly product of the legislative bodies of all our States is shown to be from four to eight thousand statutes, and Mr. Stimson makes a rough division of the States and Territories according to their habit of enacting statutes, into four classes:

1. Code States, which are Ohio, Georgia, Iowa, Texas, California, Dakota, Montana, Utah and Wyoming, though in several other States the statutes are termed codes. These undertake to substitute codes for the common law.

2. States which go far in what may be termed the *enactment* of the common law, and in *addition*, also, which are: New York, Illinois, Indiana, Michigan, Wisconsin, Minnesota and Alabama.

3. States which are generally inclined to add to, or occasionally to alter, the common law, rather than to enact it over in their statutes; which are Massachusetts, Maine, Kansas, Nebraska, North Carolina, Tennessee, Missouri and Arkansas.

4. The conservative States, which retain the common law most nearly intact; which are New Hampshire, Delaware, New Jersey, Pennsylvania, Kentucky and South Carolina.

Mr. Stimson sketches the history of the present attempt at national unification of law, showing the number of States that have appointed commissions, the conferences held, and the progress thus far made in the different branches of the law., We quote what Mr. Stimson says with regard to the progress made towards uniformity in commercial law. After speaking of the action taken for uniformity in weights and measures he continues:

"We have now entered the domain of commercial law; but the only other subject which the conference has thus far taken up is that of days of grace and the presentment of bills and notes. They have recommended the abolition of all days of grace; but this statute, though duly enacted in New York, failed of enactment in Massachusetts, owing largely to the prejudice of the country people. It is perfectly obvious that nothing has been gained to the borrower by making a note that is due in sixty days run for sixty-three, for he has to pay the additional interest on the three days. The only practical consequence is to complicate bank accounts, and to bring on much uncertainty and even considerable danger as to the duty of banks in forwarding bills and notes which are payable in some other State.

"But the whole subject of commercial law is one in which there may be much difference of opinion as to the wisdom of attempting a universal codification. We are all agreed that the few important short statutes concerning notes and bills should be generally adopted. In most states these are very brief, the statute concerning them containing in the State of Massachusetts, for instance, only thirteen sections, about one page and a half; and in some other States it is still briefer. In California and the code States generally there is an elaborate code of some thirty or forty pages on the subject. Opinions vary greatly among the commissioners themselves. Judge Brewster, of Connecticut, for instance,

is of opinion that an exhaustive commercial code should be recommended by the commissioners and adopted by all the States. The New York code on the subject contains five chapters, with some thirty articles, and would probably cover six or eight pages of an ordinary statute book. Mr. Field's International Code contains on the subject of bills of exchange some sixty articles, largely definitions. Judge Chalmers, of England, has written a treatise on the law of bills, notes and checks in the form of a code which contains ten chapters and 278 articles, which would probably fill at least thirty pages of an ordinary statute book. This code was recommended for adoption as a uniform statute at the last Saratoga conference. I myself have prepared a chapter which embodies all the important statutes now usually existing on the subject in the States of the Union, and contains only nineteen sections, and could be put in two pages of an ordinary statute book; thus being almost as short as the Massachusetts chapter, while far more comprehensive. It does not, however, concern itself with definitions or elaborate statements of the law merchant, but approximates most closely to the statute on the subject as it actually exists in most of the States of the Union at present.

"This, therefore, with the cognate subject of bills of lading and warehouse receipts, is a very good example of a most important subject upon which there is much difference in present legislation, and much difference of opinion among the State commissioners and experts on the subject generally."

The Journal, as our readers know, has commenced the publication seriatum of articles showing in detail the varying State laws in the matter of commercial paper. This work will be continued, and, when finally completed, will constitute, we trust, a valuable collection of information that may be usefully referred to in any movement towards uniformity in this important branch of law.—The Banking Law Journal.

TROLLEY CARS AND NEGLIGENCE.

In the holding by the New Jersey Court of Errors and Appeals, that it is not negligence *per se* for a driver of a vehicle not to stop, look and listen before crossing the track of an electric street railway, and that it is a question of fact to be decided by the jury, various features are apparent. Trolley cars are now in use and their speed is remarkable. They pass and repass at any moment in either direction, and the rule of looking in both directions, applicable to steam railways, might work hardship and inconvenience to travelers, who have equal rights with trolley cars at regular street crossings. If a wagon gets to the street crossing first, why should not the trolley car hold up? Both must exercise reasonable care to avoid a collision. In the case under consideration the traveler looked only in one direction, and it was claimed that he should be nonsuited. In the absence of clear evidence of contributory negligence, Courts must submit the question of reasonable care to the judgment of the jury. The law of negligence will likely receive somewhat different modifications as applied to these swiftly running trolley cars in crowded cities. The highest care should be required, consistent with their object of affording rapid locomotion. But swiftly moving surface cars, although so authorized by ordinances, are dangerous instrumentalities, and every safeguard should be reasonably required of them. The principal case is Trenton Passenger Ry. Co. v. Hawk, March 28, 1895, New Jersey L. J., May, 1895.—New Jersey Law Journal.

LAW OF THE ROAD.

Writing of the law of the road in the Yale Law Journal, Mr. Israel H. Pens says: "In O'Neil v. The Town of East Windsor, 63 Conn., 150, we find an instructive and recent opinion construing a statute requiring vehicles meeting on the highway to turn to the right; the duty of a municipality to keep its highways in repair, and the question of negligence. The rules of law applicable to the conduct of drivers of vehicles and passengers upon the highway are few, direct and simple, and ultimately resolve themselves into a question of negligence. The case mentioned was an action to recover for an injury to the plaintiff's horse occasioned by a defect in the highway of the defendant town."

The facts were as follows: A lady and her husband driving upon the highway, the husband holding a rein in each hand. Night dark and foggy. Turns vehicle to the left to avoid danger of defect in the highway and collides with a hack coming from the opposite direction. Held, that the defect was the sole cause of the injury, and that an action against the town should be sustained. "If," say the Court, "the plaintiff's husband voluntarily turned the horse to the left to avoid the danger of the buggy's tipping over, and this was done under a reasonable apprehension that the buggy would otherwise tip over in consequence of the defect in the highway, and the result was the collision and the injury, the defect would still be considered the cause of the injury, if the plaintiff and her husband used due care."

There are statutes in many of the States regulating this matter. The Tennessee provision reads: "When vehicles on said roads are passing in the same direction, and the driver of the hindmost desires to pass the foremost, each driver shall give one-half of the road, the foremost by turning to the right, the hindmost by turning to the left." This provision relates to vehicles passing, and if there is no other to intercept the driver may use any part of the road which suits him; nor is one driver bound to turn aside in either direction if there is room enough for the hindmost to safely pass. In every instance due care must be used to avoid collision and accident. 76 N. Y., 530; 2 Esp., 533; 17 Barb., 94; and 1 Watts, 360 (which last gives the law in almost the same words as the Tennessee statute).—4 Yale Law Journal, 134.

THE PORTRAIT.

HON. THOMAS S. BUCKHAM whose portrait appears as the frontispiece in this issue was born in Chelsea, Orange County, Vermont, Jan. 7, 1839. He attended the common schools and finally graduated from the university of his native state. He came to Minnesota in 1857 and during his residence here has held many positions of honor and trust, having been Mayor of Faribault, County Attorney for Rice County, County Superintendent of Schools and State Senator. That he has served continuously as Judge of the Fifth District since 1880 demonstrates the satisfaction which he has given. Judge Buckham is a Republican, though never an active politician. He is married and resides in Faribault.

Edward Everett and Judge Story once met at dinner. In his post-prandial speech the judge said that "Fame rises where Everett goes," to which Mr. Everett replied: "However high my fame may rise, I am sure I will never get above one Story."

Lawyer—"You will get your third out of the estate, madam." Widow—"Oh, Mr. Bluebags! How can you say such things with my second hardly cold in the grave?"

DECISION OF SUPREME COURT OF MINNESOTA.

Funk v. St. Paul City Railway Co.
(Filed June 27, 1895.)

STREET RAILROADS — NEGLIGENCE OF FELLOW SERVANT — GENERAL LAWS 1887, CHAPTER 13.

Chapter 13, General Laws of 1887, provides that every railroad company owning and operating a railroad in this State, shall be liable for damages sustained by an agent or servant by reason of the negligence of any other agent or servant. *Held*, that this law is not applicable to a street railway corporation although its line is operated by a cable.

STATUTORY CONSTRUCTION — MISCHIEF TO BE REMEDIED—CONTEXT.

Where language is in any manner obscure, or of a doubtful meaning, we may recur to the history of the time when it was enacted, and seek in that history for the mischief which the statute was entitled to remedy, and when words of a statute are not explicit the intention is to be collected from the context of the question.

NEW TRIAL—SEVERAL ISSUES—VERDICT—INSTRUCTION.

Where there are several material issues tried and the verdict is a general one, it can not be upheld if the trial court gave the jury an erroneous charge upon any one of the issues.

Appeal by defendant from an order of the District Court of Ramsey County, Kelly, J., made June 13, 1894, overruling defendant's motion for a new trial. Order reversed.

MUNN, BOYESEN & THYGESON for appellant. WILLRICH & LAMBERT for respondent.

BUCK, J. The material and difficult question for us to determine is whether Chapter 13 of the General Laws of 1887, in regard to damages arising by reason of a fellow servant, is applicable to the case under consideration. That law reads as follows:

"Every railroad corporation owning or operating a railroad in this State shall be liable for all damages sustained by any agent or servant thereof by reason of the negligence of any other agent or servant thereof, without contributory negligence on his part, when sustained in this State."

The defendant is the St. Paul City Railway Company, and in the complaint it is described as the Seventh Street Cable Line in the City of St. Paul, which said line of cable railway extends from Wabasha Street eastward to a point on Dayton's Bluff, in said city, and that the cars and grip cars running thereon are operated by means of a cable, which cable runs in a conduit underneath the tracks of the car line. It is also alleged that the plaintiff's intestate was a plasterer by trade and employed by the defendant to plaster the inner walls of the conduit through which the cable runs, and that while so engaged he was killed, wholly through the negligence of the defendant. The jury returned a verdict in favor of the plaintiff for the sum of $2,500, and the defendant appealed. The defendant is a street railway corporation, but whether it is included in the term "railroad" as used in the law of 1887 is a debatable question. The common understanding of the word "railroad" is that it is a graded road or way on which rails of iron or steel are laid for the wheels of the cars to run upon carrying heavy loads usually propelled by steam. Railroads in a rude form were in use as early as 1676, but it was not until 1829 when successful experiments in the use of locomotives were made that they first began to be extensively constructed, and it is only within recent years that another class of railroads, namely, those laid down in the streets of towns and cities, have become very numerous.

Judge Robertson, in Louisville & Portland Ry. Co. v. Louisville City R. R. Co., 2 Duvall, 175, says: "A railroad is for the use of the universal public in the transportation of all persons, baggage and other freight. A street railway is dedicated for the more limited use of the local public for the more transient transportation of persons only within the limits of the city. In a more technical sense, therefore, a street railway is not a railroad. A 'railroad' and a 'street railroad' or way

are in both their technical and popular import as distinct and different things as a road and a street or as a bridge and a railroad bridge, and it has been authoritatively adjudged that the simple term 'railroad' means a viaduct in a road dedicated to the common use, and that the qualified phrase 'railroad bridge' means a viaduct constructed for the use of railroad transportation." This decision was made in 1865 and involved the construction to be given to a provision in a railroad charter which provided that no other railroad should be constructed between two named points in a city, the Court holding that such provision did not prohibit the construction of a street railway between the points named.

Perhaps it may be conceded that, technically speaking, the term "railroad" would include a street railway so far as its road bed is made of iron or steel rails for wheels of cars to run upon, but where there is doubt about the true meaning of the word or term used in the law the legislative intent is not to be determined from that particular expression, but from the general legislation upon the same subject matter. It is claimed by appellant's counsel, and not denied by the counsel for the respondent, and such we believe the fact to be, that on February 24, 1887, when the general law of that year was passed, there were no cable or electric street railways in existence in this State. If so, what was the legislative intent in using the word "railroad" in the law of 1887, to be deduced from the whole or from part of the statute taken together upon the subject of railroads?

When the words of a statute are not explicit the intention is to be collected from the context, from the occasion and necessity of the law, from the mischief felt and the object and remedy in view. Potter's Dwarris, 195, note 13.

What was the mischief felt which resulted in the passage of this law? Was it a danger known or one unknown? Was it a danger then felt or realized, or one that might possibly arise in the future? We must assume that it was dealing with and acting upon existing facts within its knowledge.

Of course, if the thing was so entirely free from ambiguity and broad enough to include unknown things which might spring into existence in the future, they would be deemed to come within and be subject to the evident meaning of the terms used. Following this line of thought we quote the case of Bridge Proprietors v. Hoboken Co., 1 Wall., 116, in which Mr. Justice Miller uses this language: "It does not follow that when a newly invented or discovered thing is called by some familiar word which comes nearest to expressing the new idea that the thing so styled is really the thing formerly meant by the familiar words.

"The track upon which the steam cars now transport the traveler or his property is called a road, sometimes, perhaps generally, a railroad. The term road is applied to it, no doubt, because in some sense it is for the same purposes that road had been used. But until the thing so made and seen no imagination, even the most fertile, could have pictured it from any previous use of a railroad. Some call the enlcosure in which passengers travel on a railroad a coach, but it is more like a house than a coach, and is less like a coach than are several vehicles which are rarely if ever called coaches. It does not, therefeore, follow that when a word is used in a statute or contract seventy years since that it must be held to include everything to which the same word is applied at the present day." And where the language of a statute is in any manner obscure or of doubtful mean-

ing we may recur to the history of the time when it was enacted and seek in that history for the mischief and defect which the statute was intended to remedy. In the case of U. S. against the U. P. R. R. Co., 91 U. S., 72, the Court said: "Courts in construing statutes may with propriety recur to the history of the times when it was passed; and this is frequently necessary in order to ascertain the reason as well as the meaning of the particular provision in it." See, also, Smith v. Townsend, 13 Supreme Court, 631; Aldridge v. Williams, 3 Howard (U. S.), 24; Preston v. Brandy, 1 Wheat., 120.

But if we assume that at the time of the passage of the law of 1887 the history of street cars was generally known and their use, method of operation and dangers therefrom well understood, can it be fairly and reasonably held that it was the legislative intent to apply the term railroad to street railways? It is a matter of common knowledge that street cars operated by cable or electricity are more readily managed than those operated by steam, where long passenger and freight trains, with their weight and momentum, are not so easily controlled. A street car is generally run separately, rarely with more than two or three coupled together, and there is but little danger of collision. They do not run so rapidly, their movements are easily and quickly checked, and the road beds are constructed upon level or graded streets, without deep cuts, and generally lighted. Nor do street railways carry freight. The greatest railroad hazard and danger of personal injury to railroad employes arise from operating their trains. There is no such danger in operating street railways, whatever may be the motive power, because they do not carry freight. Especially is the danger in coupling their cars entirely absent. They get their business from the street usually in populous cities, where passenger travel is the only business carried on. Street cars do not usually run beyond the city limits, and none beyond the State boundary. The words in the law of 1887 make a railroad corporation operating the railroad in this State liable for damages "when sustained within this State." They undoubtedly aim at the railroads operated by steam where their lines extended beyond the jurisdiction of the State. It is true these restrictive words would include railroads operated by steam wholly within the State, but they were inserted to prevent the bringing of suit where the injury was sustained upon railroads out of this State, but where the lines of the same railroad came within the boundary of our own State. Hence the words "when sustained within this State" evidently referred to railroads operated by locomotives, and it was such railroads the legislature had in contemplation when this term was used. Through our Territorial and State legislation the term railroad has acquired a definite and well understood meaning, and it has never been understood to include street railroads. It is usually applied to the ordinary steam railroad of commerce, and when there has been legislation in regard to street railways they have been so designated.

In Elliott on Roads and Streets it is said that "the distinctive and essential feature of a street railway, considered in relation to other roads, is that it is a railway for the transportation of passengers and not of freight. As we employ the term, and desire it to be understood, it excuses the idea of the carriage of freight, for we do not believe that a railroad over which heavily laden freight trains are drawn can be considered a street railway." We consider the words "railroad" and "railway" as synonomous, and that

they are generally used interchangeably, as this Court has heretofore decided in State v. Brin, 30 Minn., 522.

If, in the future, street railways shall be used for carrying freight, as they undoubtedly will be, with all of its attendant hazards and dangers, it will be within the province and discretion of the legislature to make the law of 1887 applicable to street railways, or if before that time it considers the application of that law to the present method of operating street railways a necessary, wise and judicious one, it can do so by such specific and definite terms that there can be no need of construction or interpretation.

If we were to hold that the term railroad in the law of 1887 applied to street railways because the word is broad enough to cover all roads constructed of iron or steel rails for wheels of cars to pass upon, we see no reason why it should not be so construed whenever found in the other legislation of this State. This would require street railways to build depots and waiting rooms for passengers, for there is just as much reason to make the word "railroad" applicable in this respect as to personal injury cases. This is but one of the very many instances where, by the use of the word "railroad," the company is required to perform certain duties to which it cannot reasonably be said that the meaning of such words includes street railways. To so construe in such instances would lead to confusion and be a palpable violation of the legislative intent.

The respondent claims that there is sufficient evidence to justify the finding of the jury without reference to the fellow servant act of 1887. The verdict was a general one, and this Court cannot say whether the jury based its finding upon the ground that the death of Henry Funk was caused by the negligence of a fellow servant or not. It may be that the jury founded their verdict upon the erroneous instruction of the Court that the defendant would be liable for the negligence of a fellow servant under the law of 1887. There were several issues tried, and where there was such an erroneous instruction in regard to a vital one it cannot be disregarded by this Court upon the ground that possibly the jury might have founded their verdict upon some other issue. As to whether the defendant was guilty of negligence in operating its railroads we express no opinion. That issue can be determined in a new trial, which must be granted by reason of the erroneous ruling of the Court below upon the question we have discussed.

The order appealed from is reversed.

MITCHELL, J. In concurring in the foregoing opinion my only excuse for adding anything is the importance of the question involved. The question is wholly one of legislative intent. Did the legislature intend to include street railroads within the provisions of the act? In its original literal sense the word "railroad" means a road with rails upon it upon which wheels of carriages or vehicles run. In this sense it would, of course, include street railroads. But according to the common, popular usage, the word "railroad," without any qualifying or explanatory prefix, is generally understood as referring exclusively to ordinary commercial railroads used for the transportation of both passengers and freight, and whenever street railroads are referred to the word "street" is prefixed. This is also a general legislative use of the words. In all the legislation of this state I have found no act (unless this be an exception) in which the word "railroad" or "railway," standing alone, was not evidently intended to be applied exclusively to ordinary commercial railroads. Neither

have I found an act (unless this be an exception) which has reference to street railroads in which the word "street" was not prefixed. I do not claim that there might not be a law enacted where it would be evident, from its subject matter and object, that the word "railroad" was intended to include street railroads. But in my opinion this is clearly not such a case. The occasion for enacting this law was the peculiar risks incident to the operation of railroads, and especially those resulting from negligence of fellow servants. The remedy sought to be obtained was better protection to railroad employes from those peculiar hazards. The peculiar conditions which we consider to require peculiar legislation for the protection of employes engaged in the operation of railroads are too familiar to require repetition. Generally, it may be stated that the most cogent ones were the high rate of speed at which trains were run, the great momentum acquired by long and heavy trains where an accident to one car is liable to wreck the entire train, the peculiar dangers incident to the operation of freight trains, that the roads are often built upon an embankment or trestle where an accident would be peculiarly dangerous, the danger of collisions owing to the fact that numerous trains are operated over the same tracks, the vast number of employes of different grades engaged in different lines of work, many of whom are necessarily personally unknown to the others. The mere fact that steam was used as a motive power was not in itself either the occasion or the justification for the enactment of the law established for railroad companies, and subjecting them to liability for the negligence of its servants. If one of these companies were to substitute electricity for steam as its motive power, it would be still subject to the provisions of the act. In the case of street railroads, whatever be the motive power, the peculiar conditions above referred to either do not exist at all, or, at most, only in a very modified degree. This is a fact of such common knowledge that it need not be more than stated. The question is not whether the legislature had the power to place street railroads in the same class with ordinary commercial railroads, but whether they have, in fact, done so. The difference in conditions affecting the risks to which employes are exposed is sufficiently substantial to authorize the legislature to make the law applicable to ordinary commercial railroads alone, and furnishes, in my judgment, ample reason for concluding that they so intended, and that they used the word "railroad" in its ordinary and peculiar sense, and in the sense in which they themselves had generally used it in other statutes. It may be said that in the case of some other line of railroad exceptionally situated, the conditions involving dangers to employes might be exactly similar, both in kind and degree, to those existing on some lines of street railway. It is difficult to conceive of such a case. But it is sufficient answer to the suggestion that it simply shows that a classification of this sort, like everything else human, cannot be wholly perfect, and that in a case which is marked by substantial characteristics in varying degrees it will often happen that those of one member may scarcely differ at all from those of some members of another class. But the line must be drawn; and if the difference in conditions generally existing between ordinary commercial railroads and street railroads is substantial that is all that constitutional rules require as a basis of classification. Neither can I see any middle ground between excluding all street railways from the operation of the act, as including them, that would be maintainable on principle or capable of convenient practicable application.

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DISTRICT COURT.

William B. Mitchell v. Alex. Chisholm.
(District Court, Stearns County.)

VENDOR AND VENDEE—FAILURE OF TITLE.

A judgment in an action upon notes given in part payment of the purchase price of a tract of land, that said notes were without consideration by reason of a failure of title of the vendor to the land, precludes the vendor in an action brought by him in ejectment against his vendee, who had bought in the paramount title, from objecting to his vendees setting up such title.

TAX TITLE—SERVICE OF NOTICE OF EXPIRATION OF REDEMPTION—ON WHOM TO BE MADE.

Where the owner of a tax title causes the land to be assessed in his name and notice of the expiration of redemption to be served upon himself, such service is not sufficient to deprive the real owner of his rights; the statute meaning that such notice should be served upon the person in whose name the land is properly assessed.

In 1880 William B. Mitchell, the plaintiff, contracted by bond for a deed, to convey by "quitclaim deed in fee simple," eighty acres of land to the defendant Chisholm for the consideration of $400, the consideration being evidenced by five notes payable annually. Chisholm after paying the first three notes discovered that Mitchell's title was defective, being a tax title, and for his own protection purchased the interest of the actual owner of the land. He thereupon refused to pay the remaining notes until Mitchell would make good title to the land. Mitchell refused to make other than a deed of release and quitclaim, which Chisholm refused to accept, and thereupon Mitchell brought an action upon the promissory notes unpaid. The defense was failure of consideration, with a tender of the money due, conditioned that Mitchell made good title to the land. The case was tried in 1887 and the Court ordered judgment for the defendant for his costs and disbursements, and judgment was entered pursuant to this order.

Soon thereafter Mitchell commenced an action in ejectment to recover possession of the land from the defendant. To it the defense of *res adjudicata* was pleaded to which Mitchell demurred. The demurrer was overruled by the Court and the defense sustained. Thereupon Mitchell applied for a dismissal of the action which application was granted, but no judgment of dismissal was ever entered. Soon thereafter Mitchell commenced another action in ejectment identical in all respects with the last aforesaid. This action was met by the defense setting up all the matters preceding the commencement of this action, including the plea of *res adjudicata*. The defense was sustained by the trial Court and judgment directed for the defendant. Plaintiff appealed to the Supreme Court from an order denying motion for a new trial, and the decision of the trial Court was reversed in 58 N. W. R., 873. Thereupon the case was again tried to the Court which made and filed its findings April 6, 1895, in favor of the defendant. The Court finds all the tax titles upon which

plaintiff relied to be invalid, and the facts as stated substantially above.

OSCAR TAYLOR for plaintiff. GEO. W. STEWART for defendant.

BAXTER, J.: It conclusively appears from the evidence in this case that the plaintiff never was in the actual or constructive possession of the land in controversy in this action. And it also appears to my satisfaction that at the time of the commencement of this action he had no right, claim or title thereto. I am therefore unable, even with the assistance of the opinion of the Supreme Court in this case, (cited above), to see my way clear to order judgment in favor of the plaintiff herein.

The judgment adverse to the plaintiff in his action against the defendant to recover the balance of the purchase money claimed to be due upon his contract of sale to the defendants, in my opinion, wipes out any and all claim he ever had upon such contract or by reason thereof; and for that reason, if for no other, the defendants are not estopped from setting up title in themselves any more than they would have been if said contract had never existed. To say that the plaintiff can still make use of said contract for any purpose is to assert that it still has some vitality left, which, as I understand the matter, is not true. The defendants at the time of the commencement of this action were in no se se in default, and the plaintiff had no claim against them. The claim that he once had had been entirely disposed of, partly by payment and partly by the judgment of this Court. For these reasons I am unable to see how he can recover in this action without being required to show any right or title to the land in controversy.

I am not unmindful of the rule that the vendee cannot dispute the vendor's title, when possession of the vendee was acquired from the vendor, under a contract upon which the vendor seeks to recover possession; but I do not see how that rule has any application to this case. Where the vendee, defendant, is not in default, and the plaintiff has no right of action upon the contract of sale, by which alone he could sustain to the defendant, the relation of vendor. The plaintiff might have brought ejectment but he elected to bring an action upon his contract of sale for the balance of purchase money, and his defeat in that action put an end to any rights he may have had as vendor to sustain an action of ejectment based upon such contract. The relation of vendor and vendee can only exist by virtue of an existing contract between the parties, and, as before stated, none exists between the parties to this action. I am unable to find any authorities conflicting with this view of the matter.

But it appears from the testimony that the plaintiff claims a tax title to said land; and while his right to the possession thereof under said tax title has not been referred to by either counsel in their arguments before me in this case, still, as it may be mentioned on appeal, I desire to say with reference thereto that I am still of the opinion that the service of the notice of expiration of redemption upon the holder of the tax certificate, at his instance, is not sufficient to deprive the owner of the land of his right thereto although the land is assessed in the name of such tax certificate holder, as was done in this case. The plaintiff, Mitchell, holds the tax certificate. At his instance the Auditor issued the notice of expiration of redemption, the notice is directed to Mitchell as the person in whose name the land was assessed, it is served upon Mitchell by the sheriff, and returned to Mitchell as the owner of the tax title, and dur-

ing all of this time the defendants are in possession of the land, cultivating and living upon the same, ignorant of the scheme to deprive them of their homes without their knowledge.

The statute relating to notice of expiration of redemption, when properly construed, means that such notice may be served upon the person in whose name the land is properly assessed. It noes not seem to me that a fair construction of said statute can make the law making power guilty of the absurdity of providing that one man can, by serving papers upon himself, deprive another of his property. It cannot be claimed that the plaintiff had any right to said land except such as he acquired by his tax certificate, which gave him no right to have the same assessed in his name. Nor could said land, even if his tax title was good and his proceedings regular, be properly assessed in his name until the time for redemption expired, for until then he had, by virtue of his tax certificate, simply a lien upon such land for the money paid for such certificate and interest thereon.

The comments of the Supreme Court of Iowa in the case of Cummings v. Brown; 16 N. W. R., 280, a case involving the same question relative to tax titles that this one does, so fully expresses my views upon the subject that I take the liberty to quote from the opinion of the Court in that case. With reference to the service of notice of expiration of redemption the Court say: "This is quite an ingenious contrivance to acquire quietly, and without the danger of interference on the part of the owner of the land, a tax title which will divest him of his property. The mistake made by the defendant was in the expectation that the Courts would aid him in the enterprise. It therefore follows that the notice served upon himself is of no value except to show the weakness of the attempt to evade the law."

In Re Arbitration inter Joseph Alexander and A. P. Nelson:

(District Court, Olmsted County.)

ARBITRATION.

"The claim of any person to an estate in fee or for life." What is not—

On April 10, 1893, the parties agree in writing to a submission of arbitration under 1878 Gen. Stat., Chap. 89, and the arbitrators duly awarded in writing "that A. F. Nelson is indebted to Joseph Alexander in the sum of $73.62, and we therefore award and determine that said Alexander shall recover of said Nelson the sum of $73.62. In arriving at above conclusion we have allowed said Alexander credit for the value of Lots 4, 5 and 8 in Block 27, * * * sold by Alexander to Nelson under a verbal agreement, but deed of same has never been delivered by Alexander to Nelson, and we award and determine that said Alexander shall execute and deliver to said Nelson a warranty deed of said lots upon payment of said sum of $73.62." The sealed award was on April 15th filed in the District Court. On June 5th the award was in open court on motion of attorneys of both parties and in their presence opened by order of the Judge of the District Court, and by mutual consent of said attorneys, and no complaint against said award being then and there made, the Court ordered judgment to be entered in accordance with the findings of the arbitrators which were confirmed and that each party pay one-half the arbitrators' and clerk's fees. On June 6th judgment was entered by the clerk that Nelson pay Alexander $73.62 upon the execution and delivery to him by Alexander of a warranty deed of said lots, and that the parties each pay one-half the arbitrators' and clerk's fees, and the costs were so paid. Alexander failing to execute and deliver the warranty deed after demand and refusing a tender of $73.62 and interest from Nelson, the

latter commenced suit on April 24, 1895, against the former for specific performance under said award and judgment. On May 13th Alexander answered said complaint admitting the submission to arbitration and the award thereon but denied the authority or intention of the arbitrators to award as to the title to said real estate, and alleging that the District Court only ordered "that the award be in all things confirmed, that Alexander have judgment against Nelson in accordance with the arbitrators' findings and each party pay one-half of the arbitrators' and clerk's fees," and also alleging a stipulation for taxation of costs and entry of judgment with notice signed by the attorneys of both parties also alleging fraud in procuring an erroneous entry of judgment respecting the claim of either party to any estate in fee or for life in said real estate, and alleging that said judgment was void. Alexander on June 3, 1895, moved the District Court to set aside said judgment and expunge the same from the records, also to set aside and vacate the award, on the ground that the arbitrators attempted contrary to law and the covenant of submission to determine by their award respecting the claims of the parties to an estate in fee to real estate, and that the Court had not jurisdiction of the subject matter to adjudge as to the title in fee to said real estate and that said award and judgment are both contrary to law and void.

W. LOGAN BRACKINRIDGE, for Nelson; HON. CHAS. C. WILLSON and JOS. A BEAR, for Alexander.

GOULD, J.: This is not an application for relief from a judgment entered through mistake, nor to re-open a judgment once entered. The object is to have the arbitration proceedings, including the judgment, entirely done away with, vacated and set aside, for that neither the arbitrators nor the Court ever had or could acquire jurisdiction of the subject matter in controversy, under 1894 Gen. Stats., Sec. 6211, prohibiting to submission to arbitrators of the claim of any person to any estate in fee or for life to real estate. Mere irregularities would not now be available to either party. The subject matter must itself be *dehors* the jurisdiction of the arbitrators and the Court. This Court can only be guided in this matter by what appears on the record. The instrument of submission in general terms includes "all and all manner of actions, and causes of action, suits, controversies, claims and demands whatsoever, now pending, existing or held by and between said parties," but in no way does it specify any particular subject, and is, therefore, upon its face, innocent of the charge of including the prohibited topic mentioned in the statute. It must be presumed to have been intended to submit only such things as the law permitted to be thus arbitrated. The award finds Nelson indebted to Alexander in the sum of $73.62, and provides for a recovery of that amount from the debtor on the condition that Alexander shall convey certain real estate to Nelson because "they have allowed Alexander credit" for the real estate in reaching the balance found due, that said real estate had formerly been sold by him to Nelson but not conveyed. Can the Court infer from these expressions in the award, and from the judgment which follows it, as a matter of law, that a claim of any party to "an estate in fee or for life in real estate" was a subject matter of the arbitration? The prohibited topic signifies a controversy touching the amount, extent or limit of the right or interest a party may have or claim in real estate, and thereby involves inquiry into the nature and law of these two forms of estate, which the legislature has seen

fit to keep out of the power of arbitrators to pass upon. It cannot be fairly inferred from this record that either party "claimed an estate in fee or for life" in the real estate mentioned, or that there was any controversy between them on that subject. The record disclosing no want of jurisdiction the award and judgment must be held conclusive.

Ordered that said motion be denied.

The Washington Life Insurance Company v. Marshall et al. (Two cases.)
(District Court, Ramsey County.)

STATUTE OF FRAUDS—ASSUMPTION OF MORTGAGE.

Where an action at law is brought on an express contract in a deed to pay a mortgage on the property conveyed thereby, and by the terms of the mortgage payment is not to be made until after one year from the date of the deed, such agreement is within the statute of frauds, and no recovery can be had unless the contract has been "subscribed" by the party sought to be charged thereon.

SAME—PERFORMANCE ON ONE SIDE.

In New York a contract not to be performed for one year is within the statute of frauds, although it has been entirely performed on one side.

SAME—CONFLICT OF LAWS.

In an action on a contract the statute of frauds of the State where the contract was made and was to be performed, governs, and not that of the State where the action is brought.

On November 26th, 1888, Henry W. Frost and wife executed two bonds for the sums of $15,000 and $16,000, respectively, payable to the order of the Washington Life Insurance Company, and to secure their payment executed two mortgages on certain property in New York city known as Nos. 2148 and 2150 Fifth Avenue. The bonds and mortgages were executed and delivered in New York, and the bonds, which designated no particular place of payment, were by their terms made payable on December 1st, 1889.

On November 27th, 1888, Frost conveyed the property by two deeds to Edward R. Gilman, of St. Paul, and, as alleged in the complaints, Gilman "in and by his deeds" assumed and promised to pay said mortgages.

On February 23d, 1889, Gilman conveyed the property to William R. Marshall, who in his deeds assumed and agreed to pay these mortgages.

The mortgages not being paid at maturity were foreclosed by action in the Supreme Court of New York, and after the sale, on July 20, 1890, there were deficiencies of $2,674.43 and $2,742.45, respectively.

Plaintiff brought these actions against Marshall and Gilman to recover these deficiencies with interest from July 20, 1890, basing the actions on the alleged express contracts in the deeds.

The defendants answered separately, and after a general denial among other defenses set up the section of the New York statute of frauds requiring all contracts not to be performed for one year to be subscribed by the party to be charged thereon. The answers also set out in full the alleged assumption clauses in the deeds from Frost to Gilman, on which the actions were brought. These clauses were as follows: "Subject, however, to a mortgage to secure the payment of $15,000 ($16,000 in other case) and interest, which said mortgage the party of the second part hereto hereby assumes and agrees to pay."

The two actions were tried together, and after a jury had been empanelled, and the case opened by counsel for plaintiff he offered to read in evidence the alleged assumption clauses in the deeds from Frost to Gilman to prove his agreement to pay the mortgages.

Defendant's counsel objected to such evidence on the ground that the clauses were too indefinite and uncertain to prove the alleged contracts of assumption, and because the alleged contracts in the deeds were not subscribed by Gilman, or any person authorized by him to sign them for

him, and were void under the New York statute of frauds pleaded in the answers.

The Court, Willis, J., after examination of the pleadings, overruled the first ground of objection, but asked for argument as to the effect of the statute of frauds on such a contract.

ROBERTON HOWARD and HAYDN S. COLE for defendants.

These astions are actions at law upon the express written covenants in the deeds, and not brought upon the theory of implied contracts created by law. In such an action, if the contract is not to be performed for more than one year, it is void under the New York statute unless subscribed by the party sued.

The only theory on which such a contract could be held not within the statute is that adopted in some of the States, that if it has been entirely performed on one side the statute does not apply.

But in New York this theory has never been adopted, and such contracts are held to be within the statute. Kellogg v. Clark, 23 Hun., 393; Van Dyke v. Clark, 19 N. Y. Supt., 651; Broadwell v. Getman, 2 Denio, 87; Weir v. Hill, 2 Lan., 278; Bartlett v. Wheeler, 44 Barb., 162.

The validity of the contract is to be determined by the New York statute of frauds, and not by that of the *forum*. Jensen v. Weide, 42 Minn., 60; Denny v. Williams, 5 Allen, 1; De Costa v. Hatch, 24 N. J. Law, 319, 329, 333; Carrington v. Brent, 1 McLean, 167; Low v. Andrews, 1 Story, 38; Kling v. Fries, 33 Mich., 278; Sullivan v. Sullivan (Mich.), 38 N. W. Rep., 473; Anderson v. May, 10 Heiskell, 84; Houghtaling v. Ball, 19 Mo., 86; Allhouse v. Ramsey, 6 Wharton, 334, 335; Cochrau v. Ward (Ind.), 29 N. E. Rep., 796-798; 30 N. E. Rep., 581; Wolf v. Burke (Colo.), 32 Pac Rep., 428, 429.

HENRY B. WENZELL and FRANCIS B. TIFFANY for plaintiff.

The acceptance of a deed poll which stipulates for the assumption of a mortgage on the land by the vendee binds him personally, notwithstanding the statute of frauds. The contract being implied is not within the statute. Urquart v. Brayton, 12 R. I., 169; Pike v. Brown, 7 Cush., 133; Braman v. Dowse, 12 Cush., 227; Beeston v. Collyer, 4 Bing., 309; Reed Stat. Frauds, Sec. 139.

After argument the Court held that the objection should be sustained.

Plaintiff then rested. Defendant moved the Court to instruct the jury to bring in verdicts for defendants in both cases. This motion was granted, and the jury rendered verdicts in accordance with such instruction.

August Wennerberg v. The City of Stillwater.
(District Court, Washington County.)

STILLWATER—SEWERS—SURFACE WATER—DAMAGES—NOTICE—LIMITATION.

The provisions of the charter of Stillwater requiring a written notice to be served on the Mayor or City Clerk of claims for injuries received or damages sustained by reason or means of any defect in the condition of any bridge, street, sidewalk, sewer, gutter or thoroughfare, and any action to recover for such injuries or damages to be brought within one year from the happening of the injury, or the sustaining of such damage, have no application to an action brought to recover damages for injury to property caused by surface water collected by the city in the improvement of its streets, and which it fails to furnish a sufficient outlet for.

In this action defendant is accused of having diverted surface water from its natural drainage, and having, by means of gutters, sewers, etc., collected the water, turned the same into a sewer near plaintiff's premises, and is also complained of for not keeping said sewer in repair. During the week commencing May 9th, 1894, several severe rain storms visited Stillwater, clogging up the sewer, thereby causing the water to seek other channels, and in so doing the water destroyed the buildng occupied by plaintiff as a retail store and greatly damaged his stock of goods.

Section 18 of the city charter provides, in substance, that no action shall be maintained against the City of Stillwater on account of injuries received, or damages sustained, by reason of any defect in the condition of any gutter, sewer, etc., unless such action be commenced within one year from the happening of the injury or damage. The section also requires the filing with the City Clerk of the city within thirty days of the occurence of the injury or damage a notice stating the place where, and the time when, such injury or damage was sustained.

There was no allegation in the complaint as to the filing of any such notice, or that the action was commenced within the year.

Defendant demurred on ground that the complaint did not state facts sufficient to constitute a cause of action.

Demurrer overruled.

J. N. SEARLES for plaintiff. H. H. GILLEN for defendant.

WILLISTON, J. The only objections made at the hearing to the sufficiency of the complaint were that under Section 18, Sub-chapter 8 of Chapter 92, Special Laws of 1881, being an act to amend the city charter of the City of Stillwater, as amended by Section 31, Chapter 6, Special Laws of 1887. (1st.) This action was not brought within one year from the sustaining of the damages alleged to have been sustained; (2nd.) that the complaint does not allege filing with the City Clerk of said city of the notice required by said section 18, nor does it allege any facts by said section made an excuse for not filing such notice.

The gist of the action, as appears from the complaint, is that the defendant, in the improvement of its streets, collected at a point designated in the complaint large quantities of water, surface water, which did not naturally flow to said point; that it failed to furnish a sufficient outlet for such waters, and that by reason of such acts such surface waters were, during the prevalence of a severe storm, cast upon and washed and carried away a certain building occupied by plaintiff as a retail store, and greatly damaged his stock of goods, to recover which damages this action is brought.

The facts alleged in this action bring it within the rule of Pye v. City of Mankato, 38 Minn., 536; Moran v. City of St. Paul, 54 Minn., 279; and the provisions of said Section 18 are not applicable.

State v. Crossly Land Company.
(District Court, St. Louis County.)

TAXATION—JUDGMENT—MISTAKE—PUBLICATION—EVIDENCE.

Where the certified copy of the resolution of the County Commissioners designating the legal newspaper for the publication of the delinquent tax list, appears on its face by the file mark thereon to have been filed in the clerk's office after publication of the tax list, parol evidence may be admitted to show that the date of the filing of the resolution was erroneously stamped on such resolution and that the Court had, in fact, jurisdiction to enter judgment against the property on which taxes were delinquent.

GEO. E. ARBURY, County Attorney, for plaintiff. M. DOUGLAS for defendant.

ENSIGN, J. The certified copy of the resolutions of the County Commissioners designating the legal paper for the publication of the delinquent tax list appeared on its face, by the file mark thereon, to have been filed in the clerk's office on the 20th of February, while the publication of the tax list was completed before that time, and the certified copy of the resolution should have been so filed about one month earlier. Judgment was entered against the property of defendant Land Company, and it then moved to vacate and set aside such judgment for want of jurisdiction, and the Court entered an order so vacating the judgment. The State then moved to set aside the said order and presented affidavits of the County Auditor and

the Deputy Clerk of Court showing that the copy of the resolution was filed January 20th, instead of February 20th, and that the dating stamp was incorrectly set. There was no other record or minute of the filing of the resolution than the date of the filing stamp. These affidavits, though not part of the record, should be considered as evidence, and the first order, vacating the judgment, be set aside and defendant company allowed to try the issue as to when the resolution was so filed. Whether the Court had jurisdiction or not depended upon the facts as they really existed, and not upon the record. The motion to vacate and set aside the former order is granted,, with leave to defendant to introduce evidence as to the filing of said resolution.

(Fryberger v. Reed et al.)
(District Court, Hennepin County.)

EXECUTORS AND ADMINISTRATORS-BOND —LIABILITY OF SURETIES.

The sureties on an administrator's general bond are liable to the administrator's successor for money received by him from the sale of real estate in excess of enough to pay the intestate's debts.

CHILD & FRYBERGER for plaintiff. C. R. ST. JOHN for defendants.

BELDEN, J. Action against sureties on general bond of administrator for failure to pay over to his successor as administrator de bonis non, money received upon the sale of real estate, in this case in excess of enough to pay the debts of the intestate. A sale bond was given.

Defense, among others, that a sale bond was given by the administrator and that inasmuch as no title could pass in the real estate till such bond was given, the same being jurisdictional, the general bondsmen were not liable, citing current text books.

Plaintiff claimed decisions from text books, not in point; that our statutes were peculiar, and also cited Wonn v. People, 57 Ill., 172.

Judgment ordered for plaintiff.

Gardner v. Gardner.
(District Court, Olmsted County.)

DIVORCE — PARTIES — FRAUDULENT CONVEYANCE.

In an action by a wife for divorce persons to whom it is alleged the husband has conveyed property to defraud her may on motion be brought in as co-defendants.

This action was brought by Maria Gardner to obtain a divorce from William Gardner. Plaintiff and defendant were married in Ireland in September, 1846, and had two children. In December, 1856, defendant deserted plaintiff and married again and accumulated considerable property, which he has at divers times conveyed to his second wife and children. Plaintiff moved for an order making the second wife and one son co-defendants in the divorce proceedings on the ground of fraudulent conveyances to plaintiff's prejudice, and for leave to serve an amended summons and complaint.

GEO. W. GRANGER and THOS. SPELLING for plaintiff. CHAS. C. WILLSON for defendant.

GOULD, J.: Ordered, that the motion be granted and allowed. To make third parties defendants in proceedings for divorce to determine property rights is not expressly provided for by statute and has never received the approval of our Courts of last resort, and at first sight seems incongruous. Wisconsin appears to sanction it, 28 Wis., 510, upon the theory that the wife should be restored to property her own before the marriage. The law casts upon the Court the duty of determining the rights of the husband and wife in the property, and to provide for alimony and other allowances out of the husband's property. To discharge this duty it must be first advised as to what property and estate he owns, and equitable rights in property standing in the name of other parties must be inquired into and determined. This cannot be accomplished without having such other parties before this Court. While the principal object of the action is to determine the future matrimonial status, the property question incidentally involved may make the presence of third parties defendant necessary to a full and complete disposition of the case.

NOTES ON RECENT CASES.

A familiar principle is laid down in Robb v. Green, 11 T. L. Rep., 330, in regard to the use of information acquired during the existence of an agency. Of course, a list of customers' names obtained bona fide may be properly used by a person after quitting the service of his principal, but names and information acquired surreptitiously and in violation of the implied obligation to act in good faith canont be used after the termination of the business relations between the parties. Such conduct is not only "not handsome," but illegal. The agent, after leaving his principal, may engage in the same business and there make use of his acquired skill and knowledge, but he must not engage in such business with stolen goods or information.

One who harbors a dog in the habit of attacking passing teams, and who knows of the habit, and permits it to run loose, is liable for injuries received in a runaway caused by the dog's attack; and it is no defense that plaintiff knew of the dog's habit, and was not cautious in driving by defendant's house. Jones v. Carey (Del.), 31 Atl. Rep., 976.

A statute prohibiting the taking of fish, with certain exceptions, in any other way than by angling for them with hook and line, is held in State v. Mrozinski (Minn.), 27 L. R. A., 76, to be a constitutional exercise of legislative power.

A difference in the punctuation of similar statutes does not necessarily indicate a change in the coustruction, especially when the punctuation is the work of the printer, not of the legislature. Griffiths v. Montandon (Idaho), 39 Pac. Rep., 548.

The mere fact of a secret agreement giving a preference to one creditor is held in the New York case of Hanover Nat. Bank v. Blake, 27 L. R. A., 33, not enough to avoid a composition with creditors, although the secret agreement is void. The effect of such a secret agreement on compositions with creditors is the subject of an extensive note to the case.

An interesting question as to the right of a person to use his own name in carrying on business is decided in Chas. S. Higgins Co. v. Higgins Soap Co. (N. Y.), 27 L. R. A., 42. It is held that the prior use of one's name by other persons in a similar business does not destroy his right to use it, but that he cannot give such right to a corporation.

The secretary of state is by writ of mandamus ordered to countersign and affix the great seal of the state to the commission of an officer which has been issued by the governor in State ex rel. Miller v. Barber (Wyo.), 27 L. R. A., 45; and on such an application the right of the officer to his commission is not subject to question.

When the facts furnished by a client to his attorney are misleading and defamatory in character, and their incorporation into the petition is foreign to the object and purposes of the suit, the client is responsible in damages. Wimbish v. Hamilton (La.), 16 So. Rep., 856.

The period of one year from the date of the happening of an injury, to which action is limited by an accident policy, is held in McFarland v. Railway O. & E. Acc. Asso. (Wyo.), 27 L. R. A., 48, to be computable from the time of death by accident, and not from the time the cause of action accrues, where this does not acrue until ninety days after proof of injury.

The right of a wife to maintain an action for damages against any person who causes the desertion of her by her husband is steadily gaining support, and is sustained in Hodgkinson v. Hodgkinson (Neb.), 27 L. R. A., 120.

The rule caveat emptor is applied to a purchase of real estate at a sale for the collection of a special assessment or tax for which the property was in fact not liable, in the case of Pennock v. Douglas County (Neb.), 27 L. R. A., 121.

The much discussed question, "What constitutes a partnership?" is again discussed at considerable length in the Florida case of Webster v. Clark, 27 L. R. A., 126, which bases the decision on the intent of the parties, unless there is such holding out as to deceive.

The liability of a railroad company which takes the lease of a railroad for maintaining a nuisance by repairing and preserving an embankment is the question presented in Philadelphia & R. R. Co. v. Smith (C. C. App. 3d Cir.), 27 L. R. A., 131, in which case it was held that notice of damage and request to remove must precede liability of the company.

The guaranty of dividends upon preferred stock is construed in the Massachusetts case of Field v. Lamson & G. Mfg. Co., 27 L. R. A., 136, under a statute permitting a payment of such guaranteed dividends, with arrearages that may exist, cumulatively. It is held that the guaranty gives no right to dividends except when there are net profits, and that equity will not compel the declaration of dividends where it is not clear that it would not be judicious to withhold them. In a note to the case this important subject of preferred, guaranteed and interest-bearing stock in corporations is fully developed.

The maxim res ipsa loquitur, or the presumption of negligence, is held, in Howser v. Cumberland & P. R. Co. (Md.), 27 L. R. A., 154, to apply to the falling of cross-ties from a railroad car, striking a person on a foot path beside the roadbed but not on the right of way.

The word "Indian" is held in the California case of People v. Bray, 27 L. R. A., 158, to mean any person of Indian blood, even if he has become a citizen and separated from his tribe. The statutory prohibition against the sale of intoxicating liquors to Indians is held applicable to him.

The Supreme Court of Georgia has very properly ruled that an offer by the publisher of a newspaper, made pending a suit against him for a libel, to open the columns of the paper to the plaintiff for any explanation or statement he wishes to make counts for nothing on the trial of the action. Constitution Pub. Co. v. Way, 21 S. E. Rep., 139.

A stipulation by a railroad company in condemnation proceedings to provide certain crossings for the land owner is held in the Missouri case of St. Louis, K. & N. W. R. R. Co. v. Clark, 26 L. R. A., 751, to be a proper mode of preventing unnecessary damages, and the note to the case presents the various authorities, which are somewhat conflicting on the mitigation of damages in condemnation cases by preserving to the land owner an estate, rights or easements in respect to the property.

A statutory provision for roll call and vote by ayes and nays on a vote by a schol board as to the employment of a teacher is held mandatory in Board of Education v. Best (Ohio), 27 L. R. A., 77.

The right of a newspaper to obtain a copy of the proceedings in a divorce case for publication when the clerk of the court refuses to furnish them is denied in Re Caswell (R. I.), 27 L. R. A., 82; and a note to the case reviews the authorities on the right to inspect public records.

According to the Court of Criminal Appeals of Texas, a person illegally arrested, even though he has acquiesced in the arrest, may use such force as is necessary to regain his liberty; and if there is reasonable ground to believe that the officer intends to shoot to prevent his escape may shoot the officer in self-defense. Miers v. State, 29 S. W. Rep., 1074.

A provision on a slip of paper pasted on the face of an insurance policy, and not connected with the warranties therein, that a watchman shall be constantly on the premises when the mill is not in operation, which is not done, does not release the insurer from liability for a loss which is not due to the failure to keep the watchman. Hart v. Niagara Fire Ins Co. (Wash.), 27 L. R. A., 86.

A justice of the peace acting in excess of his jurisdiction by rendering judgment and issuing execution against a person outside of his territorial jurisdiction is held, in Thompson v. Jackson (Iowa), 27 L. R. A., 92, to be protected from personal liability. A note to the case raises doubt as to the correctness of the decision by quoting authorities to the effect that judges of superior as well as those of inferior courts are not exempt from liability where they act entirely without jurisdiction.

The question of implied warranty is raised in the case of Talbot Paving Co. v. Gorman (Mich.), 27 L. R. A., 96, which holds that a contract for paving stone according to certain specifications does not imply a warranty.

The right of minority stockholders who maintain a successful suit to recover corporate property to compel reimbursement of expenses, including attorneys' fees, is sustained in Grant v. Lookout Mountain Co. (Tenn.), 27 L. R. A., 98. This is a question of considerable importance, on which there is a conflict of authority.

The rule that a judgment against an administrator has no binding force or effect in another state, against another administrator of the same estate, is enforced in Braithwaite v. Harvey (Mont.), 27 L. R. A., 101, with which case is an extensive note on the subject of judgments of other states or countries against executors or administrators.

A defendant who has the right to testify in his own defense, if he chooses, and who is defended by counsel, has no right to make an unsworn assertion of facts as a part of his defense, and to introduce it to the jury as prefatory to the testimony of witnesses in his behalf. The full bench of the Supreme Court of Massachusetts has so decided in the case of Commonwealth against Henry McConnell. This is the first time that this proposition has been decided in this country.—American Lawyer.

OF CURRENT INTEREST.

Hon. Harlow S. Orton, Chief Justice of Wisconsin, died from heart failure, due to kidney troubles and other complications, on July 4th. His end was very sudden. He had been well up to within an hour of the time he died. He was a native of New York, born in 1817, and became justice of the Wis-

consin Supreme Court in 1878. He leaves a widow and four children. Associate Justice John B. Cassoday succeeds to the Chief Justiceship.

Matthew Bender announces he will issue on July 15th Volume 3 of the American Electrical Cases, reporting all the important cases (excepting patent cases) decided in the State and Federal Courts on all subjects relating to the practical uses of electricity, such as electric railway, electric light and power, the telephone, the telegraph, etc., with annotations.

Robertson Howard, of St. Paul, has removed his offices from the Globe Building to Room 57 Court House, in order to devote more time to his duties as assistant corporation attorney. He will, however, still continue to practice in the United States and State Courts, devoting special attention to insurance and corporation law and commercial litigation.

Nelson, Fitzpatrick & McDermott, of St. Paul, have dissolved partnership, Nelson & McDermott continuing.

Horace G. Stone, of St. Paul, has removed to Chicago, and will in future practice law in that city.

H. J. Peck, of Shakopee, called last week at the office of the Journal.

F. A. Mathwig has removed from Madison to Fairmont, Minn.

FACTS AND FANCIES.

One of the learned justices of the Maine Supreme Court, than whom no man better knows how to appreciate a really amusing thing, was holding court at Ellsworth, and, according to honored custom, called in a local clergyman to open the session with a supplication to heaven. This worthy gentleman came, and after a chat with the justice proceeded to address the giver of all good and perfect things thus: "Almighty God! we beseech Thee to bestow upon the presiding justice the wisdom which he so greatly needs!" The learned recipient of the blessing never heard the rest of that remarkable prayer, which, in truth, was cut short by disorder in the court, strongly resembling half-smothered laughter from the direction of the clerk's desk. It is said that the same judge once opened court after prayer which began this way: "Oh, Lord, we pray Thee to overrule the decisions of the court to Thine own honor and glory."

The prosecuting attorney had been particularly obnoxious to the witness. He had fiendishly pied over her life until desperation had quickened her feminine instinct.

"You are the wife of the prisoner, are you not?"

"I am."

"You knew he was a criminal when he married you?"

"Not on that account, sir."

"But you knew he was a professional burglar?"

"I did!"

"Then why did you marry him?"

"Well, sir, I presume it's very important you should know why I married this man, even though there may be no reasonable ground for that presumption. I'll tell you! It was in the evening of my spinsterhood; nothing had appeared on the horizon of my life in years, not even a man of your mental splendor. Hope had starved on the wastes of celibacy. Finally this man came along, and with him a lawyer. I had to choose. Well, I did just what any respectable woman would have done."

A witness who had given his evidence in such a way as satisfied everybody in court that he was committing perjury, being cautioned by the judge, said at last:

"My lord, you may believe me or not, but I have not stated a word that is false, for I have been wedded to truth from my infancy."

"Yes, sir," said Sir William Maule, "but the question is how long you have been a widower."

Says Bridget to Pat: "And how do ye loike bein' on the jury, Pat?" Says Pat: "It's somewhat confinin'." "Yes," adds Bridget, "and it's harrd wurrk, too." "Well," says Pat, "it's aisy enough decoiding which soide is right when only one of thim's Oirish, but whin they're both Oirish, bedad, it's the very divil."—Household Words.

Texas Justice—"You admit you stole the pig out of the pen?" Colored Prisoner—"Yas, I admits I stole de pig, but I wuz hongry, an' I didn't have nuffin' ter eat." "Pork reacher," said the judge, with tears in his eyes, as he chalked him down for two years.

"Did you ever surrender yourself to the police?" asked Plotting Pete.

"No, sir," replied Meandering Mike. "I'm a firm believer in the principle the orficer should seek the man; not the man the orficer."—The Star, Washington.

Minneapolis Man (to visitor)—"Well, what do you think of our city?"

Visitor—"Very nice town, indeed."

"What do you think of our trolley cars?"

"Oh, they're just killin'."

"I am too much of a gentleman, sir, to tell you what I think of you here," exclaimed the irate politician, "but if I ever catch you in congress I'll call you a liar, sir—a liar and a thief."—The Post, Chicago.

A blacksmith in a village of Spain murdered a man and was condemned to be hanged. The chief peasants of the place joined together and begged the alcade that the blacksmith might not suffer, because he was necessary to the place, which could not do without a blacksmith to shoe horses, mend wheels and such offices. "But," the alcade said, "how, then, can I carry out the law?" A laborer answered, "Sir, there are two lawyers in the village and for so small a place one is enough; you may hang the other."—Ex.

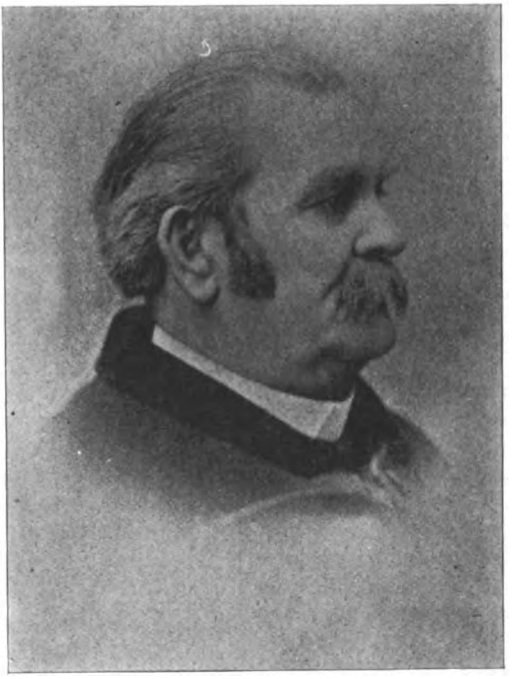
A literary man stood up in a Chicago police court to answer to a charge of vagrancy.

"I object, your honor," he said with dignity, "to this prosecution of gentlemen who follow the profession of letters, and—"

"I understand," interrupted the magistrate, "that you were found sleeping on a door-step; that you have no visible means of support, and that you have been seen under the influence of liquor."

"What of it?" cried the prisoner. "Though I am as poor as Richard Savage, when he made his bed in the ashes of a glass factory; as drunken as Dick Steele; as ragged as Goldsmith when he was on his fiddling tour, as dirty as Sam Johnson, as—"

"There, there!" cried the magistrate, impatiently. "I have no doubt that your associates are a disreputable lot, and I shall deal with you in such a manner as to cause them to give this town a wide berth. Mr. Clerk, furnish the officer with the names of the vagabonds mentioned by the prisoner."—Ex.



HON. M. J. SEVERANCE,
District Judge, Sixth Judicial District.

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A CLASS OF "TRAMP" CORPORATIONS.

The epithet tramp has been derogatorily applied by laymen to certain classes of corporations, which are subject to suspicion by reason of the manner in which they are incorporated or seek to do business. These so-called tramp corporations are so numerous in variety that we shall here consider but that single class or type which is distinguished by the fact that the corporations which it includes are organized under the laws of one State, by citizens of another State, who desire to transact business as a body corporate at home. The word tramp is often inappropriately applied to such corporations, for, although they are organized away from the State where they are to do business and their corporators live, yet they are often of great financial stability and of unquestioned business methods. In fact, a large number of the corporations which enter into our every day life have been so organized. Many of these have had only honest purposes for so incorporating. Some have thus attempted to afford their stockholders, or other people composing or dealing with them, the advantages of corporate rights most valued in the business world, and well settled by judicial decision. Others have thus obtained a more liberal grant of corporate rights or a stricter supervision of corporate management. Such, and many other, corporations can only be commended

because of their foreign creation. People would rather deal with them than with corporations established under the poorly devised, unsettled, illiberal, or perchance, too liberal laws of some of our American States. But, unfortunately, persons who incorporate without the State of their residence, when they intend to do business at home, are not generally actuated by these high motives, and the epithet tramp has not without reason been applied to corporations so organized. The members of such corporations generally seek some advantage for themselves without regard to the benefits of which the business world dealing with them may be deprived. They thus seek to deprive creditors of the right to enforce some statutory liability against directors, stockholders or members; to avoid the vigilant visitorial power to which domestic corporations are subject; to avoid expenses of incorporating; to evade taxation, or in some other way to deprive the State in which, or the persons with whom, they are to do business of some right or benefit which would be available if such corporations were created at the home of their organizers.

We will briefly consider the legality of corporations so organized. It is settled law that "a corporation of one State, not forbidden by the law of its being, may exercise within any other State the general powers conferred by its own charter, unless it is prohibited from so doing, either in the direct enactments of the latter State, or by its public policy to be deduced from the general course of legislation, or from the settled adjudications of its highest Court." Christian Union v. Yount, 101 U. S., 352, 356.

It is clear, therefore, that corporations cannot do business in a foreign State if prohibited by their charters, or by the statutory enactments or the public policy of such foreign State. The inquiry now arises, Is it contrary to the public policy of a State for it to recognize as legal corporations organized by its own citizens in another State, for the purpose of doing business at home? Upon this question the Courts are not unanimous. A few early cases hold that such a corporation is unlawful, and that the persons so associated are liable as partners. But these cases have been overruled, except in New Jersey, and even in that State it is not improbable that a different conclusion would be arrived at under the more liberal policy now prevailing.

From Hill v. Beach, 12 N. J. Equity Rep., 31, decided in 1858, it appears that certain residents of New Jersey undertook to incorporate under the laws of New York, for the purpose of working a quarry in New Jersey. The Court held that such company "cannot be recognized by any Court in New Jersey as a legally constituted corporation, nor be dealt with as such. If it can be, what need is there of any general or special law in our State? Individuals desirous of carrying on any manufacturing business may go into the City of New York, organize under the general laws of that State, erect all of their manufacturing establishments here, and, under their assumed name, transact their business, not only free from all personal responsibility, but under cover of a corporation not amenable to our laws. Surely such a corporation could not be declared an insolvent corporation under our laws to prevent frauds by incorporated companies, and must necessarily act entirely independently of all of our statutes respecting corporations. How then is such a body to be regarded and treated by our laws? How is it to be dealt with by our Courts? Here are four individuals who have assumed the name of the Belleville Quarry Company. * * * These individuals

have carried on business under its assumed name. They have made contracts and contracted debts as the Belleville Quarry Company. They are not a domestic corporation, and cannot be sued as such. They are not a foreign corporation, for it is perfectly manifest upon the face of their proceedings that their attempted organization under the general law of New York respecting corporations was a fraud upon the law of that State. These individuals then must be treated and dealt with by the law as partners, trading under the name they have assumed. Although their object in taking the name they did was to avoid personal responsibility, the law will not allow them so to escape. A Court of equity as well as a Court of law will treat them as partners."

The question was considered in 1873 by the Superior Court of Ohio in Second National Bank of Ohio v. Lovell, 2 Cincinnati Superior Court Rep., 395. The Court cited with approval Hill v. Beach, supra, but said that its doctrine was inapplicable to the case before the Court, in which the corporation attacked kept an office in the State creating it and *might* do business there. However, the case was decided on other points.

The subject was first considered by the Courts of New York, in 1860, in the case of Merrick v. Brainard, 38 Barbour, 574. The defendants, who did business in New York, had formed a corporation under the laws of Connecticut to carry on their business. The Supreme Court held that this could not be done, and that the stockholders in such a corporation were liable as partners, saying: "If a corporation created in another State can transfer to this State the whole of its business and transact the same here, under the principles of comity above allued to, then not only is our own Legislature rendered useless and unnecessary, at least so far as the creation of corporations is concerned, but all the States in the Union and all the legislatures in Christendom can create and let loose upon us a multitude of these corporoations more destructive and pernicious than the frogs and lice let loose on the Egyptians. * * * It cannot be necessary to attempt an enumeration of the evils which would result from domesticating corporations over whose creation and conduct we can have no control. They would be without limit as to number, without capital, competing with and unfairly excluding our own citizens from a share in the business of the country, or by combinations aided by aggregated wealth, not only exclude our people from a share in the business of the State, but wield a dangerous influence over our financial and commercial interests. It seems to me that we must in self-defense declare that a corporation that thus migrates into our State loses its corporate rights, and becomes, as to all persons dealing with it, a mere partnership."

The Court of Appeals in an almost eloquent opinion (34 N. Y., 208) emphatically repudiated the doctrine of the Supreme Court. The Court regarded a denial of such corporate rights as un-American, contrary to the policy of New York and to that of the country. It said: "In this country our material interests are so interwoven that the union of the States is due, in its continuance, if not in its origin, as much to commercial as to political necessity. The citizens of each claim a birthright in the advantages and resources of all. They demand, from their local authorities, such facilities as the law making power can afford, in the employment of labor and capital. They claim such corporate franchises and immunities as may enable them to compete on equal terms with the citizens of other States. For these, from the structure of our

institutions, they naturally look to their own government. They acknowledge a double allegiance in their local and federal relations, which, by general consent, carries with it a correlative community of rights. They may live in an inland State, but they are none the less citizens of a maritime nation; and they may lawfully organize companies at home for traffic on ocean highways. * * *

"New York has sent forth its citizens from time to time with corporate franchises and immunities to gather wealth from the coal mines of Pennsylvania, the silver mines of Mexico and the gold mines of California; to establish lines of inland navigation on the Orinoco and the Amazon; to plant forest trees beyond the Mississippi; to fish in the northern and southern oceans; to found Christian missions in Asia, and to colonize freedmen on the coast of Africa.* * *

"We think the policy of this State is in harmony with that of the country, and that it would be neither provident nor just to inaugurate a rule which would unsettle the security of corporate property and rights, and exclude others from the enjoyment here of privileges which have always been accorded to us abroad. Our national commerce is but the aggregate of that of the States, and every needless restriction, by the operation of local laws, is unjust and calamitous to all. We suppose the rules of comity, on which we have heretofore acted, to be generally accepted and approved. We see no reason why a southern State may not grant, to a corporation of its planters, the right to erect mills for the manufacture of their cotton in New England; nor why the Legislature of Massachusetts may not authorize a company of Lowell millers to raise cotton in South America or on the Sea Islands. The State of Illinois touches neither the Atlantic nor the Pacific; but if it should organize a company of its citizens to transport produce on the ocean, with its office in the City of New York, and its business conducted by managers, elected annually in Chicago, the rights of the corporation would be recognized wherever the obligations of national law are respected."

In 1891, the Court of Appeals of New York again examined the question in Demarest v. Grant, 128 N. Y., 205; 28 N. E. Rep., 645. This was a case where certain prominent citizens of New York organized, under the laws of West Virginia, a corporation called The America Winter Carnival Company, which was to do business in New York. The plaintiff was injured on a toboggan slide, owned by the company, and tried unsuccessfully to hold the defendant stockholders as partners. The Court particularly examined and disapproved the doctrine of Hill v. Beach, supra, saying:

"We recognize corporations formed by the citizens of a foreign State under its laws for the purpose of doing business, among other places, in our own State. Where is the essential difference between such a corporation and one legally incorporated under such foreign State for the same purpose, but the members of which are citizens of our own State? Whose rights are jeopardized more in the case where the members of the corporation are our own citizens than where they are citizens of the foreign State? What enlightened policy is violated by the recognition of the foreign corporation composed of residents of this State which would not also and equally suffer by the recognition thereof when composed of non-residents? And yet, beyond all cavil, our policy is to recognize the latter. The truth is, foreign corporations are not properly to be regarded with suspicion, nor should unnecessary restraints be imposed upon their doing business in our midst.

They carry no black flag, and the policy of all civilized nations is to grant them recognition in their Courts. It seems to me that every reason which urges upon us the recognition of foreign corporations organized with power to do business in our State, and composed of citizens of the foreign State, is equally potent when the foreign corporation is composed of our own citizens. It has always been supposed that a State should at least deal as liberally with its own citizens as with those of foreign States. If, therefore, we permit foreign citizens to come within our limits in the form of a foreign corporation organized with power to do business here, and recognized by us, why should we not permit our own citizens to avail themselves of the like privilege? If we impose terms and conditions upon foreign corporations, as such, doing business here, those same terms and conditions still and equally apply to a foreign corporation when composed of our own citizens. Why should they not be placed at least upon an equality with the foreign citizen?"

The latest case (1894) in New York is Lancaster v. Amsterdam Improvement Company, 140 N. Y., 576; 35 N. E. Rep., 964, which reaffirms the established doctrine.

Another late case (1894) is Oakdale v. Garst, 28 Atlantic Rep., 973, in which the Supreme Court of Rhode Island states that "the mere fact that the complainant corporation is created under the laws of the State of Kentucky is not sufficient to warrant a dismissal in the case, for foreign corporations have frequently been recognized as suitors in this Court. * * * They are also recognized as doing business here by comity. * * * While the fact that citizens of Rhode Island go to Kentucky for an act of incorporation is one that naturally excites curiosity, if not suspicion, as to the motives and good faith of the concern, yet so long as it pursues a lawful business, and violates no law in this State, we do not see how we can refuse to recognize it. True, the advantages of yearly statements and liability of stockholders given to creditors under our statutes are wanting, but that is a matter for those who deal with a corporation to consider. We can hardly deny the right of the foreign corporation to do business in this State under considerations of public policy, when our own statutes expressly provide for corporations formed in this State for carrying on business out of the State."

It would, therefore, seem to be the true doctrine, that, in the absence of statutory provisions, the law of comity which prevails between States recognizes the right of a corporation of one State, not forbidden by its charter, to exercise its corporate rights in another State whether its members are or are not citizens of the latter State. There seems to be no essential difference between a corporation formed under the laws of a foreign State, by its own citizens, and one so formed by citizens of another State. The prevailing doctrine recognizing the validity of such corporations seems to be sound and logical, and will work no severe hardship when the business world has learned that it is not entitled to assume that the liability of each corporation and its officers and stockholders is not the same, but that it depends largely upon the laws of the State under which such corporation is created. If upon investigation people discover that the corporation is a mere paper entity with little or no liability resting upon it, its managing officers or stockholders, they will not deal with it. If for want of time, or inclination to investigate a legal question, they deal with such a corporation, they must not complain if they later see the

corporation, its managing officers or its stockholders seeking shelter behind the laws of the Commonwealth which createrd it. Our Supreme Court has never passed upon this question.

St. Paul, Minn. A. R. MOORE.

THE PORTRAIT.

HON. MARTIN J. SEVERANCE, whose portrait appears in this number of The Journal, was born at Shelburne Falls, Franklin County, Mass., Dec. 24, 1826. He lived on his father's farm until 18 years of age, and attended Williston Seminary, from which he graduated in 1848. He read law and was admitted to practice in 1852. In 1856 he removed to Minnesota and located at Henderson. He was a member of the Legislature of 1859 and 1861, and in August of that year enlisted as a private in Company I, Tenth Minnesota Infantry. He was promoted to captain of this company on April 4, 1864, and was mustered out of service with the company Aug. 19, 1866. He resumed his practice and moved to Mankato in 1870. In 1881 he was appointed Judge of the Sixth Judicial District in place of Judge Dickinson, who was promoted to the Supreme Bench. He has served continuously ever since. He is an orator of considerable ability and is highly esteemed by the people whom he serves.

PERSONAL.

W. E. Hale, of Minneapolis, is in Manitoba.

Ambrose Tighe, of St. Paul, is taking in Holland.

F. J. Steidl has removed from Brown's Valley to Wheaton.

J. L. Higgins, of Minneapolis, has not yet returned from his Maine trip.

Hon. C. L. Lewis, of Duluth, has resigned and, it is reported, will resume the practice of law, forming a partnership with J. L. Washburn.

Thos. T. Fauntleroy, of St. Paul, is spending his vacation at his old home in Virginia.

Wright & Matchen is a new partnership with offices in the Globe Building, Minneapolis.

Senator Ozmun and wife, of St. Paul, are making a tour of England and the Continent.

J. E. Green, of Carleton, and Thomas Hanson, of Minneota, have opened offices in Minneapolis.

We regret to chronicle the sudden death of ex-Judge of Probate H. C. Butler, of Rochester, Minn.

Dean Pattee, of the Law School, is spending his vacation in Europe. Prof. James Paige, his assistant, was on June 10th married to Miss Maybeth Hurd, of Newburyport, Mass.

Assistant Attorney General Luse, of Wisconsin, has resigned, to accept the position of counsel to the Chicago, St. Paul, Minneapolis & Omaha Railway Company, headquarters at St. Paul.

Page Morris, city attorney of Duluth, has been appointed by Gov. Clough to fill the vacancy caused by the resignation of Judge Lewis. The appointment gives general satisfaction.

S. L. Perrin, assistant counsel of the Omaha railway in St. Paul, will soon remove to West Superior, where he has formed a partnership with Mr. Pope, of that city. The Journal expresses the regret of the Ramsey County Bar in his loss.

THE JOURNAL has been honored the past month, by the calls, among others, of Capt. J. N. Searles, of Stillwater; D. T. Calhoun, of St. Cloud; C. J. Mahuken, of Fargo, N. D.; W. T. Valentine, of Winona; and Senator R. E. Thompson, of Preston.

ATTORNEY GENERAL'S DECISIONS.

EXTRADITION WHERE THERE HAS BEEN NO INDICTMENT.

In order to extradite one against whom no indictment has been found, the facts showing the commission of the crime and the probable guilt of the accused must be made clearly to appear by affidavits taken before a magistrate.

HIS EXCELLENCY,
D. M. CLOUGH,
Governor.

Sir: Referring to the application for a requisition for the apprehension and rendition of ————————, who stands charged by an information pending in the Justice Court, A. S. Ober, a Justice of the Peace in and for Hand County, in the State of South Dakota, with the crime of rape, I desire to say that, from the papers presented, there is only the uncorroborated affidavit of India A. Failing, the prosecuting witness. It appears that no indictment has ever been presented by the grand jury, and there are no accompanying affidavits substantiating, in whole or in part, any of the affidavits of the prosecuting witness; and it further appears that no warrant has been issued, so that there has been no compliance with the following rule adopted by the Interstate Extradition Conference held recently in the City of New York for guidance in making applications for requisitions:

"If an indictment has not been found by the grand jury, the facts and circumstances showing the commission of the crime charged and that the accused perpetrated the same must be shown by affidavits taken before a magistrate, and that a warrant has been issued and duplicate certified copies of the same, together with the returns thereof, if any, must be furnished upon application."

You will observe that this rule has not been complied with in the respects above indicated, that there are no affidavits corroborating the affidavit of the prosecuting witness as to her age, and no proof that a warrant has been issued.

I am therefore of the opinion that the requisition should not be honored until the requirements of this rule are complied with.

Very respectfully,
H. W. CHILDS,
Attorney General.

May 28, 1895.

IMPRISONMENT—BEGINNING OF TERM.

When a sentence of imprisonment in the State penitentiary fails to state when the term begins to run, it will be held to commence at the date of the incarceration of the prisoner in the penitentiary.

HON. HENRY WOLFER,
Warden State Penitentiary.

Dear Sir: It appears that you have in custody a United States prisoner, held pursuant to a sentence which fails to state when the term therein prescribed began to run. You now inquire whether such term began with the day on which the sentence was imposed or the day on which incarceration in your institution began.

It was held by my predecessor under date of November 18, 1891, that a term of sentence begins to run from the date of arrival at the penitentiary, when the sentence does not otherwise provide. A similar holding was made by the Attorney General of the United States on two occasions. While it may well be doubted whether such view is sustained by the weight of judicial authority, I feel bound to follow it. The following cases are decidedly the other way, and would control my present action but for the holdings above named: 15 Fla., 576; 44 Mo., 279; 62 How. Pr., 412; 52 N. W. Rep., 577; 31 Cal., 619.

You are accordingly advised that the prisoner's term dates from the day of his reception into your custody under his commitment.

I am, very respectfully,
H. W. CHILDS,
Attorney General.

May 7, 1895.

THE MINNESOTA LAW JOURNAL.

Communications in regard to the Contents of the JOURNAL should be addressed to the Publisher, FRANK P. DUFRESNE, ST. PAUL, MINN.

DISTRICT COURT.

Emery H. Breault v. Elzor Archambault, et al. (District Court, St. Louis County, 10953.)

LUMBERMAN'S LIEN.

The statute allowing lumbermen a lien on logs cut or banked gives a lien on the logs to any person whose labor is actually used in and is necessary in the performance of the lumberman's labor on the logs, and includes cooks in camp and blacksmiths whose labor is necessary in the process of logging.

TEAR & MIDDLECOFF for plaintiff. DRAPER, DAVIS & HOLLISTER for defendants

ENSIGN, J. There are three questions raised by the demurrer in this case. 1. Does the law give any lien on logs to a person who works as a cook in a lumber camp? 2. Does the law give any lien on logs to a person who works as cookee (assisting the cook) or doing handy work or chores in a lumber camp? 3. Does the law give any lien on logs to a person who does blacksmith work in repairing cant hooks, axes, chains, sleighs and other tools and shoeing horses used in skidding, hauling and banking logs in a lumber camp?

In the determination of these questions I think it is proper to consider some of the peculiar circumstances that must necessarily pertain to the business of logging or cutting, hauling and banking logs in a lumber camp. I cannot well explain my construction of this statute without doing so.

If a man owned land upon which there was standing ten million feet of pine which he wished to cut and bank, so that he could drive or tow it to market in the spring, how would he do it?

The place for the performance of the work must be in a wilderness remote from towns, stores, hotels, boarding houses and mechanical shops. The work is usually done in the winter, when hauling can be done on snow or ice roads, and for that reason the work must be hurried, so that it will be completed before warm weather destroys the roads. It must be done by large "crews" of men, and they must be supplied with food and shelter in or near their place of labor.

A large number of teams must be employed, and there must be food and shelter provided for them. Camps must be built for the men and stables for the horses and storehouses for the supplies for both men and teams. Roads must be made for hauling logs to the banking grounds, branching in different directions through the timber, and they must be kept in repair. Tools, such as sleds, axes, cant hooks and other appliances must be provided, and they must be kept in repair.

To support the men and horses supplies must be provided and be coming into camp during the winter as they are needed. The first work is commenced late in the fall or early in the winter, and necessarily at that time supplies are brought in in small quantities because of difficulty in transportation. This renders it necessary for men and teams to be constantly employed in "toting" or bringing supplies and materials into camp.

The work of cutting, hauling and banking must be divided (especially after snow falls) so that all branches of the work may be carried on at the same time. A certain portion of the men must cut down trees and trim them; others with teams will skid the logs, do hauling and banking. While this is being done the roads must be kept in repair, so that hauling can be safely and speedily done. And all the time other men must be preparing food for the men, caring for the camp and providing for the necessities of the men and the teams during the hours of rest. It is a heavy and hard business, and chains, sleds, cant hooks and axes are broken, horse shoes are broken, worn smooth, or cast, and the tools must be repaired and horses kept sharply shod. This indicates that a blacksmith is a necessity in the camp. It is important that the men and teams should be employed from early morning until dark; hence it is necessary to employ a handy man to care for the stables, chop wood for the camp, assist the cook, and carry dinners to the choppers, sawyers, swampers and others too remote from the camp. In fact, the owner of the tract of pine, for the purpose of cutting and banking his logs, must create and maintain a little community of dependent laborers in the wilderenss during the winter, and the general purpose of this community is to cut and bank the logs with the greatest economy and dispatch, and he must have men who can perform the various kinds of labor in the logging business, and also men who can supply the wants of the men so employed, so that they may give their whole time to the business of cutting, hauling and banking the logs.

This is the established and recognized manner in which lumbering operations are carried on by owners as well as contractors. When the owner contracts for the cutting of his pine he does so upon the understanding that the established methods, those sanctioned by experience and usage as the most economical, shall be followed. This would be for the owner's interest, as under the law, as he well knows, his logs are liable for unpaid wages, and he would not let a contract to a man who expected that the choppers, etc., would cook their own food, or who announced his intention to have his blacksmithing done at the nearest town.

The men who build camps and stables and make roads, while so engaged, are not cutting or banking logs, but they are doing work that is necessary, and that renders it possible to have them cut and banked.

The cook's labors are indispensable in this community of labor. The men actually engaged in cutting, etc., are dependent upon his labors for their food, and his labor aids the general purpose as much, if not more, than the labors of any other man. The same is true of the cookee, handy man or chore boy.

The blacksmith does not cut or bank logs, but his work tends to make the work of choppers, teamsters and others effective and economical. Are the men who build camps, stables and make roads to be deprived of their protection under the law while they are so engaged because their work is not actually upon the logs? I think no one would claim that there is any work more necessary or indispensable in a lumber camp than that of the cook, assistant cook, blacksmith or man who repairs roads.

The same general course of lumbering was established long before the act of 1876 was passed, and it was evidently the intention of the Legislature to recognize and give a lien for any and all labor that was actually necessary in aiding the cutting and banking of logs in this method generally established, approved and practiced by lumbermen of this and other states.

Courts have held diversely upon the questions here involved, and there have been hair-splitting decisions over the use and definitions of particular words and phrases found in the statutes, but it seems to me the Courts should look at the work involved in logging, the time when it is usually done, its location, its character, its necessities and generally adopted methods, and from all these construe the statute so that it will meet the purpose for which it was intended as a remedial statute, by the Legislature, by giving to every man a lien for his labor, if his labor was *necessary* and was *indispensable* to the economical prosecution of the labor involved in the work mentioned in the statutes.

I have entertained different opinions in regard to this statute than I now hold, and have made decisions that I would now be glad to change. I failed to take the broad view of the statute that was taken by the Supreme Court when it said: "Such a construction is too narrow, and would in most cases render nugatory and defeat the remedy which the Legislature intended to give. In almost every department of the work of logging, certain tools, appliances or instrumentalities are indispensably necessary to the performance of the labor. The timber cannot be cut without axes or hauled and banked without teams. Remedial statutes are to be liberally construed to advance the remedy. The Legislature could not have intended to exclude the use of those appliances or institutions which are absolutely necessary to the performance of the various departments of labor enumerated in the statute." Martin v. Wakefield, 42 Minn., 176.

I am aware of the danger when a contractor is given power to contract debts for which the property of another is liable, and I know that it is a power liable to be abused; but the owner can prevent abuse by a prudent choice of contractor and a careful surveillance of the work as it progresses, and Courts should only allow for such classes of labor as "are actually *used in* and *necessary* to the *performance of such labor* by the lumberman or logger. Demurrer to the complaint is overruled.

In re Assignment of James F. Kingsland, Insolvent.
(District Court, Chisago County.)

BANKS AND BANKING—ASSIGNMENT FOR BENEFIT OF CREDITORS—FOLLOWING TRUST FUNDS.

A bank which makes collections from time to time, and at stated periods remits the proceeds thereof, is a mere debtor of the owner of the moneys collected and not a trustee.

Where, upon the insolvency of such bank, it cannot be shown that among the moneys turned over to the assignee are the identical moneys collected by the bank, the creditor will not be treated as a *cestui que* trust and the moneys in the assignee's hands as trust funds, but such creditor will have to share with the other creditors in the dividends of the estate.

On, and for some time prior to, the 21st day of January, 1895, James F. Kingsland was engaged in the banking business at North Branch, in Chisago County, under the name of the Bank of North Branch. On said 21st day of January, 1895, he made a general assignment for the benefit of his creditors. Sometime preceding the assignment the Continental Savings, Loan and Building Company entered into an agreement with said Kingsland, doing business as such bank, whereby the said Kingsland agreed to make certain collections for said Company and once each month, having first deducted his commission for making such collections, to remit the proceeds. At the time of his assignment Kingsland was indebted to the Company for money collected for it and not remitted, and certain sums of money in specie were by him delivered to his assignee, in amount more than sufficient to pay said Company's claim in full. An order was obtained for the assignee to

show cause why he should not turn over to said Company sufficient of the funds in his hands to pay it in full.

WILLISTON, J.: Upon the hearing of the order to show cause no proof was offered tending to show that the moneys so collected formed any part of the moneys received by the assignee, nor was any proof offered tending to show what disposition said assignee made of any such money.

In this proceeding the petitioner prays that the assignee be directed to pay over to it the moneys so collected, deducting the agreed commission thereon due the assignor for making the collections; in other words, it claims that it is to be treated as a preferred creditor.

It bases its right to be so treated as a preferred creditor upon its claim that the insolvent stands in the relation of a trustee for the petitioner; that the moneys collected by him were at all times the property of the petitioner, held in trust for it by the insolvent; that as trust funds they came into the hands of the assignee, who holds them impressed with the trust; and that, wholly ignoring the rights of the other creditors, the petitioner is of right entitled to be paid in full out of the moneys in the hands of the assignee. For anything to the contrary appearing, the moneys so received by the insolvent may have been used by him in paying his debts, or in some other manner been wholly dissipated prior to the assignment.

The petitioner is not entitled to such a preference for—

First. The relation existing between it and the insolvent was that of debtor and creditor. It appears from the contract between the parties that it was not by either party intended that the identical money collected should be remitted to the petitioner, or that it should by the insolvent be kept separate and distinct from the funds used by him in his general banking business; on the contrary, it does appear that it was the intention of each party that the moneys collected should become a part of the common banking fund and moneys of the insolvent, to be held and used by him in the same manner as the moneys deposited with him by general depositors. The language of the contract is: "All that we expect you to do is to receipt the passbook for the collection and enter the amount collected on the duplicate collection sheets, one of which you will retain and the other you will mail to this office once a month with draft to cover the collections, less your one per cent commissions." The construction of the contract is that the bank should upon or near the last day of the month remit to the petitioner the amount due it for all collections made during the month; or, if the remittance should not be made until after such last day, but in the early days of the next month, then that such remittance should cover all collections made for the preceding month; that the bank should remit, not the identical money by it received or any moneys by it substituted therefor, but by its draft, and that intermediate such collection and remittance the bank should hold and treat the moneys so collected as an ordinary deposit made by the petitioner. That would be according to the usual course of collection and banking business in like matters. Commercial Bank of Penn. v. Armstrong, 148 U. S., 50 (58); Henry v. Martin, 60 N. W., 269 (Wis.); Westfall v. Mullen, 59 N. W., 633 (Minn).

Second. Admitting that the relation of *cestui que* trust and trustee did exist between the parties, the petitioner is not entitled to the relief demanded. The principle is not questioned that whenever a trust fund has been wrongfully converted into an-

other species of property, if its identity can be traced, it will be held in its new form liable to the rights of the original owner or *cestui que* trust, and that such right ceases only when the means of ascertainment fail. The touchstone of the right of the owner of the trust property to be indemnified from any property or fund which represents the original property or fund is the tracing of the original property or trust fund into the property or fund out of which the indemnity is demanded; the identification not appearing the right does not exist.

Story's Eq. Jur. (6th Ed.), Secs. 1257-1259.

Perry on Trusts, Sec. 636.

Cook v. Tullis, 18 Wall., 332.

Union Nat'l Bank v. Catz, 27 N. E. (Ill.), 907.

A general assignment for the benefit of creditors does not pass a trust estate. In such cases it requires special words to vest the estate in the assignee. If the assignor has converted the trust estate into other property the *cestui que* trust may follow it into the hands of the assignee so far as he can identify the particular property obtained by breach of the trust; but if the trust property has become so amalgamated with the general mass of the bankrupt's estate that it cannot be traced or identified, the *cestui que* trust must prove his claim. Perry on Trusts, Sec. 345; Hill on Trustees, Neely v. Rood, 19 N. W., 920 (Mich.).

In the case at bar, if the relation of *cestui que* trust and trustee ever existed, the trust moneys have become so mixed and mingled with other moneys of the trustee that it is impossible to trace or identify any of them as forming a part of the funds received by the assignee, and by reason of such mingling the petitioner is not entitled to the relief demanded.

In Little v. Chadwick, 151 Mass., 110 (28 N. E., 1005), the Court say: "The Court will go as far as it can in thus tracing and following trust money; but when, as a matter of fact, it cannot be traced, the equitable right of the *cestui que* trust to follow it fails. Under such circumstances if the trustee has become bankrupt, the Court cannot say that the money is to be found somewhere in the general estate of the trustee that still remains. He may have lost it with property of his own, and in such case the *cestui que* trust can only come in and share with the general creditors."

There is nothing to the contrary in Bank v. Insurance Co., 104 U. S., 54, 66, 71, or in the Matter of Hallet's Estate, 18 Ch. Div., 696, 708.

See, also, Ferris v. Van Hooten, 73 N. Y., 113; Cavin v. Gleason, 113 N. Y., 256; Atkins v. Rochester Ptg. Co., 114 N. Y., 168; Appeal Hopkins, 9 Atl. Rep. (Pa.), 867; Engler v. Offert, 16 Atl. Rep. (Md.), 497; Union Nat'l Bank v. Catz, 27 N. E. Rep. (Ill.), 907; Sherwood v. Millford State Bank, 53 N. W. Rep. (Mich.), 928; Anheuser-Busch Brewing Co. v. Clayton, 6 U. S. C. C. A., 108; Nonotuck Silk Co. v. Flanders, 58 N. W. Rep. (Wis.), 283; Bank of Commerce v. Russell, 2 Dillon's C. C. Rs., 215.

The failure of the bank to remit was a breach of duty on its part, but it does not follow that other moneys subsequently received by the bank, and which may have come into the hands of the assignee, became impressed with a trust or charge which would give the petitioner a preference on distribution of the funds received by the assignee.

A trust creditor is not entitled to preference over general creditors merely on the ground of the nature of the claim. Freiburg v. Stoddart, 28 Atl. Rep., 1111 (Pa.); Cavin v. Gleason, 105 N. Y., 256; North Dakota Elevator Co. v. Clark, 53 N. W. Rep., 175 (N. D).

The case of Westfall v. Mullen, determined by the Supreme Court of this

State, and cited above, is decisive of the matter at bar. The language of the late Chief Justice in that case is equally applicable to this, that "to allow such claims to be paid in full out of the assets when all claims cannot be paid in full, would give a preference to such claims. There is nothing in the insolvency law justifying it."

In this case it might further be said that there is no principle of common law or of equity justifying the granting of the relief demanded by the petitioner. *

Joseph Leasor v. C. H. Colyer et al.
(District Court, Traverse County.)

REFEREE—STAY.

The authority of a Referee appointed to try and determine a cause ceases on the filing of his report, except for the purpose of settling a case or bill of exceptions. He cannot order a stay of proceedings.

GEORGE R. SMITH for plaintiff. C. H. COLYER for defendants.

By stipulation this cause was tried before George Ketcham, Esq., appointed referee to try and determine. He found for the defendants, and on June 8th, 1895, his report was filed in the office of the Clerk. Thereafter, and on the 3d day of July, 1895, on the *ex parte* application of plaintiff, the referee made and filed an order staying all proceedings in the action for sixty days. The defendants thereupon moved the Court that said order be vacated and set aside.

BROWN, J.: Upon the filing of his report the authority of a Referee ceases; except for the purpose of settling a case or bill of exceptions he has no further jurisdiction in the action or over the parties, and cannot order a stay of proceedings. If a stay is desired, and is not stipulated to, application for it should be made to the Court. The order in question is also in violation of Sec. 87, Chap. 66, G. S. 1878, which provides that an order staying proceedings for a longer period than twenty days shall not be granted *ex parte*.

The order of the Court is, that the said order by said Referee staying proceedings in said cause be and it is hereby in all things vacated and set aside.

* For a full discussion of the law governing the following of trust funds, vide Vol. II, M. L. J 27.

Burt Rogers v. Charles Amos.
(District Court, Olmsted County.)

JUSTICE PRACTICE—OPENING DEFAULT—UNMERITORIOUS DEFENSE.

Where judgment has been entered in Justice Court on default, defendant must show that he has a meritorious defense in order to have the default set aside in the District Court.

Practice on appeal from Justice Court is construed strictly.

BRADFORD & LEACH for plaintiff. H. A. ECKHOLDT for defendant

Plaintiff sued on an order in writing from F to him upon defendant for $34.75, which defendant refused to pay. On the return day, Feb. 8, 1895, defendant failed to appear within the hour allowed by law, but on Feb. 4 wrote to plaintiff's attorneys that he was confined to bed and asked for an adjournment to Feb. 22. Plaintiff, however, took judgment on default on Feb. 8. Defendant arrived in Court about an hour and a half after the hour stated in the summons, owing to bad roads. Plaintiff refused to allow him to interpose an answer, and he appealed on questions of law and fact, and moved the District Court for leave to file an answer alleging presentation and acceptance of said order on Sunday, and that prior to the execution of said order another order upon him had been made and delivered by F to a fourth party. No affidavit of merits accompanied the motion. The summons was not returned to the District Court. The surety on the bond did not sign the justification, and the Justice's certificate to the return was irregularly defective and crude.

GOULD, J. Whether the order in question was accepted and delivered on Sunday, the only defense offered in the proposed answer, is not decided.

It is suggested, however, that he who seeks to repudiate his promise, because made on Sunday, and benefit by his own wrong, is not in the best position to invoke the equitable discretion of this Court. Aside from the character of the proposed answer, defendant has not come within the rule for setting aside defaults with leave to answer after judgment.

The moving affidavit does not excuse the default, and contains no affidavit of merits as required by Rules 18, 19 and 20 of this Court. While no part of the issues, the record does not clearly show that this action is properly in this Court. The practice on appeal from Justice Courts has been construed strictly. The Justice "shall allow the appeal" and enter the fact of such allowance on the docket. The return should be made within twenty days after the appeal is taken. 1894 Gen. Stats., Secs. 5069-70. The summons is not returned, and the papers sent up are scarcely such an authenticated transcript and return as the law contemplates shall give this Court jurisdiction.

These defects might have been on motion corrected, but the record must be considered as it exists.

The motion for leave to file an answer herein is denied.

Menzell Brothers v. Charles J. Ferch.
(District Court, Big Stone County.)

JUSTICE PRACTICE—PLEADING—AMENDMENT.

An answer containing only a general denial in an action in Justice Court for goods sold and delivered, can be amended at the trial on motion only, and the granting or overruling of such motion rests entirely in the discretion of the Justice.

F. L. CLIFF for plaintiff. E. M. MORRILL, for defendant.

This action was commenced in Justice Court on the 15th day of February, 1895. The summons was returnable March 7th, 1895, at 10 o'clock A. M. At that time the parties appeared. Plaintiff filed a written complaint alleging the sale to the defendant of goods, wares and merchandise of the value of $50.69. The defendant answered by a general denial. The case was then adjourned to March 14th, 1895. Three other adjournments were had, and finally the case came to trial on the 12th of April, 1895. At this time the defendant offered and requested leave to file an amended answer setting up that the goods, wares and merchandise sued for were sold by weights and measures, which weights and measures had not theretofore been tested and sealed by the County Treasurer of the County, as required by law. The Justice refused the amendment, rendered judgment for the plaintiff, and the defendant appealed to the District Court on questions of law alone. He urged in the District Court that he had the absolute right to amend his answer in the manner indicated, but the Court held that the matter rested in the discretion of the Justice, and that the Justice did not err by refusing the amendment. The judgment appealed from was therefore affirmed.

BROWN, J.

The National Bank of Wahpeton v. The First National Bank of Breckenridge and George Cook.
(District Court, Wilkin County.)

HOMESTEAD—UNREASONABLE SELECTION OF.

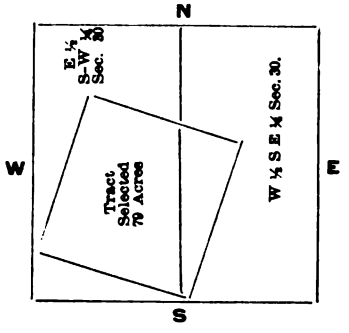
Where one is entitled to select a homestead from a tract of land he cannot make such selection arbitrarily in such a manner as to destroy the value of the remaining portion of such tract, if a homestead of equal value to that selected can be made that will leave the value of the remainder of such tract unimpaired.

W. B. PURCELL and CHARLES B. WOLF for plaintiff. L. B. EVERDELL and EZRA G. VALENTINE for defendants

This cause is now before the Court on the plaintiff's motion for an order directing that the selection made by the defendant Cook of his homestead be vacated and set aside, and directing the said Cook to make a new selection of such homestead.

The action is brought to foreclose a mortgage executed by the defendant

George Cook on the W. ½ of the S. E. ¼, and the E. ½ of the S. W. ¼ of Section 30, Township 131, Range 46, containing 160 acres. The said mortgage was signed and executed by the defendant George Cook alone. At the time of its execution he was a married man, having a wife then living, and resided with her upon the said land as his homestead. The mortgage as to that part of the land which is exempt as a homestead being void, the Court, following Coles v. Yorkes, 36 Minn., 388, directed that the said defendant Cook select out of the said one hundred and sixty acres that portion which he desired to hold as his homestead, and ordered judgment of foreclosure as to the remainder of said land. Pursuant to said judgment, the said Cook made a selection substantially as shown by the folowing diagram:



It appears from the moving papers before me that there are no features of the land in question requiring or rendering necessary or advisable the selection of a homestead in the manner in which the defendant has attempted to select it. The tract of land in question is level prairie, all substantially similar in character, and the larger portion of it is under cultivation. The particular selection, if permitted to remain, would render practcally valueless all that remained outside of the homestead. The selection is regarded as unreasonable and unfair and a deliberate attempt to deprive the plaintiff of its just rights under its mortgage; and the order of the Court is that the same be and it is hereby in all things set aside.

And it is further ordered that the said defendant Cook, within five days from notice of this order, make a new selection of his homestead in the same manner as indicated and directed by the judgment herein; and, if he shall fail to do so, then the Sheriff of said County will make such selection in the manner indicated and directed by the said judgment.

Plaintiff to have ten dollars costs of this motion.

Dated July 26th, 1895.

BROWN, J.

Anthony Kelly, et al, v. The City of Minneapolis, et al, (District Court, Hennepin County, 66107.)

MUNICIPAL CORPORATIONS—BOND DEBT LIMITATION—SINKING FUND—INDEBTEDNESS OF SPECIAL BOARDS.

In computing the bonded indebtedness of a city for the purpose of ascertaining if the bond debt limit of five per cent of the assessed valuation has been reached, the moneys and bonds in the sinking fund of such city applicable to the payment of its bonded indebtedness should be deducted therefrom.

Certificates of indebtedness of a special board or commission of a city for which the city is not itself liable are no part of the city's indebtedness within the meaning of the law defining indebtedness for the purpose of debt limitation.

JOHN B. ATWATER and P. M. BABCOCK, for plaintiffs. DAVID F. SIMPSON and M. B. KOON, for defendants.

This action was brought by the plaintiffs, as taxpayers of the City of Minneapolis, against the city and its officials, to restrain and enjoin them from negotiating to the sinking fund commissioners of the city, or any one else, the $200,000 of city bonds, designated as reservoir bonds, which have already been issued by the city, but now remain in its possession.

This hearing arises on an order to show cause why a temporary injunction or restraining order should not be made, restraining the negotiation of the bonds during the pendancy of this

action. The plaintiffs claim that the defendants should be restrained on the ground that the issue of the bonds was unwarranted; that the city has already reached the limit of its indebtedness, exclusive of this bond issue, as provided by section 2 of chapter 204 of the session laws of 1893, which provides "that no city in this state shall at any time be authorized to issue bonds or to incur any debt or liability of any kind, for any purpose, in excess of 5 per centum of the assessed valuation of the taxable property of such city, according to the last preceding assessment," and that the bonds are invalid.

By the Court:

As to the facts in the case, there is but little, if any, difference in the claims of the respective parties. It is conceded that the bonded indebtedness of the city, exclusive of the bonds of the city in the sinking fund, amounts to $6,760,000; that at the time of the commencement of this action, and at the time of the attempted negotiation of the bonds in question, there was in cash, in addition to the $705,000 of the city bonds in the sinking fund, the sum of $485,932, which makes the total bonded indebtedness of the city, less cash in the sinking fund, $6,274,068, provided it is held that the bonds and cash in the sinking fund should be deducted from the aggregate of the other bond indebtedness. It is also conceded that there are outstanding park board certificates to the amount of $747,848. It is also conceded that the assessed valuation of the taxable property of the city, as equalized by the state board of equalization, and on which the tax of 1894 was levied, amounts to $134,478,572, and that 5 per centum of that is $6,723,928, which would constitute the limit of the city indebtedness, as claimed by the plaintiffs. The defendants claim that the 5 per cent limit should be based on the assessment as made and equalized by the city authorities, which gave a greater valuation than that on which the tax is levied. We are of the opinion that the limit of indebtedness should be based upon the valuation as equalized by the state board, and on which the tax was extended.

As to the park board certificates, we are of the opinion that they are no part of the city's indebtedness within the meaning of the law defining indebtedness for the purpose of debt limitation. These certificates were issued under section 2 of the park board act, found on page 205 of the city charter. The act specifically provides against creating any liability against the city. It simply provides that certain assessments and collections on property benefited by the construction of parks should be made by the city authorities, and when collected paid to the certificate holders. The city is only liable as a trustee, to perform the duties required of it by the law, and in no sense liable as a city for the payment of the same. The city cannot be sued to recover the amount of the certificates, neither can a general tax be levied for the payment of the same.

We are of the opinion that the moneys and bonds in the sinking fund should be deducted from the amount of the bonded indebtedness, which would leave the actual indebtedness of the city to which the limit act applies, at $6,274,068.

Prior to the general act of 1893, limiting the indebtedness to 5 per cent of the assessed valuation of the taxable property in the city, there was a provision of the city charter also limiting the indebtedness of the city to 5 per cent of the aggregate value of its taxable property, and defining the manner in which the indebtedness should be ascertained. It provided: "That in estimating the whole amount of the

principal of all bonds actually issued by said city at the time, together with the proposed issue, there shall be deducted the total amount of funds and securities in the sinking fund provided for in this charter, for the payment of the bonds of said city and the bonds issued and proposed to be issued, less the amount of such sinking fund, shall not exceed 5 per centum of the aggregate value of the taxable property of said city as aforesaid." This provision was not repealed by the general law of 1893 fixing the debt limit.

Whatever views we might take of the law were it not for this charter provision, it is unnecessary to state. The charter provision requires the moneys and securities in the sinking fund to be deducted from the aggregate indebtedness, and seems to us to be decisive of the question in this case.

Applying the definition as provided for in the charter to this case, the indebtedness of the city is $6,274,068. It is claimed by the plaintiffs that the city owes the court house and city hall commission $206,567, which should be added to the city's indebtedness. It is not necessary for us with the view we take of this case to pass upon that question, and we decline to do so.

There is a difference between the indebtedness of the city and the amount of its debt limit of $449,860. After deducting the $206,568 claimed to be due from to the city to the county in the construction of the city hall and the $200,000 reservoir bonds in question, there would be a surplus of $43,293 over and above the debt limit.

For the reasons herein set forth the order to show cause is discharged, and motion for a restraining order during the pendency of the action denied.

—Seagrave Smith,
—Chas. M. Pond,
—Robert D. Russell,
—Robert Jamison,
—Henry C. Belden,
Judges.

Clara S. Badgley v. J. Rheinberger, et al.
(District Court, Winona County.)

ATTACHMENT—EXEMPTION—RESIDENTS—MEASURE OF DAMAGES.

A sewing machine used by one in his business is exempt, and a mere intention on the part of the owner thereof to remove from the state does not destroy the exemption. A resident of the state remains such until he has actually left the state with the intention of abandoning his residence therein.

Where exempt property has been attached in good faith, without malice or oppression, the measure of damages is the value of the use of the property during its detention, and its depreciation, if any; where there is no proof of this value and depreciation, the measure of damages is the interest on the value of the property while detained.

M. B. WEBBER, for plaintiff. TAWNEY & RANDALL, for defendant.

The plaintiff in this action, a married woman, was the owner of a sewing machine which was used by her in her business of dress making. She and her husband were residents of Winona, Minnesota, and on the 18th day of June, 1889, they had given up their house, had packed their household goods, including said sewing machine, with the intention of leaving this State and of becoming citizens of the State of Iowa. While said goods were being conveyed from the home formerly occupied by said plaintiff and her husband to the railroad station to be thence removed from the State said sewing machine was seized under a writ of attachment issued in an action in the Municipal Court of the City of Winona, wherein the defendants, Rheinberger Brothers, herein were plaintiffs and this plaintiff's husband was defendant. This action was commenced on July 10th, 1889, to recover back said machine, together with damages for its retention. Thereafter, on the 13th day of July, 1889, said plaintiff herein did leave this State to go to said State of Iowa, and ever since has and still does reside therein. It further appeared that in making such attachment the said defendants all acted in good faith, believing that said machine was not ex-

empt. The value of the machine was proven to be $35.00. The Court found that the plaintiff was, at the time of the seizure of the machine, an actual resident of the State of Minnesota.

START, J.: Where exempt property is seized under a writ of attachment on execution no demand is necessary before bringing suit. Murphy v. Sherman, 25 Minn., 196.

2. In an action of replevin where the defendant acted in good faith without malice or oppression the measure of damages is the value of the use of the property during its detention, and the depreciation in its value if any; where there is no proof of this value and depreciation (as in the case at bar) the measure of damages is the interest on the value of the property while detained. Attorneys' fees and expenses of suit, except as they are covered by costs and disbursements, cannot be recovered. Berthold v. Fox, 13 Minn., 501; Sherman v. Clark, 24 Minn., 37; Ferguson v. Hogan, 25 Minn., 135.

3. Exemption laws are based upon considerations of humanity and an enlightened public policy, and "must be liberally construed in favor of the right of exemption." The rule in this State was at one time otherwise, but it is now settled as here stated. Berg v. Baldwin, 31 Minn., 541.

The proviso to our exemption laws which seeks to restrict their beneficent operation to actual residents of the State must not by construction be extended beyond its strict letter. To sustain the contention of the defendants, the words "actual resident" in the proviso must be held to mean "one who does not intend to leave the State," or "one who has started to go out of the State, although still within it." (See McClean's Statutes of Iowa, Sec. 3076.)

Such a construction would be extra-judicial legislation and lead to absurd results in many cases. To illustrate, a resident and voter of the State starts to leave it, but changes his mind before reaching the state line. What would be his status? Would he be a non-resident? Would he be obliged to live in the State for four months thereafter before he could vote? If so, he would be an alien upon his "native heath" without wrong doing on his part, or ever leaving it. It seems clear that the defendants have not brought their defense within the proviso. The burden is on them to do so before they can ask the Court to deprive a working woman of her sewing machine because she intended to go out of the State to reside.

Merchants National Bank of Helena v. West Duluth Light and Water Company.
(District Court, Ramsey County, 56846.)

OPENING JUDGMENT—DEPOSITIONS.

Where depositions are taken upon due notice, in accordance with the provisions of the statute, and no appearance is made by the adverse party and no cross-examination had, the right to cross-examine is waived and lost.

Where it appears upon the face of the moving papers in an application to open a judgment that no defense can be made by the defendant if the judgment were opened, the application will be denied. The mere general statement that defendant has a good defense is overcome by the particular facts set up in the moving papers showing that he has not.

NELSON, FITZPATRICK & MCDERMOTT, for plaintiff.
DAVIS, KELLOGG & SEVERANCE for defendant.

This action was on a promissory note executed by the defendant and endorsed to plaintiff. Plaintiff gave due notice that he would take the depositions of certain parties without the State. At the taking of these depositions no appearance was made by defendant and no cross-examination of the witnesses was had. The cause was thereafter duly placed upon the calendar for trial. At the trial no appearance was made by defendant. Findings were made in plaintiff's favor, and on June 7, 1895, judgment was entered thereon on due notice. Thereafter, and on the 26th of June,

1895, an order was obtained that the plaintiff show cause why the said judgment should not be vacated, and why the defendant should not be permitted to cross-examine the witnesses whose testimony had theretofore been taken by deposition.

From the moving affidavits it appeared that the reason why no appearance had been made by defendant at the taking of said depositions and at the trial, was the misunderstanding between the attorneys of the defendant who had appeared and answered in the case, and of the receiver of the defendant, who was the proper party to defend, as to whether any defense was to be made to said action and as to which of them was to attend to the same. Order to show cause discharged.

BRILL, J.: It appears from the affidavits of Mr. Richardson and Mr. Kellogg that it will be futile to vacate the judgment unless the taking of the depositions on file is opened and defendant given the privilege of cross-examining the witnesses whose testimony is contained in said depositions. The depositions were taken upon due notice, in accordance with the provisions of the statute. The time of taking the depositions was fixed by written stipulation signed by the attorneys of both parties. The depositions were returned and filed two weeks or more before the trial, and they were examined by defendant's attorneys soon after their return. The failure to cross-examine the witnesses is not charged to any fault of plaintiff. The right of defendant to cross-examine the witnesses upon the depositions is gone.

The Court has not now power to make any order affecting the depositions, and if it had it would not under the circumstances, be warranted in doing it.

The affidavit of merits technically satisfies this rule, but in view of the fact that the depositions on file contain the evidence upon which plaintiff relies, and the nature of the evidence is such that defendant's attorneys have declared in their affidavits that they cannot make an effectual defense without cross-examination of the witnesses, the simple statement in the moving affidavits that defendant has a good defense on the merits is hardly sufficient to satisfy the demands of the situation, especially as the answer consists of a general denial only.

The very general statements of the affidavits regarding diligence do not satisfy me that due diligence was used in making the application after the judgment was entered. The situation at that time called for very prompt action. Without going into detail into the matter of the mistake or inadvertence of counsel before the trial, I think the showing is not sufficient to warrant me in opening the judgment. The affidavits in rebuttal are not within the leave granted and are not considered.

Koiff Silverstein v. A. E. Johnson et al.
(District Court, Ramsey County, 60738.)

PLEADING — DENIAL ON INFORMATION AND BELIEF.

An allegation in an answer of a former suit pending and of settlement thereof by payment must be denied positively. A denial on information and belief is bad on demurrer.

SCHOONMAKER, FLEMING & HINTERMEISTER for plaintiff. M. HEIM for defendants.

KELLY, J.: This answer pleads a former suit on the same cause of action in the Municipal Court, and full settlement thereof, and satisfaction by payment to plaintiff's attorneys in that suit of the sum demanded. The reply fails to deny this allegation except by denying on information and belief, which is as bad, and says, "in case the defendants did pay" said sum to said attorneys, said defendants afterward repudiated the same, and notified

the attorneys not to pay this sum to plaintiff. The difficulty with this is that it does not deny that the settlement pleaded was made and consummated by payment. After that neither party could, without consent at least, of the other, reopen the matter. Any notice of the defendants, therefore, was wholly ineffectual.

REVIEWS.

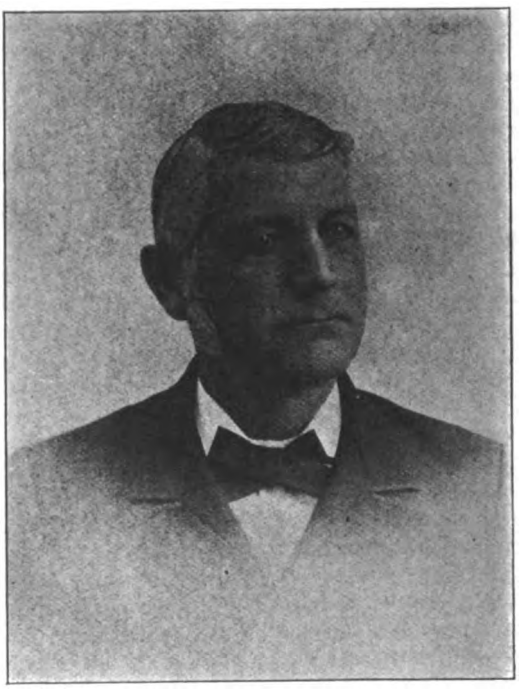
Judicial Writs and Process in Civil and Criminal Cases, by William R. Alderson, of the New York Bar.—Baker, Voorhis & Co., New York, 1895. $6.00 Net.

This work is in many respects a model of what a text book written for use by practicing lawyers should be. The subject of the book is new, and is one which does not admit of literary amplification, and the author has wisely confined himself to a statement of the law, frequently in the language of the Courts, and a citation of all authorities on each particular proposition. The value of the work, therefore, as of all text books, if they have any value, lies in its being a reliable guide to the authorities. For this purpose a clear and natural arrangement and development of the subject is essential. The author covers the entire subject expressed in the title of the work. He gives the practitioner full information as to, and all the authorities upon, the effect of errors and defects in process, and how they may be remedied; what may and may not be done in the service and execution of writs; the property subject to and the persons privileged from the service of process, and the manner and sufficiency of service, together with a discussion of the duties, powers and liabilities of officers in the service of writs, and the return of service thereof.

The chapters on what has been termed the "ceremonial dress" of writs, i. e., the style, direction, teste, seal and signature, are very interesting, illustrating, as they do, the growth of our Courts away from the technical precedents of the old ante-code regime.

The disputed question of service of process upon a foreign corporation by serving upon an officer thereof who is temporarily, and not on the corporation's business, within the jurisdiction of the Court from which the process issues, is also ably discussed, Mr. Alderson inclining to the view that such service is not valid. As he tersely states his position, "the presence of a corporation is in the State where it was created and in any other State where it transacts business," and it "cannot be considered present in a State where it was neither incorporated nor does business."

The discussion of criminal process is much more brief than that of civil process, but much said of the latter is applicable to the former, as our author observes, the difference between the two is in the rigidness which is demanded by the law in criminal process, which is of greater seriousness and consequence than civil writs.



HON. F. M. CROSBY,

District Judge, First Judicial District.

...THE...

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OUR NEXT ISSUE.

It being deemed desirable, and also the express wish of many of our patrons that we publish in full the proceedings of the Minnesota State Bar Association, the next number, almost entirely, will be devoted to this end. As the meetings of the Association promise to be of interest and value in the future, we shall endeavor to give our patrons full accounts of them, and also the addresses delivered when of such value as those published in the next number.

There will, therefore, be issued this month, nearly simultaneously, two numbers of The Journal, which will enable us to change the date of issue to the last of each month, an improvement long desired. The Journal hereafter will promptly be issued on the above date.

WE would call especial attention to the new special rule of the Eleventh District relating to the custody of exhibits published in this number of The Journal. This rule should be incorporated in the general district court rules. The exhibits offered form a part of the record, and ought to be left in the care of the reporter whose duty it is to prepare a copy of the record if one is desired. To be careless in the care of exhibits seems to have been a portion of every lawyer's education—and a portion always thoroughly learned. Almost invariably, in the preparation of the record of a case in which many exhibits have

been offered, a great amount of trouble and annoyance is caused by this carelessness which would be avoided by the adoption of this rule.

THE case of O'Connor v. Allen, relating to the affidavit to be filed by legal newspapers, published in this number of The Journal, is, in our opinion, one of unusual interest. These affidavits in most cases are drawn by the publisher without legal advice, and therefore, in most cases are imperfect in one or more particulars, and we doubt if one per cent of the attorneys examine the affidavit filed by the newspaper in which they publish their notices. If the first decision arrived at on the motion by Judge Jamison were finally held to be correct, *i. e.*, that the statute in requiring certain facts to appear in the affidavit is mandatory and must be strictly followed, and if not strictly followed that the paper is not a proper newspaper in which to publish legal notices, the result, as remarked by Judge Smith, would unsettle titles, promote litigation, in some cases disturb matrimonial relations, and in a general way operate disastrously to private rights and to public good throughout the State. We are of the opinion, however, that the conclusion finally arrived at by the Court of the Fourth District is correct and would be sustained if appealed from. In rendering its decisions our Supreme Court very properly considers the effect which they are apt to have upon the general welfare of the people, and in this case pre-eminently this consideration should and doubtless would have great weight in favor of affirmance.

THE PORTRAIT.

HON. FRANCIS MARION CROSBY, the subject of The Journal's portrait for this month, was born in Wilmington, Vermont, Nov. 13, 1830. His ancestors were participants in our country's struggle for freedom, entitling him to a membership in the society of Sons of the Revolution, of which privilege he has availed himself.

He attended the high school of his native town and finished his education at Caesar Seminary at Swanzey, N. H. After graduating he entered the law office of Hon. O. L. Shafter (afterward Chief Justice of the Supreme Court of California), and was admitted to the bar at Bennington, Vt., in 1855. Returning to Wilmington, he commenced the practice of law with Stephen P. Flagg, and there remained until the spring of 1858, when he removed to Hastings, Minn. During the time of his practice of law at Wilmington he represented that town in the Vermont legislature in the sessions of 1855 and 1856.

In the July following his arrival in Minnesota he became a member of the law firm of Smith, Smith & Crosby. In 1860 and 1861 he served as Judge of the Probate Court of Dakota County, and in 1862 became a member of the law firm of Clagett & Crosby, continuing the practice of law in that firm until elected Judge of the District Court and entering upon the duties of that office January 1st, 1872. During that time Judge Crosby was for three years—1862, 1867 and 1868—City Attorney. From 1866 to 1872 he was on or connected with the School Board of the city, and has always taken a lively interest in educational matters and kindred subjects. Since his first election as Judge of the District Court he has served continually on the bench of the First Judicial District, having been elected three times—in 1878, 1884 and 1890—without opposition.

His present term of office expires January 1st, 1897, which, if completed, will make a quarter of a century of uninterrupted service on the bench. The

Judge is a conservative Republican in politics, but his personal popularity has induced his resident county, although a Democratic stronghold, to always rally to his support when he has been a candidate.

As a Judge he has ever been considered honest and competent by the people, and just and able by the profession.

PERSONAL.

J. P. Gunn., of Eau Claire, Wis., will locate at Chatfield, Minn.

Ex-Congressman O. M. Hall has gone back to the practice of law at his home in Red Wing.

Giddings & Pratt is the title of a new firm at Anoka. The members are A. E. Giddings and A. F. Pratt.

Neff & Hartley is the name of a new law firm with offices in the First National Bank Building, Duluth.

Hodgson & Schaller, of Hastings, Minn., have opened a St. Paul office in the New York Life Insurance Building.

Pfau & Young, of Mankato, have dissolved partnership. Mr. Young will continue business at the offices formerly occupied by the firm.

Haden L. Cole, Esq., of the firm of Stevens, O'Brien, Cole & Albrecht, has gone to Europe with his family, and will be gone several months.

The partnership of M. R. Webber and Edward Lees, both of Winona, under the firm name of Webber & Lees, is announced. Their offices will be located in the Schlitz Block.

Hunt & Prendergast is the name of a new firm for the practice of law, with offices in the New York Life Building, St. Paul. Mr. Hunt was formerly with C. D. & T. D. O'Brien, of this city.

Horace E. Bigelow, of the St. Paul bar, was married to Miss Upham on Tuesday, Sept. 24.

J. L. Washburn, Judge C. L. Lewis and L. E. Judson, Jr., have formed a new law firm as Washburn, Lewis & Judson, in Duluth, Minn.

Mr. M. V. Seymour, a prominent member of the St. Paul bar, and a member of the firm of Stringer & Seymour, was on Sept. 17th married to Miss Lenore Horn, daughter of H. J. Horn, also of the St. Paul bar.

The firm of Smith, McMahon & Mitchell, of Duluth, Minn., has been dissolved, Oscar Mitchell retiring. The latter is now a member of the firm of Schmidt, Reynolds & Mitchell, in the Torrey Building. Smith and McMahon will continue in partnership.

R. P. Brower, of St. Cloud, was elected Vice Chancellor of the Knights of Pythias of Minnesota at the recent annual meeting.

The law firm of Taylor, Calhoun & Rhodes, of St. Cloud and Little Falls, has dissolved partnership. The firm is composed of M. D. Taylor and D. T. Calhoun, of St. Cloud, and J. H. Rhodes of Little Falls. Each will engage in business for himself.

Messrs. George H. Fletcher and Benjamin Taylor, of Minneapolis, have opened an office in Mankato. Mr. Fletcher will, however, continue his connection with the old firm of Fletcher, Cairne & Rockwood. Mr. Taylor will be the resident member.

On the 11th of August, before Judge Gould, sitting in special term at Rochester, Minn., the bar, as a body, moved the Court that resolutions framed by a committee in memory of and as a tribute to the late H. C. Butler, Ex-Judge of Probate of Olmsted County, be spread upon the records of the Court. It was so ordered.

RECENT DEATHS.

Judge Robert Desty, author of "Desty's Federal Practice," died Sept. 27 at St. Mary's Hospital, Rochester, N. Y., aged 68 years. Judge Desty was the son of an exiled French nobleman named Doestemauxville, who was forced to leave France at the time of the revolution. Judge Desty served in the Mexican war and was an original forty-niner. He was a Supreme Court Justice in California. At the time of his death he was preparing a work on "Contracts."

We regret to announce the death of S. W. Ferber, of Northfield, on Sept. 19, aged 76. Mr. Furber came to Minnesota in 1856, locating in Washington County. He represented that county in the Legislature, coming to Northfield in 1883. He was recently appointed Municipal Judge by the Governor, and was held in the highest esteem by the entire community.

J. C. Cooper has been appointed to fill the vacancy.

Attorneys in Minnesota may be interested in knowing the States which have abolished grace.

State	Act Passed	Date of Taking Effect
California	March 21, 1872	Jan. 1, 1873
Connecticut	April 2, 1895	July 1, 1895
Idaho		June 1, 1887
Illinois	June 4, 1895	July 1, 1895
Montana		July 1, 1895
New Jersey	February 12, 1895	July 4, 1895
New York	May 10, 1894	Jan. 1, 1895
Oregon	February, 1893	May, 1893
Pennsylvania	June 18, 1895	Jan. 1, 1896
Utah		1888
Vermont	November 4, 1892	Jan. 1, 1893
Wisconsin	April 5, 1893	April 5, 1894

Luther Laflin Mills, the Chicago criminal lawyer, says that when he was a boy he frequently accompanied his father, who was a wholesale merchant, on collecting tours through the Northwest. They had to travel by wagon, and, as the father would have large sums of money about him, it was often a problem where they could safely put for the night. "My boy," the old man used to say, "it is safe to stay at a house where there are flowers in the window."

Sentence of Pontius Pilate.

The following is a correct transcript of the sentence of Pontius Pilate, the most memorable judicial sentence which has ever been uttered by human lips:

"Sentence pronounced by Pontius Pilate, intendant of Lower Galilee, that Jesus of Nazareth shall suffer death by the cross. In the seventeenth year of the reign of the Emperor Tiberius, and on the 25th of March, in the most holy city of Jerusalem, during pontificate of Annas and Caiphas, Pontius Pilate, intendant of the Province of Lower Galilee, sitting in judgment in the presidential chair of the praetor, sentences Jesus of Nazareth to death on a cross, between two robbers, as the numerous testimonies of the people prove that (1) Jesus is a misleader; (2) He has excited the people to sedition; (3) He is an enemy of the laws; (4) He calls himself the Son of God; (5) He falsely calls himself the King of Israel; (6) He went to the temple followed by a multitude carrying palms in their hands."

It likewise orders the first centurion, Quirilius Cornelius, to bring Him to the place of execution, and forbids all persons, rich or poor, to prevent the execution of Jesus.

The witnesses who have signed the execution against Jesus are: (1) Daniel Robani, a Pharisee; (2) John Zorobabel; (3) Raphael Robani; (4) Capet. Finally it orders that the said Jesus be taken out of Jerusalem through the gate of Tournea.

There seems to be no historical doubt as to the authenticity of the above document, and it is obvious that the reasons of the sentence correspond exactly with those recorded in the gospels.

The curious document was discovered in A. D. 1280 in the city of Aquill, in the kingdom of Naples, in the course of a search being made for the discovery of Roman antiquities, and it re-

mained there until it was found by the commissioners of art in the French army of Italy. Up to the time of the campaign in Southern Italy it was preserved in the sacristy of the Carthusians, near Naples, where it was kept in a box of ebony.

Since then the relic has been kept in the Chapelo Caserta. The Carthusians obtained, by petition, leave that the plate might be kept by them as an acknowledgment of the sacrifices which they had made for the French army. The French translation was made literally by members of the commission of art. Denon had a fac simile of the plate engraved, which was bought by Lord Howard, on the sale of his cabinet, for 2,890 francs.

NOTES ON RECENT CASES.

In State v. Julow, 31 S. W. Rep., 781, the Supreme Court of Missouri, Division No. 2, has lately rendered a very interesting and valuable decision on one of the most important questions of the day—that of the right of an employer to prohibit his employes from becoming or remaining members of labor unions. This right exists at common law, as was ably demonstrated by Judge Dallas, of the Circuit Court for the Eastern District of Pennsylvania, in Platt v. Phila. & Reading R. R. Co., 65 Fed. Rep., 660; but it has been abrogated by statute in several States. In Missouri the act of March 6, 1893 (P. L. 187, Section 1), provides that "no employer * * * shall enter into any contract or agreement with any such employe to withdraw from any trade union, labor union or other lawful organization of which said employe may be a member, or requiring said employe to refrain from joining any trade union, labor union or other lawful organization, or requiring any such employe to abstain from attending any meeting or assemblage of people called or held for lawful purposes, or shall by any means attempt to compel or coerce any employe into withdrawal from any lawful organization or society;" and Section 3 makes a violation of the act punishable by fine and imprisonment. This, in the case mentioned above, was held to be unconstitutional—(1) because it is in contravention of the Fifth Amendment to the Constitution of the United States, and Article 2, Section 30, of the Constitution of Missouri, providing that no person shall be deprived of life, liberty or property without due process of law; (2) because it is in violation of Section 1 of the Fourteenth Amendment, providing that no State shall "deprive any person of life, liberty or property without due process of law;" and (3) because it is special legislation, forbidden by Article 4, Section 53, of the Missouri Constitution, in that "it does not to persons or things as a class—to all workingmen, etc.—but only to those who belong to some 'lawful organization or society,' evidently referring to a trade union, etc." The Court further goes on to declare that the statute cannot be upheld on the assumption that it is a police regulation. "It has none of the elements or attributes which pertain to such a regulation, for it does not, in terms or by implication, promote, or tend to promote, the public health, welfare, comfort or safety, and, if it did, the State would not be allowed, under the guise and pretense of a police regulation, to encroach or trample upon any of the just rights of the citizen, which the Constitution intended to secure against diminution or abridgement."

Similar statutes have been passed in other States. In California it is enacted by the act of March 14, 1893, Chapter 149, P. L. 176 (Penal Code California, Section 679), that "any person or corporation within this State, or agent or officer on behalf of such person or corporation, who shall hereafter coerce

or compel any person or persons to enter into an agreement, either written or verbal, not to join or become a member of any labor organization, as a condition of such person or persons securing employment or continuing in the employment of any such person or cor poration, shall be guilty of a misdemeanor." The act of Idaho of March 6, 1893 (P. L. 152), provides that "it shall be unlawful for any person, firm or corporation to make or enter into any agreement, either oral or in writing, by the terms of which any employe of such person, firm or corporation, or any person about to enter the employ of such person, firm or corporation, as a condition for continuing or obtaining such employment, shall promise or agree not to become or continue a member of a labor organization;" and makes a violation of the act a misdemeanor, punishable by fine and imprisonment. The act of Illinois of June 17, 1893, P. L. 98, enacts that "it shall be unlawful for any individual or member of any firm, or agent, officer or employe of any company or corporation, to prevent, or attempt to prevent. employes from forming, joining and belonging to any lawful labor organization, and any such individual, member, agent, officer or employe that coerces or attempts to coerce employes by discharging or threatening to discharge (them) from their employ or the employ of any firm, company or corporation, because of their connection with such lawful labor organization, shall be guilty of a misdemeanor," punishable by fine and imprisonment. By the act of Massachusetts of May 31, 1892, it is provided that "any person or corporation, or agent or officer on behalf of such person or corporation, who shall hereafter coerce or compel any person or persons to enter into an agreement, either written or verbal, not to join or become a member of any labor organization as a condition of such person or persons securing employment or continuing in the employment of any such person or corporation, shall be punished by a fine of not more than one hundred dollars." And the act of Ohio of April 14, 1892, P. L. 269, is exactly the same as the Illinois statute quoted above, word for word, the latter being evidently a transcript of the former. This Ohio act was held constitutional in Davis v. State, 30 Wkly. Law Bull., 342, because the Court did not see its way clear to hold it unconstitutional; but all such acts, according to the Missouri case cited above, are unconstitutional.—Am. Law Register and Review.

In the opinion of the Supreme Court of Nebraska, a mortgage given to secure a debt will not be set aside as procured by duress, on the ground that it was given to obtain a dismissal of criminal proceedings instituted by the creditor against the mortgagor, when the mortgage was given without threat or promises having been made to the mortgagor, and after a statement by the creditor's agent that no promise could be made, but, on the contrary, that the prosecution would have to take its course. Hargreaves v. Menken, 63 N. W. Rep., 951. See 1 Am. L. Reg. & Rev. (N. S.), 885.

A passenger knowing that he is violating the rules of the road in riding on a freight train, although he does so with the permission of the conductor, is held, in Louisville & N. R. Co. v. Hailey, 27 L. R. A., 549, to assume all risk of accidents.

A Texas judge has recently held that laws against ticket scalpers are unconstitutional, on the ground that when a railroad company sells a ticket it presumably gets all that it is worth, and that a scalper has the same rights that dealers in other second-hand articles have.

Wheelmen have rights, and the Courts say so. In Scranton, Pa., a young man leaned his wheel against the curb while he went into a house. A teamster drove his heavy wagon against the wheel and smashed it, and when the owner of the bike asked him what he was going to do about the wrecked wheel the teamster told him to "keep your —— wheel out of the street." This occurred in June, 1893. The young man brought suit, and the case was heard by arbitrators, who found for the plaintiff for the full value of the wheel. The case was appealed, and in the winter of 1894 was tried, but the jury, not understanding the case, disagreed. Finally the young owner of the wheel appealed for help from the League of American Wheelmen, and Chief Counsel Boyle, of Philadelphia, saw the opportunity for establishing the rights of the bicycle in the streets, and promised the help of the League. Last week the case was again tried in Scranton, before Judge Gunster, who, in explaining to the jury the law bearing upon the case set forth beyond all cavil in the future the rights of bicyclists upon the public thoroughfares. They have no right upon sidewalks at all, any more than have other vehicles, but they have the same rights upon highways and streets that all other conveyances have. If one is left leaning against a curb stone, the man who runs into and damages it does so at his peril. Upon the streets a wheelman is entitled to his share of the roadway, and the man who negligently or recklessly runs him down must answer to the law. Upon the strength of such a charge as that, the jury promptly returned a verdict for the owner of the wheel, thus establishing a precedent that will prove of inestimable advantage to thousands of riders in this commonwealth.—Harrisburg (Pa.) Telegraph.

The body of fire insurance law has been enriched with a lucidly-conceived judgment by Judge Magruder, of the Illinois Supreme Court, in Niagara Fire Ins. Co., 154 Ill., 9. The question discussed is as to the conduct of appraisers and the right of the insurer to sue without procuring the stipulated arbitration. A valid excuse is sufficient, particularly if the insurance company prevented the award through the conduct of its arbitrator. Incidentally, the opinion disapproves of the rule contended for in Davenport v. L. I. Ins. Co., 10 Daly, 535, that upon the failure of the appraisers to agree upon an umpire, it is the duty of the insured, at least, to propose to the company the selection of new appraisers. "We are unable," says Judge Magruder, "to subscribe to this doctrine, so far as the policy upon which the present suit has been brought is concerned. The contract here only requires the parties to choose appraisers once, and not twice. Now let the companies change their policies and require double appraisements. They usually follow in the wake of the Court adjudications and conform their cunningly-conceived conditions accordingly."

The right of a newspaper to obtain a copy of the proceedings in a divorce case for publication when the Clerk of the Court refuses to furnish them is denied in Re Caswell (R. I.), 27 L. R. A., 82; and a note to the case reviews the authorities on the right to inspect public records.

When, in proceedings for contempt in inciting and causing the publication of a criticism of a judge's official action, it appears that the defendant had no agency in the publication, nor knowledge of it, a commitment for contempt is void for want of jurisdiction. Ex parte Taylor (Court of Criminal Appeals of Texas), 31 S. W. Rep., 641.

A person who signs an instrument without reading it, when he can read, cannot, in the absence of fraud, deceit or misrepresentation, avoid the effect of his signature, because not informed of the contents of the instrument. The same rule would apply to one who cannot read, if he neglects to have it read, or to inquire as to its contents. This well-settled rule is based upon the sufficient reason that in such case ignorance of the contents of instruments is attributable to the party's own negligence. But the rule is otherwise where the execution of an instrument is obtained by a misrepresentation of its contents; where the party signed a paper he did not know he was signing, and did not really intend to sign. It is immaterial, in the latter aspect of the case, that the party signing had an opportunity to read the paper, for he may have been prevented from doing so by the very fact that he trusted to the truth of the representation made by the other party with whom he was dealing.

This is the clear-cut manner in which the Supreme Court of Alabama, in the case of Beck & Pauli Lithographing Co. v. Houppert et al., 16 So. Rep., 522, reiterates the wholesome doctrine that a person cannot take advantage of his own wrong or negligence.

The case of Farley v. Bateman, decided by the Supreme Court of Appeals of West Virginia, is noteworthy, not so much for what it decides as for the very forcible language of Dent, J., in illustrating the keen eye of a court of equity in detecting fraud. "A boy," he says, "may satisfy his mother that his wet hair is the result of sweat, and not of his going in swimming contrary to her commands, but he will hardly convince her that his back and arms were sunburned, and his shirt turned wrong side out, in crawling through a rail fence backwards." The case turned upon a question of notice by a subsequent purchaser of a prior undocketed judgment, and the Court used the above impressive language to show that the fact of notice may be inferred from circumstances, as well as proved by direct evidence.

Wires and insulators, used in forming and completing the connection between an electric light and power plant and the dwellings, stores and other public places supplied by that plant, for the purpose of conveying or transmitting light and heat thereto, are fixtures, within the provisions of the mechanic's lien law. Hughes v. Lambertville Electric Light, Heat and Power Co. (Court of Chancery of New Jersey), 32 Atl. Rep., 69.

To the same effect is Badger Lumber Co. v. Marion Water Supply, Electric Light and Power Co., 48 Kans., 182; S. C., 29 Pac. Rep., 476; and the same is true of the pipes used by a corporation to convey vapor used for cold storage from its plant to its customers. Steger v. Arctic Refrigerating Co. (Tenn.), 14 S. W. Rep., 1087. See 2 Am. L. Reg. & Rev. (N. S.), 431.

The bed of an unnavigable lake of considerable size is held in the Iowa case of Noyes v. Collins, 26 L. R. A., 609, not to belong to riparian owners. This is contrary to the doctrine now generally established, as shown in a note to Gouverneur v. National Ice Co., 18 L. R. A., 695, and the late Michigan case of Grand Rapids Ice & C. Co. v. South Grand Rapids I. & C. Co., 25 L. R. A., 815.

A queer decision is reported from Pittsburg. A mother left a child with a friend and contracted for its board. She failed to pay its board, and when she demanded the child compliance with the demand was refused, the friend claiming to hold it for security. The Court is said to have decided that the friend is entitled to the custody of the child until the bill is paid.

ATTORNEY GENERAL'S DECISIONS.

EDUCATION — SCHOOL DAY — TEACHING FOREIGN LANGUAGES.

The term "school day," as used in the statute, has acquired a well-defined meaning, and embraces both a morning and afternoon session.

The English language must be used at both sessions, except for a period not exceeding one hour in each day.

HON. W. W. PRENDERGAST,
Supt. of Public Instruction.

Dear Sir: You state that it is proposed in a certain common school district to teach in a foreign language in the forenoon and in the English language in the afternoon, and inquire if public funds can lawfully be employed to pay the teacher for the time he is engaged in teaching the foreign language.

As the case is stated, it is proposed to conduct a public school in the afternoon only. The law provides that, "in every contract between any teacher and Board of Trustees or Board of Education, a school month shall be construed and taken to be twenty days, or four weeks of five school days each." (Comp. Sch. Laws, Sec. 57.)

A school day has acquired by long custom and usage a well defined meaning. The change proposed contemplates only one-half of such a day, and a contract made for such a day is void.

In further support of the view herein expressed, attention is called to Section 59 of the Compiled School Laws, which authorizes instruction in a foreign language by a teacher capable of speaking the same for a period of "not to exceed one hour in each day." By virtue of a well established rule of construction, the last named provision is prohibitive of the contemplated change. It would, in my judgment, be an unwarranted innovation upon the system of public instruction estab lished in this State.

I am, very truly yours,
H. W. CHILDS,
Attorney General.

LEGISLATORS—ELIGIBILITY OF TO APPOINTIVE OFFICES.

A member of the Legislature, if he choose to resign his legislative seat, at once becomes eligible to any elective or appointive office, save such as were created or the emoluments whereof were increased during the session of the Legislature of which he was a member.

HON. L. G. POWERS,
Commissioner of Labor.

Dear Sir: You state that you contemplate the appointment of Hon. J. N. Jones, member of the House of Representatives from the Ninth District, to the position of Assistant Factory Inspector in the Bureau of Labor, but that your attention having been called to the provisions of the Constitution of Minnesota, Article 4, Section 9, you are in doubt as to the eligibility of that gentleman to said position.

The construction of the above named provision of the Constitution has, on several previous occasions, engaged the attention of this office. Whenever the question presented has involved an elective office it has invariably been held that the Constitution does not prohibit the election of a senator or representative to another office. As stated by Mr. Attorney General Cornell, speaking of the same constitutional provision: "The clause is simply a declaration of the fact that the office of senator is incompatible with any other except that of postmaster, and prohibits the holding of the two incompatible offices at the same time. The effect of this is not to make the person holding the office of senator ineligible to such other office, but to create a vacancy in the former office in case of his acceptance of the latter." (Op. Attys. Gen., 277.) This view was subsequently acquiesced in by Attorney General Start after mature deliberation, who, among other reasons for his decision, expressed the following: "One Governor, three Lieutenant Gov-

ernors, one Secretary of State, one Attorney General, one Judge of the Supreme Court and two District Court Judges have been elected to their respective offices during the time for which they had been elected members of the Legislature. I do not think the cause of public justice requires that I should reverse the rulings of this office, disregard the practical construction of the question, and seek on my own motion to reverse the popular verdict as emphatically declared." (Id., 406.)

It may fairly be urged, furthermore, that the views of this office upon the question are supported by the decision of the Supreme Court in Barnum v. Gilman, 27 Minn., 466. It is there held that "the prohibition is against holding any other office embraced within it, but it does not in terms go to the ineligibility of a person holding the office of senator or representative to an election to such an office."

While the question would seem to be foreclosed, so far as it pertains to elective offices, it is not as definitely determined with reference to appointive offices. One consideration, much relied on by both the Court and my predecessors in reaching the views above expressed, was the belief that the framers of the Constitution never intended the provision in question "as a restriction upon the choice of the electors in the selection of their official servants." Clauses of that character, it was said, must receive strict construction. They cannot be extended by application. Obviously, such consideration fails in the case of an appointive office. The question of popular choice is not involved. That Attorney General Cornell did not intend to extend the rule to appointive offices is evident when he said: "Whatever may be the rule as regards appointive offices, whether the precedents of a legislative and executive character heretofore established in relation to them are correct or incorrect, it seems to me beyond controversy that the clause cannot be construed as limiting or in any manner restricting the people in their choice of elective officers." It is difficult, however, to found a distinction in the language of the Constitution between the two classes of officers. If it exist there, it must be perforce of other provisions of that instrument modifying the terms of the one in question.

But whatever view obtains as to the member's right to hold another office during his incumbency of the legislative office, no question attends his eligibility to such other office. If he choose to resign his legislative seat, he at once becomes eligible to any elective or appointive office, save, of course, such offices as were created or the emoluments whereof were increased during the session of the Legislature of which he was a member, and to which he is ineligible for the period of one year.

While it is my opinion that Mr. Jones may properly be appointed by you to the said position, and you are so advised, I shall not, in view of the importance of the question, permit this opinion to stand in the way of the institution of quo warranto proceedings in any case in which the public interest may seem to require it.

I am, very respectfully,

H. W. CHILDS,
Attorney General.

Judge Jeremiah Black for a long time wore a black wig. On one occasion, having donned a new one, he met Senator Bayard, of Delaware, who thus accosted him: "Why, Black, how young you look! You are not so gray as I am, and you must be twenty years older." "Humph!" replied the judge, "good reason; your hair comes by descent, and I got mine by purchase."—Green Bag.

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DISTRICT COURT.

John A. O'Connor v. Cornelia F. Allen et. al.
(District Court, Hennepin County, 63002.)

FORECLOSURE—LEGAL PUBLICATION.

The failure to state that a newspaper is "printed" in connection with the statement that it is published at a certain place, and to state on what day of the week it is published, in the affidavit required to be filed by Section 2, Chapter 33, General Laws 1893, the affidavit in other respects being full and complete, is not such a failure as will render the newspaper not a legal newspaper, and legal notices published therein are sufficient.

YOUNG, FISH & DICKINSON for plaintiff. DAVIS & DWINNELL for defendants.

Action to recover possession of real property. As stipulated by the parties, the facts are as follows: Mary Louise O'Connor was the owner of certain real property situated in the City of Minneapolis, which she conveyed to the defendants, who entered into possession thereof, giving a note and mortgage back in part payment. Default occurring in the payment of said note, said mortgage was foreclosed, and the property was bid in by the mortgagee for the full amount of the mortgage debt, interest and costs. At the expiration of the period of redemption, the defendants, without redeeming from said sale, refused to surrender possession of the property. Plaintiff is the duly appointed executor of said mortgagee. It was agreed that the foreclosure proceedings were in all things regular except in the following particular: The notice of sale was published in "The Register," a weekly newspaper, which conformed in all things to the definition set forth in Section 1, of Chapter 33, Laws of 1893, but the affidavit required by Section 2 of said act to be filed in the office of the County Auditor was as follows, omitting the italicized words: "Elbridge L. Otis, being first duly sworn, doth declare that he is the president and general manager of the Register Publishing Company, a corporation, and as such has sole charge of the publication of The Register, a weekly newspaper, *printed and* published *on Saturdays*, at 401 National Bank of Commerce Building, in the City of Minneapolis, in Hennepin County and State of Minnesota; that said newspaper is delivered *each week* to more than two hundred and forty paid subscribers each week; that in all particulars said newspaper conforms to the statute of Minnesota defining what is a newspaper for publishing the laws of the State and other legal advertising."

After this affidavit was filed, and after the last publication of the notice of sale in said foreclosure, said affidavit was altered by inserting in the presence of the Notary before whom the same was originally verified the words so italicized.

On the above facts, the Court, by Jamison, J., found that said newspaper was not, at the time of said publication, a legal newspaper for the publication of legal notices, and that, therefore, the foreclosure proceedings were null and void.

On motion for a new trial the ques-

tion was raised before the full bench, which granted the motion.

SMITH, J. The question involved in this case is the validity of the foreclosure of a mortgage by advertisement under a power of sale contained in the mortgage. The notice of sale was published in The Register, a weekly newspaper, printed and published in the City of Minneapolis, Hennepin County, the County where the real estate described in the mortgage is situated. The first publication of the notice occurred on the 8th day of July, 1893, and the last on the 19th day of August, 1893. On the 22nd day of April, 1893, the publishers of this paper filed in the office of the County Auditor an affidavit in writing, stating the city, county and state in which the paper was published; that it was a weekly paper, and that the number of the regular paid subscribers to the paper to whom it was delivered each week exceeded two hundred and forty, and that in all particulars it conformed to the statute of Minnesota defining what was a legal newspaper for publishing legal notices. The only defects in the affidavit, as claimed, were that the words "printed and" were omitted, in connection with the word "published," and that it failed to state on what day of the week it was published. This was the condition of the affidavit on file in the Auditor's office during all of the time the notice of sale was being published, and there was no other publication of the notice.

It is conceded that all of the proceedings had in making the foreclosure sale were regular, and in accordance with the statute, and that the sale was valid if the paper in which the notice was published was a legal paper under the provisions of Chapter 33 of the Laws of 1893, and authorized to publish legal notices. It is conceded as a matter of fact that the paper in which the notice was published possessed all of the requisites required by Section 1 of said Chapter to make it a legal paper. In case the provisions of Section 2 had been complied with there could have been no question but what it would have been, in all respects, a legal newspaper, and authorized to publish legal notices.

Section 3 of said act provides that "any newspaper conforming to the description given in Section 1, and complying with the requirements of Section 2 of this act, shall be considered a legal newspaper in all of the meanings of the term, and shall be entitled to publish all legal notices, * * * foreclosures of mortgage sale, etc."

It is contended by the defendants' attorneys that the statute is mandatory in its provisions; that there is no ambiguity in the language employed; that it should be strictly construed and substantially complied with; that it has not been complied with, in so far as making and filing in the County Auditor's office the affidavit as required by Section 2 of said act; that the affidavit omitted to state that it was printed in the County of Hennepin, and the day of the week on which it was printed; that the affidavit filed was not one in strict compliance with the law; that the paper was not a legal paper within the meaning of the law, had no legal authority to publish the notice, and the sale made in pursuance of the notice was absolutely void.

We agree with the defendants' attorneys that the statue in question is, in so far as it requires an affidavit to be filed in the Auditor's office, mandatory; that it is clear and explicit in its provisions, no ambiguity in the language used, and that it should be construed strictly and substantially followed. The law is well settled that the requirements of the statute can never be dispensed with as being directory, when the act or the omission of it can, by any possibility, work advantage or injury to any one affected by it. When the law is plain and un-

ambiguous it must be taken to mean what it plainly expresses; negative words will make a statute mandatory if they are absolute and explicit and show that no discretion is intended. Woods v. Adams, 35 N. H., 32; Koch et al. v. Bridges et al., 45 Miss., 248; Bidwell v. Whitaker, 1 Mo., 469; Martin v. Baldwin, 30 Minn., 537; Holmes v. Crumnett, 30 Minn., 23.

Our Supreme Court has said, in an opinion written by Justice Collins, in Bowen v. City of Minneapolis, 48 N. W. Rep., 683: "To determine whether a statute is mandatory or not, you must look to the subject-matter, consider the importance of the provision that has been disregarded and the relation of the provision to the general object intended to be secured by the act, and upon the review of the case in that aspect decide whether the matter is called imperative or only directory." Applying this rule to the law in question we cannot agree with the conclusion of the plaintiff's attorneys that the legislature intended only to establish a class of papers which might receive pay for publishing the laws. It intended to provide for a suitable paper in which legal notices should be published—a *newspaper* of a certain size containing general news and read by the people generally in the town and county where it is published. The intention was to give proper and as extensive notice as possible to legal notices which might affect the rights of the people in the community where the paper was published and read. The requirements of Section 2 requiring an affidavit to be filed in the Auditor's office was intended to establish the place where any interested person might go and ascertain what papers were authorized to publish legal notices, and is of as much importance to the public and persons as any other provisions of the act. To dispense with filing the affidavit would naturally curtail some of the benefits intended by the act.

It seems to us that the only question in this case is, Has there been a substantial compliance with the law in filing the affidavit? Has there been anything left out of the affidavit which would materially affect the rights of any one? It is claimed by the defendants' attorneys that leaving out of the affidavit the words "printed and" was a material and substantial defect. To so hold would be giving to the act a very narrow and technical construction. When we speak of a newspaper being published at a certain place it is generally understood that it is printed at the same place. We do not say that a paper is printed and published at a certain place. No one is misled or injured, or their rights in any way prejudiced, by reason of the omission of the words "printed and" in the affidavit. In this regard the affidavit is a substantial compliance with the law.

It is also claimed by the defendants' attorneys that the omission to state the day of the week on which the paper was published is a fatal omission. At the first thought it might very reasonably so appear, but on reflection and a careful study of the matter we are unable to see how any one's rights could be affected by the omission. It is of no consequence to any one on what day of the week it is published, unless it is Sunday. There could be no presumption that it would be published on a day which would make the publication illegal. The affidavit shows where it is published; the day of publication could be easily ascertained if desired. We are of the opinion that the affidavit filed substantially complied with the law, at least to such an extent that the sale under the notice would not be void.

In the case of Holmes v. Crumnett, supra, the Court says: "It is a general principle that compliance with the prescribed statutory requirements is

necessary to make a valid statutory foreclosure; and the statute must undoubtedly be observed as to all steps in the proceeding which are calculated to protect the interest of the party whose rights are in question; and the omission of any required act which the Court can see, or from its nature will presume, prejudicial to the rights of parties thus sought to be foreclosed, will render ineffectual the attempted foreclosure. But the Court will regard the object sought to be accomplished by the statutory requirements; and it is not enough to warrant the granting of relief to one seeking to have the foreclosure set aside, or adjudged ineffectual as to him, that there has been an omission of some prescribed act which cannot have affected him."

We are unable to conceive how the omissions in the affidavit have or could in any way have affected the rights of the defendants in this action. Mere irregularities in judicial sales, or sales under powers, unless the statute provides that they shall render the sale void, do not affect their validity unless they operate to prejudice some party interested. Bottineau et al. v. Ins. Co. 31 Minn., 125.

The doctrine is well established in this State that any omission to literally carry out the provisions of the statute regulating foreclosure by advertisement, which is not prejudicial to the parties in interest, in the absence of fraud, will not invalidate the sale. Butterfield v. Farnham, 19 Minn. (Gil.), 402; Golcher v. Brisbin, 20 Minn. (Gil.), 407; Thorworth v. Armstrong, 20 Minn. (Gil.), 419; Schoch v. Birdsall, 48 Minn., 441; Bowers v. Hichtman, 45 Minn., 238; Kirkpatrick v. Lewis, 46 Minn., 783.

The legislature seems to have taken the same view of the question that the Supreme Court has, and recognized the doctrine that omissions and informalities in foreclosure proceedings may exist in which the letter of the law is not fully complied with, and in such cases, in the absence of fraud, the sale would not be void, but only voidable. Chapter 112 of the Session Laws of 1883 provides "that no sale shall be held invalid or set aside by reason of any defect in the notice thereof, or in the publication or posting thereof, * * * unless the action to test the validity of the sale shall be brought within five years."

In construing this statute the Supreme Court, in the case of Marcotte v. Hartman, 48 N. W. Rep., 767, in "an action brought to set aside a foreclosure" sale, says: "The sale was not absolutely void, but was voidable if the action to set it aside was brought with reasonable diligence. * * * The proceeding is one of equitable nature, and the right to maintain it, therefore, is controlled by equitable considerations."

There is no fraud alleged or shown in this action; nor does it appear, nor is it claimed by the defendant, that her rights in the matter have been prejudiced, or that she has been injured in any way on account of the omissions in the affidavit filed with the Auditor.

We recognize the fact that this action is not brought to set aside the foreclosure sale; but from the defense set up by the defendant the same questions are involved that would have been in an action brought by the defendant to set aside the foreclosure sale. We can see no reason why the same rule should not apply to the defendant in this case that would have applied had she brought an action to set aside the sale.

It is urged by the plaintiff's attorneys that public policy demands a construction of the law that would sustain the publication of legal notices in this paper during the time there was no other affidavit on file in the Auditor's office than the one in question, which continued until February 1, 1894; that

there were hundreds of legal notices published in the paper during the time, consisting of notices of foreclosure sales, execution sales, probate notices of all kinds, summons in actions of all kinds, including divorce cases, and upon the supposed legality of these notices people have, in good faith, acted upon them; that the consequences of holding the publication of the notice invalid would unsettle titles, promote litigation, and, in some cases, disturb matrimonial relations, and, in a general way, operate disastrously to private rights and to public good.

Undoubtedly considerations of this kind may properly be, and sometimes are, taken into consideration in the construction of statutes. As the Court said, in its opinion in the case of Dana v. Farrington, 4 Minn. (Gil.), 335, in answer to a claim made by the attorney that if the notice of foreclosure was held bad, they would have to wait six weeks before they could insert a new notice: "If such embarrassing circumstances flow from mistakes of this character, the best remedy we can suggest is to be more careful and not make them."

From the views we take of the case, as here indicated, it is unnecessary for us to consider what influence public policy should have in the construction of the statute in question.

We are of the opinion that the order directing judgment for the defendants should be set aside; and on the Court's finding of the facts in the case a judgment should be ordered in favor of the plaintiff as prayed for in her complaint, with costs, etc.

Adrew B. Larsen v. W. A. Kelly, et al.
(District Court, Norman County.)

JUSTICES OF THE PEACE—NEGLIGENCE—FAILURE TO ENTER JUDGMENT.

A Justice of the Peace is liable for damages caused by his negligence to a party litigant in his court.

M. A. BRATTLAND for plaintiff. CALKINS & SHARPE for defendant.

Plaintiff alleged upon two counts, stating that defendant Kelly was a Justice of the Peace; that before he had entered upon the performance of his duties as such Justice he gave a bond conditioned that "said W. A. Kelly shall, will and does faithfully discharge all his judicial duties as such Justice of the Peace;" that said plaintiff brought an action before said Justice against one Foss, and that said Justice did duly decide and render judgment in favor of said plaintiff and against said Foss, but that he failed to enter said judgment on his docket, and that by reason of such failure plaintiff lost the amount of his judgment against Foss. The action was brought on the bond against the Justice and his sureties. Defendants demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action.

IVES, J.: 1st. The statute provides that a Justice of the Peace shall give bonds for the faithful performance of his duty, and a bond in the words of the one in this case substantially fills all the requirements of the law.

2nd. The duties of a Justice of the Peace are both judicial and ministerial, but they are so combined that a failure to perform a purely ministerial duty cannot be excused on the grounds claimed, especially as in this case when the failure is gross negligence.

Demurrer overruled.

John Hotin v. Anna Munch.
(District Court, Pine County.)

ASSIGNMENT—TRESPASS TO LAND.

A right of action for trespass to land is not assignable.

This action was brought to recover damages for overflowing plaintiff's land by the operation of the Chengwatona sluicing dam on Snake River by defendant.

Plaintiff claimed damages for the years 1890, 1891, 1892, 1893 and 1894 as the owner of the land.

As a second cause of action he alleged that one Patrick Hoban was in possession of the land during 1895

under a contract for a deed given him by plaintiff; that said Hoban had been damaged by the overflow in 1895 $75, and had assigned to him his claim for such damages.

On the trial defendant's counsel objected to the admission of any evidence as to damages during the year 1895.

J. C. NETHEWAY and L. H. MCKUSICK for plaintiff. ROBERTSON HOWARD and S. G. L. ROBERTS for defendant.

Mr. Howard argued that the alleged claim was not assignable because it was a mere right to recover damages for a tort, the assignment giving plaintiff no interest whatever in the property alleged to have been injured; that there was no difference between an injury to the person in this respect and an injury to property; and that the only cases sustaining the right of an assignee to recover damages for injuries to property were cases where the action was for a conversion of the property itself, so that the assignment operated to transfer the property, and was more than the assignment of a mere right of action, citing Hunt v. Conrad, 47 Minn., 557; Hammond v. Great Northern Ry. Co., 53 Minn., 249; Tome v. Dubois, 6 Wall., 548; Brady v. Whitney, 24 Mich., 155; Gen. St. 1894, Sec. 5156.

Mr. Netheway claimed that while a right to recover damages for a personal tort would not be assignable, a right to recover for an injury to land would be, especially as plaintiff was still the legal owner, subject to his contract to convey.

CROSBY, J.: A right to recover damages for a tort is not assignable in this State. Section 5156 of General Statutes 1894 provides that "every action shall be prosecuted in the name of the real party in interest, except as hereinafter provided; but this section does not authorize the assignment of a thing in action not arising out of contract." There is no difference between an action for a personal injury and an action to recover for an injury to property. The objection is sustained.

Andrew Homme v. Minneapolis Gas Light Company.
(District Court, Hennepin County.)

(TEN CASES.)

CONSTITUTIONAL LAW—STRUCK JURIES.

Laws of 1895, Chapter 328, relating to struck juries, construed and held constitutional.

J. W. ARCTANDER and F. R. HUBACHEK for plaintiff. A. B. JACKSON for defendant.

In the above entitled actions, which had all been noticed for trial for the September 10th, 1895, General Term of the above entitled Court, the defendant demanded a struck jury, under the law of 1895, Chap. 328, which virtually re-enacted the old law as to struck juries. At the time for striking the juries, plaintiffs filed a written objection, objecting and excepting to all proceedings had in the matter, for the reason that the law above mentioned was unconstitutional and void. The juries were struck and the panels were returned to the Sheriff and filed with the Clerk. No venire was issued by the Clerk, however, and the said struck jurors were not summoned to attend, and did not attend, at the first day of said term. At the call of the calendar on the first day of the term, plaintiff gave notice of motion to quash all struck jury proceedings, and said motion was argued September 14, and on the 16th of September an oral decision was rendered denying the motion.

The grounds of the motion were: First, That all of the struck jury proceedings were null and void in this, that the pretended act of the legislature pretending to provide for struck juries is unconstitutional and void; Second, That no venire had been issued for said struck juries prior to the commencement of said term, and that the same had not been made returnable for the first day of the term, and that on said first day of said term none of said struck jurors were summoned or appeared or were called by the Court.

In support of the first contention plaintiff argued that the struck jury law of 1895, as well as the old struck jury law, is unconstitutional, for the

reason that it is contrary to the fourth and seventh articles of the bill of rights of the constitution, and, further, because it is contrary to the spirit of the constitution in being class legislation.

On the second ground plaintiff argued that by Section 2 of the act of 1895, which corresponds to Section 16, General Statutes of 1878, Chapter 71, it is required that the venire for the struck jury panel shall be issued at least three days before the first day of the term at which the action is to be tried, and that as no such venire had been issued the proceedings were wholly void and irregular. The section of the statute referred to is rather blind in itself. That part of it depended upon in this controversy reads as follows:

"In no case shall it be necessary to strike such jury more than six days previous to the term of the Court at which the action or proceeding is to be tried, and three days' service of the venire shall be held sufficient."

Plaintiffs insisted that the phrase "previous to the term of the Court at which the action or proceeding is to be tried," by implication should apply to the last sentence of that section, as well as to the foregoing, and in support of that contention cited O'Brien v. City of Minneapolis, 22 Minn., 378, where the Court, speaking of this section, says:

"This clearly implies that such jury must be struck at least six days previous to the term, so that the venire can be issued in time to secure the attendance of the jurors at its commencement. This construction harmonizes with the general theory of our statutes relating to the practice and trial applicable to issues of fact, which evidently contemplates the first day of the term as the time when all such causes to be tried thereat are presumed to be in readiness for trial, both as respects the attendance of suitors and their witnesses, as well as the presence of the requisite jury panel, whether regular or struck, from which the trial panel is to be obtained. To allow, as matter of right, proceedings for a struck jury to be instituted, at the instance of either party, after the beginning of the term, might often seriously interfere with that control over its calendar which every Court possesses and ought to exercise for the convenience of parties and the dispatch of business. The ruling of the District Court was, in our judgment, correct."

The defendant contended that this construction of the statute in question, while it might apply to the State at large, did not apply to Hennepin County, for the reason that by a special law the petit jury is not to be summoned to attend on the first day of the term, as is the rule in the State at large, but that they shall only be summoned to attend on the first Monday of such term. (See Section 5615, General Statutes of Minnesota of 1894.)

Plaintiffs contended that this special law, which only mentions when petit jurors shall be summoned in Hennepin County, and which does not contain any provision whatsoever in regard to struck jurors, in no manner could be held to affect or change the meaning of the general law reviving the struck jury system, and in support of this contention plaintiffs quoted Mark v. Railway Co., 32 Minn., 208, where the Court reaffirms its decision in O'Brien v. City of Minneapolis, in the following language:

"The amendment to General Statutes, Chapter 71, Section 4, (Laws 1881, Chapter 45, Section 1), providing that in Hennepin County the petit jurors shall be summoned to appear on the second Tuesday of each general term of the District Court, does not change or amend the statute as to struck juries. This amendment may have re-

moved, so far as that county is concerned, one of the reasons for requiring struck juries to be selected six days before the commencement of the term of Court; but the statute requiring it still remains. The venire for the struck jury was therefore properly quashed."

Plaintiffs further contended that, as the struck jury law of 1895 is a general law applicable to the whole State, it should receive a construction consistent with the practice and circumstances of the Courts in the State at large. While it may be utterly unnecessary in Hennepin County to require that the struck jury be summoned for, and attend, the first day of the term, it is well known that in the country districts that would be the only sensible and practicable method of procedure. And plaintiffs contended further that the act in question should not be subjected to a double construction, one applicable to the State at large, the other confined to Hennepin County; but that the construction applicable to the State at large, and which is the only sensible and reasonable construction, as far as the State at large is concerned, and which construction the Supreme Court had expressly adopted in the two cases above cited, should be held applicable to Hennepin County, although the reason for it in this county has ceased.

RUSSELL,
JAMIESON,
BELDEN, JJ.

Walter A. Wood Mowing and Reaping Co. v. Herman R. Barrill.
(District Court, Clay County.)

PRACTICE—ORDER FOR JUDGMENT—DISCRETION OF TRIAL COURT.

Chapter 320 of the Laws of 1895 held not to be mandatory, but to give the trial Court discretion to order judgment as in said act directed, or not, as will best subserve the ends of justice.

BURNHAM & TILLOTSON for plaintiff. C. A. NYE for defendant.

This action was brought upon a promissory note given for a harvester and binder purchased by the defendant from the plaintiff. Upon the trial of the case the execution and delivery of the note was admitted by the defendant. The defendant then introduced evidence tending to show that the machine was of no value as a harvester and binder, to which the plaintiff objected on the ground that such was not the proper measure of damages. The plaintiff offered no testimony in rebuttal. At the close of the testimony plaintiff moved the Court to instruct the jury to return a verdict in its favor for the amount claimed on the ground that defendant had not proven facts constituting a defense to the note, which was denied, and the Court thereupon instructed the jury to return a verdict in favor of the defendant. A motion was made by the plaintiff for a new trial, based upon the minutes of the Court, and that judgment be entered in favor of the plaintiff, notwithstanding the verdict, under the provisions of Chapter 320 of the Laws of 1895. The Court granted plaintiff's motion for a new trial, but denied the motion for judgment, notwithstanding the verdict.

SEARLE, J. The plaintiff bases his motion for judgment, notwithstanding the verdict, upon the provisions of Chapter 320 of the Laws of 1895, which provides, among other things, that "in all cases where, at the close of the testimony, in a case tried, a motion was made by either party to the suit requesting the trial Court to direct a verdict in favor of the party making such motion, which motion was denied, the trial Court, on motion made that judgment be entered notwithstanding the verdict, or on motion for a new trial, *shall* order judgment to be entered in favor of the party who was entitled to have a verdict directed in its favor." It seems to me that the word "shall" is not mandatory, but should be construed to read "may," giving the Court discretion in such cases. It will be readily seen that the construction contended for by the plaintiff would, in

many cases, work a great hardship and prevent justice being done to litigants; and without entering upon any lengthy argument I shall have to hold that the intention of the Legislature was to vest in the trial Court discretionary powers in the matter.

Elmonia La Rocque v. Charles E. Chapel, Sheriff. (District Court, Ramsey County, 61111.)

MORTGAGES—FORECLOSURE—WHEN COMPLETE.

The word "foreclosure," as used in statutes of 1894, Section 6051, includes all that is necessary to vest title in the purchaser at the sale if no redemption is made. Therefore, the affidavit of costs and disbursements if filed for record within ten days after the final completion of the foreclosure is filed in sufficient time.

NELSON & MCDERMOTT for plaintiff. ELLER & HOW for defendant.

On the 18th day of September, 1894, the defendant, pursuant to due notice, as Sheriff, sold certain property of the plaintiff at foreclosure sale. The property was bid in for the amount of the mortgage, together with the costs of the foreclosure. On the 27th day of September, 1894, a sheriff's certificate of such sale was executed and on the 29th was recorded. On the same day the affidavit of costs and disbursements required by Section 23, Chapter 81, General Statutes 1878, (Section 6051 Statutes of 1894), was recorded. This action was brought to recover the amount of such costs and disbursements, the plaintiff contending that such affidavit should be filed within ten days after the foreclosure sale.

KERR, J.: Aside from the curative act passed by the last Legislature, upon the validity of which I do not pass, it seems to me that under a proper construction of the statute the affidavit of costs in this case was made and filed in time.

The statute provides that within ten days after foreclosure such affidavit shall be made and filed, and our Supreme Court, in the recent case of Johnson v. Building Society, 62 N. W. Rep., 381, has, in effect, decided that where such affidavit has not been so made or filed, and the bid at the sale was sufficient to cover such costs, they may be recovered by the mortgagor. Accepting said decision as conclusive under the facts there involved, and as applicable to all cases where the affidavit has not been filed strictly within ten (10) days after foreclosure, there remains to be considered in the case at bar what construction shall be given to the term "foreclosure" as the same is used in the statute referred to, being Section 6051 of the Statutes of 1894. The plaintiff contends that it means the striking off the property to the highest bidder; that it is strictly synonymous with the term "sale," and cites Beal v. White, 28 Minn., 6, as conclusive upon that point.

The defendant, on the other hand, contends that the word "foreclosure" includes all that is necessary to vest title in the purchaser, if there shall thereafter be no redemption; that to effect this there must be a certificate of sale duly executed by the Sheriff and recorded; that Section 6038, which is in *pari materia* with said Section 6051, provides that this certificate must be so executed, proved or acknowledged and recorded within twenty days after the sale; that the cost of acknowledging and recording same is part of the costs of the sale recoverable by the mortgagee, and that if he or his attorney, who makes the affidavit of costs, is conscientious he cannot make oath that such item of costs is absolutely and unconditionally paid or incurred before the service is performed With respect to the language of the Supreme Court in 28 Minn., supra, relied upon by the plaintiff the defendant claims that it is inapplicable to the facts in this case, but even if strictly adhered to, the same term applies to the term "sale" as to the term "foreclosure," namely, that the same is not completed until the certificate is acknowledged and recorded, and that the only consistent construction of the statute, in

view of all its provisions, is that the mortgagee has ten days after the certificate of sale is recorded in which to file for record the affidavit of disbursements, provided, of course, that the certificate of sale is recorded within twenty days after the sale.

Speaking of such a foreclosure, our Supreme Court, in Johnson v. Cocks, 37 Minn., 532, says: "The sale is complete (so far as any act is required to complete it) when the certificate is executed, acknowledged and recorded." See, also, Smith v. Buse, 35 Minn., 234, and Arnot v. McCure, 4 Denio, 45.

The better reasoning is with the contention of the defendant. The Court would feel impelled to hold with the defendant, unless clearly against the letter and spirit of the statute, for the reason that a large portion of the bar has for many years so construed the law, and to hold otherwise now would serve to promote extensive and meretricious litigation.

Leonard W. Randlett v. The City of St. Paul.
(District Court, Ramsey County, 61437.)

CITY OF ST. PAUL—MUNICIPAL CORPORATIONS—OFFICERS—SALARIES.

The Common Council of a city has only such powers as are expressly, or by necessary implication, granted to it by the Legislature.

By the laws of 1887 and 1891, the salaries of certain officers of the City of St. Paul are fixed, and the Common Council has no power to change the same.

MICHAEL & PEEBLES and W. J. ROMANS for plaintiff. B. J. DARRAGH and ROBERTSON HOWARD for defendant.

BRILL, J.: The question in this case is, whether the Common Council of the City of St. Paul has power to determine the salary of the City Engineer, or whether the amount of his salary has been absolutely fixed by the Legislature.

The Council has only such powers as are expressly, or by necessary implication, granted to it by the Legislature. If the Legislature itself has fixed the salary of a city officer, the Common Council has no power to change it, unless such power is expressly granted.

At certain times in the history of the multitudinous and complex legislation regarding the city, the Common Council had certain functions to perform in connection with fixing the salary of the City Engineer. At certain times it was given power to fix his salary below a certain sum specified. It is contended by the plaintiff that his salary is now absolutely fixed by legislative enactment, and that the Council has no power to change the same. An examination of the legislation had upon the subject shows, without doubt, that his contention must be sustained.

It is not necessary, in considering the question, to go farther back than the year 1874. A complete revision of the charter was had at that time. All the previous legislation relating to the city was collected together and arranged in one act; changes and additions were made, and the act as passed constituted the charter of the city. (Chapter 1, Special Laws 1874.)

This charter provided, among other things, for the election or appointment of the various city officers, and in some instances fixed their salaries, and under appropriate sub-chapters it provided for the various legislative and administrative departments and prescribed their powers and duties. It contained this provision (Sub-chapter 3, Section 22): "The Common Council shall also have the power, unless herein otherwise provided, to fix the compensation of all officers elected or appointed under this act. Such compensation shall be fixed by resolution at the time the office is created, or at the commencement of the year." The act provided (Sub-chapter 6) for the appointment of the Board of Public Works and prescribed its duties. Section 11 of this sub-chapter provided for the appointment by the Board of Public Works of a competent person as civil engineer to said board, who should be removable at the pleasure of said board, and that he should be ex-

officio City Engineer. And the provision regarding his salary was: "He shall receive a salary to be fixed by said Board of Public Works with the concurrence of the Common Council of said city. * * * He shall be entitled to such additional compensation for assistants as may be allowed by said board, with the concurrence of the Common Council."

It is apparent that the provision giving the Council power to fix salaries contained in Section 22 did not apply to the case of the City Engineer. That provision was only applicable where the salary of an officer was not otherwise provided in this act. It was provided in the act that the salary of the engineer should be fixed by the Board of Public Works, with the concurrence of the Council.

The next legislation affecting the question was in 1876, found in Chapter 86 of the Special Laws of that year, which was an act entitled "An act to amend certain sections of an act entitled," giving the title of the act of 1874, before referred to. This act specifically amends certain sections of the act of 1874, and it also contains independent provisions without specifically referring to any sections of that act. Section 5 provides as follows: "That the following compensation shall be allowed and paid to the officers of the city, and no more, to-wit." Then the various city officers are named, and the amounts to be paid each, and among the others it is stated "that the salary of the City Engineer shall be $2,500 per annum, and such assistants, rodmen, chainmen and clerks as the Board of Public Works and Common Council may by two-thirds vote order." At the end of the section it is provided "that the Common Council shall have power to reduce the compensation above provided for or amount of the salary of any officer or employe, but shall not have power to increase the same." Though this act contains no words of express repeal, it must be held that its provisions respecting salaries superseded and took the place of the provisions referred to in the act of 1874. The power to fix the salary of the City Engineer was taken from the Board of Public Works, the amount to be paid was named, and the Council was given power to reduce the salaries below that amount.

In 1878 (Special Laws, Chapter 216) the Legislature passed an act entitled "An act to regulate the salary and fees of certain officers in Ramsey County, Minnesota." This act, besides fixing the salary and fees of certain county officers, prescribes the salaries of certain city officers, including the City Engineer, whose salary was fixed at $2,250, and provides: "There shall be allowed such sums in addition for assistants in the engineer's office as may be deemed indispensable by the Board of Public Works." It also provides that no other or greater salary or compensation shall be allowed or paid to any of the city officers or in the office of any officer named than the amounts named in the act, but that the Council shall have authority to reduce the salary, fees or compensation of any such officers. No reference is made to any previous law, except that the last section provides that the act shall take effect from and after its passage, anything in the city charter of the City of St. Paul notwithstanding. It is doubtful whether this act was valid as to city officers.

In 1881 the Legislature passed an act entitled "An act amending parts of the charter of the City of St. Paul and acts amendatory thereof," which act was approved March 5, 1881 (Chapter 93, S. Laws 1881). This act, without referring specifically to particular sections of the charter except in one minor instance, or to prior legislation, makes many and important changes in former provisions respecting many city matters. Section 3 provides that the Board

of Public Works and Common Council shall, on a day named in each year, meet in joint convention and "elect a competent and scientific person as civil engineer to the Board of Public Works by *viva voce* (vote) of two-thirds of all the members elect of the Board of Public Works and Common Council," and it provides that he shall be ex-officio City Engineer, and prescribes his duties.

Section 18 fixes the salary of various city officers, and, among others, the City Engineer, at $2,500 (nothing being said about assistants), subject to the proviso at the end of the section that the Council may fix the salaries of the officers named at a lower rate than therein specified, and providing that the Council shall not allow more than certain amounts, which are named, not including the City Engineer.

Section 19 is: "All acts and parts of acts contravening this act are hereby repealed."

In 1883 (Special Laws, Chapter 2) an act was passed entitled "An act amending parts of the charter of the City of St. Paul and acts amendatory thereof." This act amends certain specified sections in the charter of 1874 and of other subsequent acts not material here; and section 13 provides as follows: "That Section 18 of an act amending parts of the city charter of the City of St. Paul and acts amendatory thereof, approved March 5, 1881, be and the same is hereby amended so as to read as follows: Section 18. The salary of the City Controller shall be $2,500 per annum; the salary of the City Engineer shall be $2,500 per annum; the salary of the First Assistant Engineer shall be $2,000."

Then follows all the city officers named in the act of 1881, with the salary of each, save the Chief Engineer of the Fire Department, whose salary had already been fixed by an act passed at the same session. (Chapter 6, S. Laws 1883.) At the end of the section was this provision: "The salary of the janitor of public buildings shall be such sum as may be fixed by the Common Council, not to exceed $70 per month, however." The clause contained in Section 18 of the act of 1881, giving the Common Council power to fix salaries at a lower sum, was omitted, and neither in Section 18 or elsewhere in the act of 1883 was any provision of that nature found.

Twice since the last act named the Legislature has fixed the salary of the Engineer, and in neither instance has there been any right reserved in the Council to change the amount named by the Legislature.

In 1887 (Chapter 7, Special Laws 1887) an act was passed which was declared by its title to be "An act to amend Chapters 6 and 7 of the act of 1874 and acts amendatory thereof," which chapters of the act of 1874 provided for the organization and duties of the Board of Public Works, and the appointment, duties and salary of the Engineer and for special assessments. The act of 1887 was a complete revision of the law relating to the Board of Public Works and special assessments. Section 9 of this act provides that the Board shall elect a civil engineer of the board, who shall be ex-officio City Engineer, and, after prescribing his duties and term of office, contains this provision: "He shall receive a salary of $5,000 per annum. Said Engineer shall appoint a first assistant, who shall hold his office for a like term and shall receive $2,500 per annum. Said Engineer may appoint such further assistant engineers as the public service may require, and said assistant engineers and employes in his department shall receive such compensation as the Board, with the concurrence of the Common Council, may determine." All acts and parts of acts inconsistent with this act are expressly repealed.

In 1891 (Chapter 9, Special Laws 1891) an act was passed entitled "An act to establish and regulate the salaries and compensation of certain officers in the City of St. Paul, and to abolish certain offices of said city and of the Board of Water Commissioners of said city, and to provide the maximum amounts allowed for the administration of certain departments of said city, and to repeal all acts inconsistent therewith." Section 1 begins: "That for the faithful discharge of their respective duties, the following named officers of the City of St. Paul shall receive per annum, payable in equal monthly installments out of the city treasury, the amounts herein specified, viz." Then follows the various officers of the city, and the amounts to be paid each. After naming the Mayor and his Secretary and the City Treasurer is the following: "The City Engineer the sum of $5,000 per annum. The Common Council of the said city may from time to time fix and provide for the compensation of the assistant and other subordinates of said City Engineer's office at such amounts as shall seem to said Common Council proper, the aggregate of said amounts not to exceed the sum of $40,000 per annum. The said City Engineer shall furnish engineering services for the Board of Water Commissioners of said city when and to the extent only by them in writing requested, and the cost thereof shall be paid out of the sum of $40,000 hereinbefore provided for." Whenever an officer has clerks and assistants, the provisions of this section are similar to those quoted, the amount to be paid employes of the office being expressly fixed, or the maximum amount being limited, with power in the Common Council or in the officer to determine their compensation definitely. No provision is made in the act for the Council to revise, or limit, or fix in any manner, the amounts named in the act to be paid the officers themselves. The act contains a clause repealing all acts and parts of acts inconsistent with its provisions.

A subsequent statute revising the subject-matter of a former one, and evidently intended as a substitute for it, although it contains no express words of repeal, must operate as a repeal of the former to the extent to which its provisions are revised and supplied. The act of 1881, when passed, regulated the appointment and duties of the City Engineer and the matter of his salary. It was evidently intended by the Legislature to cover the subject. It was the last expression of the legislative will, and it constituted the law relating to the salary of the Engineer.

It is too well settled to need citation of authorities, that when a statute provides that a section of the former act "shall be amended so as to read as follows," any part of such section not found in the new section is repealed. There can be no doubt that the amendment of Section 18 of the act of 1881 by the act of 1883 repealed every provision of Section 18 not contained in the law of 1883; and so the provision of Section 18 of the Law of 1881 that the Common Council might reduce the salary of the various officers was repealed by the law of 1883. Where a clause in an act is re-enacted by successive Legislatures it is not necessary, in order to its repeal, that the Legislature should repeal expressly each successive enactment. The repeal of the final enactment disposes of the provision; and the repeal of the provision before referred to in Section 18 of the act of 1881, by the act of 1883, left the Council without power to reduce or fix the salary of the Engineer. If there were any doubt as to the correctness of this proposition, the matter is settled beyond question by the acts of 1887 and 1891. The law of 1887 provides that the Engineer shall be elected by the Board (before he

was elected by the Board and Council), fixes his duties and provides that he shall receive a salary of $5,000 per annum, and that he shall appoint a first assistant, who shall receive a salary of $2,500. Then it provides that he may appoint such further assistants and employes as the public service may require, and that the Board, with the concurrence of the Common Council, may determine the compensation of such assistants and employes, and all acts and parts of acts inconsistent therewith are repealed.

Clearly the provision that he shall receive a salary of $5,000 is inconsistent with the provision that he shall receive $2,500, less such amount as the Common Council may determine; and the clause giving the Board and Common Council power to fix the compensation of certain of his employes is very significant in this connection.

What is said regarding the law of 1887 applies with still greater force to the law of 1891. The title of the law of 1891 indicates that it was the intention to cover the whole matter of salaries of the officers named in the act, and the repealing clause repeals all inconsistent acts. The language of the act that for the faithful discharge of their duties the officers named shall receive the sum stated is wholly inconsistent with the idea that the Council might fix their salaries at some other amount; and the provision that the Council may fix and provide for the compensation of the assistant and other subordinates excludes the idea, under a very familiar rule of construction, that the Council was to fix the salary of the Engineer himself.

Without pursuing the argument, I am of the opinion that the Common Council had no power to reduce the salary of the City Engineer, and that the resolution pleaded in the answer was without effect.

EXHIBITS.

District Court Rule—Special Rule of the 11th District.

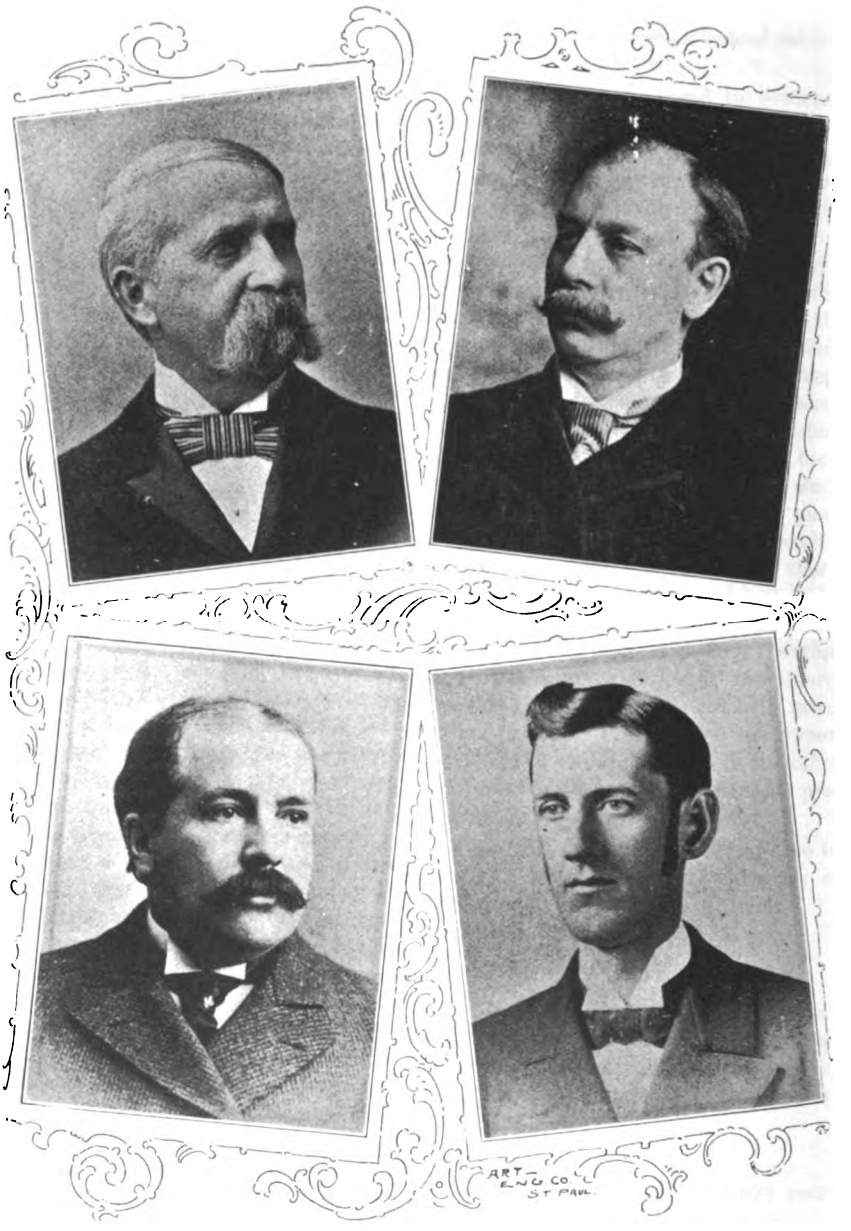
All exhibits introduced in evidence by any party in the trial of all actions shall be marked by the stenographer, and shall be left in the custody of the stenographer until the close of the trial of said cause; and when the trial of any cause is completed the stenographer shall deliver all exhibits introduced in evidence in each case to the Clerk of said Court, and the said Clerk shall cause the same to be filed and kept in a proper and safe place, and shall cause the same to be made and shall keep a proper index or reference book wherein shall be kept a list of all such exhibits, with reference to their place of deposit, so that they can be readily found by any parties interested therein; and no person or persons shall be permitted to remove any of such exhibits from such depository except upon the written order of the Court; provided, that all attorneys and interested parties shall have an opportunity to examine the same in the office of the said Clerk under reasonable provisions to be provided therefor.

This rule shall take effect and be in force from and after this 4th day of September, 1895.

Duluth, Minnesota.

Is Mars inhabited, and, if so, by what kind of people? These are questions Percival Lowell attempts to answer in his final article on Mars in the August Atlantic.

No magazine article of recent years is calculated to arouse more interest than Jacob D. Cox's article on Judge Hoar in the August Atlantic. The title is "How Judge Hoar Ceased to Be Attorney General;" and it is a most important contribution to the secret political history of our country.



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W. J. HAHN, President.
H. F. STEVENS, Vice President.
E. H. OZMUN, Secretary.
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JOHN A. LARIMORE, . . . EDITOR

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This number of The Journal is devoted largely to a report of the proceedings of the Minnesota State Bar Association, held at St. Paul on September 13th, 1895.

The meeting was one of the best ever held by the Association. The addresses of the president and of Senator Davis, it would seem, ought to be productive of action beneficial to the bar and to the State.

The Association has not, heretofore, exercised the influence it ought, either on the bar or the State at large. It has never attempted to voice the general opinion of the lawyers of the State upon those important questions which they are peculiarly able to decide, and hence its meetings have attracted but little attention, and but few have formally connected themselves with it. But a new regime seems to have been ushered in at this meeting.

The address of the president, Mr. Hahn, is excellent, and if the course therein advised be pursued by the Association it will certainly become very influential in guiding the legislative action of the State, and in moulding general public opinion.

The address of Senator Davis, and the action of the Association upon the question of constitutional revision, therein discussed, seems to evince a spirit of willingness on the part of the Association to assume the initiative in legislation. This, as remarked by both Senator Davis and Mr. Hahn, is where

such a proposition should originate. In our busy country, where there is no leisure class who can and will devote themselves disinterestedly to the service of the State; where all, or almost all, of the capable men are employed in some gainful occupation, there is no class so well fitted to initiate and carry forward constitutional and legislative revision as the lawyers. And the work can best be done by them through such a medium as the State Bar Association. Organization is essential to successful action, as remarked by the president, and therefore the success or failure of the Bar Association is fraught with good or evil to the State.

PROCEEDINGS OF THE TWELFTH ANNUAL MEETING OF THE MINNESOTA STATE BAR ASSOCIATION.

The twelfth annual meeting of the Minnesota State Bar Association was held at the Capitol in St. Paul on Friday, September 13th, 1895. The meeting was called to order at 2 o'clock P. M. by the president, Mr. W. J. Hahn. In the absence of the secretary, Hon. H. F. Stevens was elected secretary *pro tempore*.

The president then proceeded to deliver an address upon the purposes and prospects of the Association, and was followed by Hon. C. K. Davis upon the duties and privileges of the bar.

Moved and seconded that election of members then follow, and Messrs. James Schoonmaker, of St. Paul, and John T. Baxter, A. Ueland, A. B. Choate, A. Y. Merrill, Albert H. Hall, John H. Nickel, George E. Le Clair, James O. Pierce, Fred W. Reed, S. R. Child and H. E. Fryberger, of Minneapolis, were duly admitted to membership.

On motion of Gen. John B. Sanborn, the thanks of the Association were tendered to the president and to Senator Davis for their able addresses, and the officers were directed to cause 500 copies of the same to be printed and distributed.

Discussion ensued upon the topic, "Shall there be a Constitutional Convention, and, if so, when?" participated in by Messrs. Chas. C. Houpt, of Fergus Falls, J. B. Sanborn, H. L. Williams, H. F. Stevens and W. P. Murray, of St. Paul, and Messrs. G. P. Flannery, J. A. Kellogg and James O. Pierce, of Minneapolis, after which, upon motion of Gen. J. B. Sanborn, it was unanimously voted as the sense of the Association that such convention should be held at the earliest practicable date.

On motion of Gen. J. B. Sanborn it was voted that the matter of the relief of the Supreme Court be referred to a special committee of five to be appointed by the chair.

On motion of Gen. J. B. Sanborn the secretary was directed to cast the vote of the Association for the re-election of the present officers of the Association, which was done and duly announced as follows: President, W. J. Hahn, of Minneapolis; vice president, H. F. Stevens, of St. Paul; secretary, E. H. Ozmun, of St. Paul; treasurer, D. F. Simpson, of Minneapolis; and for the members of the governing board as last year.

After remarks by the president and Messrs. J. W. Arctander, C. C. Haupt, Daniel Fish, A. Barta, J. O. Pearce and others, upon motion of G. P. Flannery it was voted that the constitution be amended so as to hereafter allow the governing board to fix the time and place of the annual meeting.

On motion of Daniel Fish it was voted that committees be appointed to attend to details of annual meetings.

On motion of D. F. Simpson it was voted that the constitution be so amended as to provide that the president and secretary of each local Bar Association in the State be ex-officio a member of the goverining board of this Association.

On motion the meeting adjourned.

A true record.

Attest:

H. F. STEVENS,
Secretary Pro Tem.

SHALL THIS ASSOCIATION BE SUSTAINED?

By the President, W. J. HAHN.

We are accustomed to speak of our country with much pride and considerable boasting as the greatest in the history of the world. To a certain extent and in many particulars this is true. Whether we consider its vast territorial extent; its diversified climatic conditions; its measureless natural resources; the character and productiveness of its soil; the beauty and variety of its scenery; its inestimable mineral wealth; its rapid settlement and wonderful development; its past history and future possibilities—we are alike astounded at the prospect and fail to grasp, in full significance, either the grandeur of our inheritance or the responsibilities of our situation. We may justly say we are indeed citizens of no mean country, and feel that our pride is both justifiable and commendable, our boasting not without warrant.

Our position, however, in the social evolution of the race is in many respects unique. The destiny which we seem called upon to fulfill, while a grand and imposing one, involves the solution or problems in the aritmetic of government which are alike interesting and exceedingly intricate. A government "of the people, by the people and for the people;" the whole people, the rich and the poor, the learned and the ignorant, the honest, and the vicious, the patriots and the demagogues; can such a government be successfully maintained, and its elevating and broadening influence upon the race perpetuated? That is the question which we, in this generation, have, in part, to meet. It is the question which confronted the fathers when they laid the foundation of this republic. It is the question which our children and children's children must face in the years to come.

It was a noble conception—this government of ours. The field for its growth and development was new and vast. We had no ancient history to embarrass us, and but few precedents to hamper or to guide us. It required courage of high order, with self-confidence and faith in American humanity of monumental character to launch so frail a craft upon such a tempestuous sea. In the light of the past experience of the race; with full knowledge of the then condition of mankind and his snail-like progress onward and upward; appreciating to the utmost the short-sighted vision, the vacillating, impulsive, selfish character of man, the founders of this government might well not only have hesitated to undertake so novel and dangerous a task, but have relegated its suggestion to the realm of Utopian speculation.

Unlimited right to vote; unlimited right of speech and publication; all power resting ultimately in the hands of an irresponsible majority; life and property in the last analysis subject in a greater or less extent to the whims and caprices of the sordid, the selfish, the designing, the aspiring, the indifferent. Who, under such circumstances, could fail to note the possible, and in fact probable, danger? Indeed, I think we may say, without fear of successful contradiction, that at the time our government was established no careful student of history believed it could long continue. The fathers themselves evidently had serious doubts as to its eventual success, and saw the time when greater security to life and property would be necessary.

But who, at that time, historian or patriot, could have foreseen or imagined that the then feeble, sparsely settled, impecunious thirteen colonies should within a single century have grown and developed and expanded

into this imposing, all-embracing, stupendous nation with its seventy millions of people, its untold wealth, its numerous, large and ever-increasing cities, its heterogeneous population? That all this and more should have been accomplished in so short a time and our form of government remain intact, is the most wonderful thing in all political history.

Permit me in this connection to enforce the trite suggestions I have made by recalling to your recollection the famous letter of Lord Macauley, written on receipt of a copy of Randall's Life of Jefferson, from the author in 1857, in which he said that "he could not reckon Jefferson among the benefactors of mankind," because he had "long been convinced that institutions purely democratic must sooner or later destroy liberty or civilization, or both." He continues:

"As long as you (the Americans) have a boundless extent of fertile and unoccupied land, your laboring population will be far more at ease than the laboring population of the Old World; and, while that is the case, the Jefferson politics may continue to exist without causing any fatal calamity. But the time will come when New England will be as thickly peopled as Old England; wages will be as low and will fluctuate as much with you as with us; * * * then your institutions will be fairly brought to the test. * * * It is quite plain that your government will never be able to restrain a distressed and discontented majority, for with you the majority is the government and has the rich, who are always a minority, absolutely at its mercy. * * * I seriously apprehend that you will, in some such season of adversity, do things which will prevent prosperity from returning; that you will act like people who should in a year of scarcity devour all the seed corn, and thus make the next a year, not of scarcity, but of absolute famine. There will be, I fear, spoliation; the spoliation will increase the distress; the distress will produce fresh spoliation. There is nothing to stop you. Your constitution is all sail and no anchor. As I said before, when a society has entered on the downward progress, either civilization or liberty must perish; either some Caesar or Napoleon will seize the reins of government with a strong hand, or your republic will be as fearfully plundered and laid waste by barbarians in the twentieth century as the Roman empire was in the fifth, with this difference: that the Huns and Vandals, who ravaged the Roman empire, came from without, and that your Huns and Vandals will have been engendered within your own country, by your own institutions."

It is unnecessary for me to weary you with further remarks or quotations bearing upon the question of the inherent difficulties in our form of government. My purpose is not to point out in particular what these dangers are. No thoughtful man, and especially no thoughtful lawyer, has failed to see and to be impressed with their gravity.

Yet, notwithstanding the prediction of philosophers and the fears of many of the founders of this nation, we have come thus far on our way with constantly increasing wealth and numbers, the wonder and admiration of mankind. Dangers the most serious have been confronted and avoided. Perils the most threatening have been met and overcome. By counsel and compromise, by blood and sacrifice we have many times been rescued from risk and jeopardy. And what has been, to a great extent at least, the conservative force and directing agency which has made the achieve-

ment of this amazing issue feasible? What has been the sheet anchor of the republic amid all the storms of passion and the waves of faction which have arisen in our path and surged around our progress? What influences have been at work to minimize these difficulties and to make possible the accomplishment of these marvelous results?

I think we may confidently assert that no careful observer of our history and development as a nation has failed to note the helpful and preservative force which has been exerted by the bar of this country. Edmund Burke, in one of the greatest of all his speeches, observes, concerning the American colonies: "In no country, perhaps, in the world, is the law so general a study. The profession itself is numerous and powerful, and in most provinces it takes the lead. The greatest number of the deputies sent to congress were lawyers." That accurate and philosophical observer of our institutions, De Tocqueville, sixty years ago, after a careful study of them, wrote: "I cannot believe that a republic could subsist at the present time if the influence of lawyers in public business did not increase in proportion to the power of the people." This eminent and profound Frenchman also observed "that the legal profession in the United States is qualified, by its powers and even by its defects, to neutralize the vices which are inherent in popular government." "The lawyers of the United States," he says, "form a party which is little feared and scarcely perceived, which has no badge peculiar to itself, which adapts itself with great flexibility to the exigencies of the time and accommodates itself to all the movements of the social body. But this party extends over the whole community, and it penetrates into all classes of society. It acts upon the country imperceptibly, but it finally fashions it to suit its purposes."

And Justice Harlan, in his address at the celebration of the centennial of the adoption of the federal constitution, said: "If there be security for life, liberty and property it is because the lawyers of America have not been unmindful of their obligation as ministers of justice."

But it is not essential to the establishment of this claim that the opinions of men, however eminent, be taken as true. I think a little reflection upon the intimate connection which the laws of our country and the administration of those laws have, and in the very nature of the case must have, upon the prosperity, the peace, the good order, the well being, the interests and affections of the people, and upon the vast, permeating, and, in many directions, the absolutely controlling influence of the bar in moulding and fashioning those laws and directing their administration, must convince the most skeptical that it is no idle boast or egotistical assertion.

Judge Dillon, in one of his admirable lectures on Laws and Jurisprudence, says: "It is the justice of good laws well enforced that restrains and punishes the criminal; that erects the only effectual barrier against the uncurbed and multitudinous passions of men as they come surging on with the power of the ocean and proclaims, 'thus far and no farther;' that protects with absolute impartiality every right recognized by the law, whether of natural persons or corporate, of the weak or the strong, against any who menace or invade it; that stands as the impersonation of the highest attribute of God, not passively with her scales in equipoise, but with flaming sword, to guard the injured and the innocent, and to strike down the high-handed or the fraudulent wrong-doer."

Again he says: "In our time, certainly in our country, no government is secure that does not rest upon the interests and affection of the governed. Ordinarily, when things are moving on in the even, accustomed tenor of their way, we lose sight of the vital dependence of national life upon national justice. But let the safety of the nation be threatened from within or without, in the pressure and stress of such an exigency, which comes sooner or later to all nations, then is instantly perceived and felt the vital relation between the national justice and the national existence. If all interests in the state, those of labor and those of capital, which are always closely allied and rarely antagonistic, except as the result of laws which operate unjustly upon the one or the other; if all persons within the state, regardless of birth, race, religion or condition, feel that the state is the highest embodiment of practical beneficence, and surely to be relied on to do equal justice to all men and all interests—then in the moment of public peril all persons rise and rally, dilated and transfigured by a sublime and irresistible patriotism, bringing as free-will offerings their treasure and their lives to defend and preserve the laws and institutions which they have found to be so dear. Then especially it is that the strength of popular institutions such as ours is revealed and demonstrated."

The same eminent jurist, speaking of our institutions and the relations of the bar to the same, says: "It is with the laws and the legal institutions of such a nation—founded upon the sovereignty of the public will; with the cherished traditions and rich heritage of its past history and achievements; with its present greatness and grandeur; with the bright visions of the future which it opens to our view, and which, expanding illimitably as we gaze, swell our hopes and exalt our pride; a homogeneous people, widely distributed over a territory of more than imperial extent, with a common language, with common interests, with common aspirations and hopes—it is with the laws and legal institutions of such a country that we have to do, and which are placed under the special guardianship of the bar of America." And then adds: "The lawyers and students of law of America ought especially to remember that the strength of the nation largely depends upon its laws and the manner in which they are administered."

Again Judge Dillon, in speaking of the influences of the bar upon the laws of England, and which with equal or greater force may be applied to the bar of this country, says: "The fashioning of the laws of England is, in its last analysis, the work, not of lawyers and judges, but in a broad sense the work of the bar, of whom the judges are an integral, and in virtue of the functions and powers of the judicial office, a most important part." And again in the same connection he remarks that "the rules of English law are all-embracing in their protective energy, and that they have in the main been the work of the courts, which have defined, established and enforced them. They have their source or authoritative evidence in the adjudged rights of individuals." He designates the lawyers and judges of England the "artificers and builders of English law," which law, as exemplified in the judicial history of England, and of the colonies, and of the United States, he declares to be "the best system of practical justice, adapted to the needs of the people whose conduct it regulates, which the world has ever seen, the civil or Roman law not excepted."

Said a distinguished member of our

profession in concluding a brief review of the life of one of the most eminent men who ever graced the bench of the Supreme Court of the United States (Chief Justice Taney): "Ours is a profession whose labors and talents are expended for the most part upon the controversies of individuals and about transitory affairs. And yet it is of all professions the one most important to good government and to just living. In our favored land, with its great natural advantages and its freedom from arbitrary government, where individual rights are protected even against the government itself by fundamental laws, the administration of the law is that exercise of government which is at once the most frequent and the most important. To it we must look for relief from injustice, for the preservation of personal rights and for the protection of property. We may differ about political questions, about the nature of government, about public policy; but for ourselves and our daily lives what we most need, what is of the highest importance to each one of us is a pure, just, wise and fearless administration of the law."

A single instance given by Judge Dillon of the inestimable service performed by the bar, in its true and broad sense, for the welfare and perpetuity of this government may give us some conception of the truth of what I am now endeavoring to show. He says: "If the Supreme Court, during the period of active national development, covered by the long official career of Chief Justice Marshall, had put a narrow and inelastic construction upon the federal constitution, so that it could not have expanded with the growth and answered the necessities of a great people, it would have been calamitous to an extent no words can portray and no imagination conceive. His views left it possible for the national growth to take place in accordance with the natural process of evolution."

In the same connection, and referring to the same subject-matter, one of the most eminent lawyers who has adorned the profession in this country (Rufus Choate), says: "I do not know that I can point to one achievement in American statesmanship which can take rank for its consequences of good above that single decision of the Supreme Court which adjudged that an act of the legislature contrary to the constitution is void, and that the judicial department is clothed with the power—and he might have added charged with the duty—to ascertain the repugnancy and pronounce the legal conclusion; that the framers of the constitution intended this to be so is certain; but to have asserted it against congress and the executive; to have vindicated it by that easy yet adamantine demonstration than which the reasonings of mathematics show nothing surer; to have inscribed this vast truth of conservatism upon the public mind, so that no demagogue, not in the last stage of intoxication, denies it—this is an achievement of statesmanship (of the judiciary) of which a thousand years may not exhaust or reveal all the good."

But not only has the bar exercised a most salutary sway in the fashioning and moulding of our jurisprudence and laws, and exerted a most healthy and conservative influence on the communities in which they live, through the clients whom they advise, the juries whom they address, and the citizens with whom they mingle; but it has fostered on the part of the people a devotion to individual rights under the law and a courage in vindicating and maintaining them by the constant fearlessness which has at all times characterized the profession in asserting legal rights committed to their advocacy or defense.

Rare Ben Johnson dedicated a play, "To the Noblest Nurseries of Humanity and Liberty, Inns of Court."

"Intrepidity in the discharge of professional duty is so common a quality at the English bar," said Sir James Mackintosh in a speech in defense of a client for libel, "that it has, thank God, long ceased to be a matter of boast or praise. If it had been otherwise; * * * if the bar could have been silenced or overawed by power, I may presume to say that an English jury would not this day have been met to administer justice. Perhaps I need scarce say that my defense shall be fearless in a place where fear never enters any heart but that of a criminal."

Said a distinguished member of the American bar in a recent address: "Maynard, with the weight of ninety years upon his snow-crowned head, leading the defense against the arbitrary prerogative of the crown; John Adams standing amid a storm of popular indignation in defense of hated foreign soldiers, against illegal prosecution; Seward, speaking for the weak and friendless freemen, and Dana daring social ostracism and personal violence in defense of the fugitive slave, are only illustrations of how the bar unawed by power, unmoved by popular clamor, has always stood for personal liberty regulated by law."

But whatever the dangers and difficulties of the past may have been, and to whatever extent they may be said to be inherent in our form of government, and therefore continuous, the rapid development we have experienced, and the wonderful increase in wealth and population which we have had, have multiplied and aggravated both. New obstacles and unforseen exigencies are presenting themselves. The apparently irrepressible conflict between capital and labor; the imminent danger incident to unrestricted immigration; the peril pertaining to the ever-increasing disparity of pecuniary and social conditions; the jeopardy arising from the advanced position and ever-increasing boldness of socialistic and communistic ideas; the hazard which presents itself in the insidious and threatening opinion, now unfortunately so frequently and so daringly expressed, that the judiciary itself should be but the mere tool to register the judgments and decrees of an excited and unreflecting majority; the risk which may flow from the power and possible corrupting influence of immense wealth and vast corporations; the chance of irreparable injury to our institutions in particular and to the cause of humanity in general, which is liable to happen from the sordid, selfish, grasping spirit of the age—all these, with many more as serious and as threatening, call upon us as men, as citizens, and, above all, as lawyers, to come up to the full measure of our stature and to see to it that by no act or omission of ours shall the glorious heritage bequeathed us by the fathers perish from the earth.

"The special duty of the American lawyer," says Judge Dillon, "is, of course, to improve and promote the laws and jurisprudence of his own country. What great and complex problems confront the American lawyer growing out of our vast territorial extent and our distinct federal and state systems of government and jurisprudence; out of the changes wrought by iron, steam and electricity in business and all the modes of communication and transportation; out of the combination of capital almost without limit in corporate form affecting interests vital to individuals and to society? The law has to be adapted to these new situations and circumstances. What a weighty work! Truly, it demands the most attentive study, the

most penetrating observation, the most sedate consideration, the ripest judgment. Here will be found work for all. * * * What more generous ambition can inspire, what higher duty can engage the American lawyer, than to assist in his day in advancing this structure and adapting it by alteration and enlargement to the changed and changing condition of society, a work which must ever go on, yet never be completed?"

Beneath all our laws and constitutions lies public opinion, "elusive, subtle, all-pervading, like the mysterious forces of nature, and, like them, tremendous for good or evil. That it shall be not only untrammelled, but sound and pure, and alike unawed by the voice of one tyrant, or of many, is the condition upon which, perhaps, more than upon any other, the well being of the nation (and the state) rests. To that end it is your privilege to contribute in fulfilling the purposes of this association."

Said that noted lawyer, David Dudley Field, in an address to the American Bar Association in 1889: "We take, in my opinion, but a very narrow view of the obligation of our profession when we leave out of it that of improving the laws we help to administer. One who is content in applying these as he finds them, solacing himself with the idea that it is no part of his business to help make them, or to make them better, has an imperfect estimate of his calling. His obligations are, in fact, commensurate with his opportunities, and these are greater than those of any other class of citizens. He sees more clearly what is needed, and he knows better how to supply it."

Another noted lawyer, in addressing the same association, says: "Law is the handmaid of progress, the political factor of national and individual success. It becomes, therefore, our duty, brethren, to see, as far as in us lies, that we have good laws first, and then ever to strive for their honest use and impartial execution. * * * Be constant and untiring in your intercourse with the bar associations of the several states. Organize your committees for concerted plans of action, and bring your influence to bear in state legislatures for the correction of evils in general legislation which cry out loudly for reform."

That eloquent Virginian, John Randolph Tucker, speaking to the same association in 1893, after tersely reciting the subjects which belong to the reserved power of the states under our wonderful system, says: "When I look at these subjects for legislation, to which the members of the bar, by their training, learning and ability are fitted above all other men, I wonder why our great profession is content to devote its immense faculties, so adapted to promote the welfare of mankind, to the mere accretion of wealth, or is seduced from a field of labor so suited to its energies, to employ them in a pursuit of federal honors or emolument. * * * The work of moulding laws to the growing need of our civilization is most worthy of the ambition of the bar. The highest legal ability of the English bar and bench is laid under tribute in parliament to the development of law to be the fit companion of their splendid civilization. * * * Let me urge upon the thoughtful minds I see before me the imperative duty of lending their labor and their talents to rearing upon the foundation of our inherited jurisprudence a superstructure which will energize, beautify and regulate, by a wise system of law, all the activities of our wonderful American republic of free commonwealths and of free men. In the domain of state legislation the real law-

yer of every state will find his best place for enduring fame in the grateful honors which a people will lavish upon one who dedicates his best powers to the growth and development of law, as the handmaid of civilization, as the leader of human progress, and as the conservator of our American constitutional system of governments."

The year before, in 1892, Judge Dillon, having in matchless language referred to the spectacle of our federal republic, which he characterizes as "the creation, the prodigy, almost the miracle of liberty and law as wrought out and exemplified in the institutions which our fathers formed," proceeds to say: "Holders in fee of such a magnificent and priceless inheritance, presently for ourselves and of the reversion for the generations that in endless succession are to come after us, there rests upon us the solemn and sacred duty to see that the estate is not wasted, despoiled or lost. This duty rests generally upon all citizens; but in view of the nature of our profession, its studies, its labors and its influence, it rests with peculiar and special force upon it and upon us. * * * It is consolatory to think that it is at times possible for a lawyer, even unaided, as in Lord Bacon's case, not only to discharge his debt to his profession, but to overpay it, and thus to make the profession his debtor. *But his ability to meet this obligation is much increased when he acts in an organized capacity.*"

If, then, there are serious dangers, inherent in our political system; if the influence and power exerted by our brethren in the past has largely contributed to the maintenance and perpetuation of that system; if those dangers have been increased by the strain and stress of our very prosperity and progress, and by reason thereof our duty has become more pressing and the necessity for an heroic effort on our part to conserve and preserve more imperative, may we not seriously and earnestly inquire by what means and through what agencies can we most effectively and wisely exert our influence and put forth our power? Should such a question be asked, I think the answer is obvious. This is peculiarly an age of organized effort. Capital has become associated with capital until, from the Atlantic day springs to the Pacific's golden eves, its gigantic, powerful hand controls and moves or retards the vast machinery of our commercial and industrial life. Labor has united in societies so powerful and compact that the edict of a few men paralyzed for a time the business and intercourse of the greater portion of this land. The Young Men's Christian Association, the Christian Endeavor societies, the associated charities, the municipal reform organizations, all emphasize the fact that we have learned that the trite saying, "in union is strength," is as true in the contest against evil in all its forms, and in the discharge of our Christian and humanitarian duties, as in a contest for liberty or in the achievement of independence. "Everybody is wiser than anybody," says Talleyrand, and truly.

But not only is it a fact that the power for good which the bar is capable of exerting, and should exert, is increased in a geometrical ratio by organized effort, but the same organization is equally required by the attentive study, the penetrating observation and the sedate consideration which is necessary to a proper discharge of the duties devolving upon the bar, and which can only be certainly attained by discussion and mutual interchange of opinions and plans.

I think the saying of Lord Coke as to the benefits of oral arguments in the determination of cases, that "no man

alone, with all his uttermost labors, nor all the actors in them, themselves, by themselves, * * * can attain unto a right decision," can be equally applied, and is just as true when applied, to the consideration and determination of what is necessary and best to be attempted in the line of the betterment of our laws and the improvement of our procedure.

There are at least two directions in which an organization such as this can exert a most salutary influence upon the laws and their administration more effectively, more wisely and more rapidly than by the individual efforts of its individual members. The first is legislation. In speaking of this matter a distinguished member of our profession (Mr. James C. Carter), in the annual address delivered at a meeting of the American Bar Association, said: "Here is the principal field of direct and voluntary reform. It is here that society can consciously note its defects and shortcomings and resolve upon change and improvement. And it is here that the imperfections of the instrumentality involves the greatest liability to errors. Surely there is no employment which demands a larger measure of wisdom than that of surveying the field of human activities, observing the tendencies to evil, discerning the unconscious efforts of society to counteract them, divining the common thought which is animating the general mind and contriving plans which will be accepted as satisfactory experssions of that thought. * * * For such a work a combination of qualities is requisite which is rarely found in one individual. There is *room* and *demand* for the *united* labor of all."

The second is that of judicial inquiry and decision. Here is a vast field for effort peculiarly our own. It is our duty to keep abreast of and in full sympathy with every healthy, judicious advance made by society, "catching the spirit which animates the movement," and making it our united aim to keep jurisprudence alongside other social tendencies. The influence of the bar in this particular domain cannot be overestimated.

Mr. Bryce, in his American Commonwealth, well says: "The keen interest which the profession takes in the law secures an unusually large number of accurate and competent critics of the interpretation put upon the law by the judges. Such men form a tribunal, to whose approval the judges are sensitive, and all the more because, like the judges of England, but unlike those of continental Europe, they have been themselves practicing counsel."

The discussions had, the labor performed, the permanent good, while perhaps not yet fully realized, but which must inevitably grow out of work done by the American Bar Association at their annual meetings, and particularly by the services of their very able committees on jurisprudence and law reform, on judicial administration and remedial procedure, on legal education and admission to the bar, throw much light upon what an association such as this may accomplish in our narrower, but for us, and the people of this state, more important field.

But it is unnecessary for me to attempt to state in detail the various subjects which might with propriety, and ought in justice to ourselves and to society, to receive the united, earnest, organized attention and consideration of the bar of this state. We have been sadly derelict in this regard heretofore. We are here today to infuse life, vigor, energy, earnestness, a sense of duty and responsibility in this respect into the individual members of this organization, hoping thereby that this sometime poor, weak, halting, indifferent, and therefore, useless society may

become a power for good, an instrument of usefulness, the spring and source of streams whose waters, like the leaves of the tree of life, shall be for the healing of the nations.

And as we stand today at the shrine of our illustrious predecessors and for a brief moment contemplate the high sense of duty, the fearless courage, the profound wisdom which animated and directed them; reflect upon the manly, conscientious, earnest way in which they served this people; consider the many new, complex, harassing, perplexing questions which confront this generation; seriously ponder upon what we can do and what we ought to do toward solving these difficult problems, and in the direction of serving our state and nation in the best, wisest and most effective manner possible; and weigh the force and vastly increased influence which is possible from united, organized endeavor—shall we not, each one, solemnly resolve to put forth every effort possible to make this State Bar Association the living, throbbing, efficient, conserving and directing agency in all that concerns the order and good government of this state that it ought to be? Or, can it be possible that we, the lawyers of Minnesota, will, by indifference, by inattention, by the selfish pursuit of our own present narrow interests and the interests of our individual clientage, important and sacred as they are, permit it to be truthfully said that the profession in this state has surrendered its noble prerogative of moulding and directing legislation and of bettering, simplifying and expediting the administration of justice?

I have endeavored in this plain, unvarnished, brief way to call your attention and the attention of the bar of this state to the importance and desirability of some such organization as this. Our brethren in the past have, in the main, performed their duty as citizens of this great country and as members of our learned and noble profession, which is so intimately connected with the administration and prosperity of our government. That we, as their successors, will, as individual citizens, and as individual members of the bar, be as faithful to our trust and our opportunities in the future, is to be confidently expected. But that duty can be best performed, and those opportunities be more certainly embraced and made the most of by an association of ourselves in some organization where, by mutual interchange of views and discussion of proposed measures, we may be able to reach a more rational conclusion and more certainly accomplish what is best for our beloved state and nation.

Our duty then is plain. To the building up of our glorious system of laws, many generations of judges and lawyers have brought their wisdom, learning and experience. It is our special duty in our day and generation, by the best and most effective means within our reach, to carry forward the work of improving the law, so that we may leave it in a better condition than when we found it; to keep on by the same peaceful means with their labors, "now strengthening its foundation, now removing some unsightly angle, anon lighting up or clearing out some dark passage, now adding to its size and improving its symmetry and usefulness, and at all times carrying its walls still higher toward the sky, thus preserving and adapting it, albeit at times tardily, to the ever-changing and multiplying wants of society."

Ours must be a silent, peaceful, and largely an unrecognized labor. No cannon's boom, no musket's rattle, no blood-stained field, no wild huzzah of serried hosts will attest the quiet victories for liberty and for humanity which

we may win. No vast cathedral's dome, no living marble form, no speaking canvas scene will tell the story of our achievements. Down deep in the ocean of human activities, beneath the roll and roar of the storm-tossed waves of man's constant struggle, in the still, unfathomable waters that send no foam nor spray to catch the fleeting glories of the passing sun, we must be content to raise still higher the coral reef of justice and individual rights under the law, and thus, by such noble sacrifice, such blessed immolation of self upon the immortal altar of man's higher destiny, connect ourselves with that which shall last until the Eternal Voice shall say to the troubled billows that vex the sea of humanity, "Peace, be still!" and in its placid waters be reflected the meridian splendor of the perfect day.

Senator Davis spoke as follows:

Mr. President and Gentlemen of the State Bar Association:

The bar of Minnesota, when I entered it in 1864, was an exceedingly able one. It had been such from the organization of the Territory. As the bench is always the product of the bar, so the judges of those times were men of learning, capacity and integrity. Many of them remain with us. Nor do they "lag superfluous on the stage." They continue to be positive forces in the profession. It gives pleasure on this fraternal occasion to name some of those survivors. Flandrau, irresistible when he is right and very formidable even when he is wrong; Emmett and Atwater, still in the possession and use of forensic vigor; Chief Justice Wilson in the front ranks of the profession, unconquered and irrepressibly unconquerable, punishes his adversaries *ulnis, calcibus et dentibus;* Chief Justice McMillan, always judicial, is in general practice. Judge Nelson has presided in the Federal Court ever since Minnesota became a state. I believe that he has never missed a term. During this long and spotless judicial career he has held, and still holds, the scales of justice with ability and firmness which have never been questioned.

These magistrates and others, their cotemporaries and successors, well deserving of much more than this general reference, to which I am restricted by the limitations of the present occasion, have created the law of this state as expounded by the courts. The foundation stones were laid by them. Every course upon the still rising walls is their masonry and that of the bar over which they have presided.

Viewing this juridical structure as it now is, I think it may safely be asserted that we need not fear a most critical comparison with the similar edifices which have been raised cotemporaneously in other states. Indeed, I think that the questions which have been adjudicated in Minnesota are of remarkable scope and diversity. I was impressed by this fact when I came to the state in 1864 and began to study the nine volumes of the Minnesota Reports. Since then this comprehensive judicial and forensic work has gone on until we possess and are administering a system of law which touches every boundary of practical jurisprudence. A commentary on the common and equity law can be written from the State and Federal decisions of Minnesota. I insist that my students, as they read Blackstone and Kent, particularly the latter, shall concurrently study these decisions upon the subject of each chapter. The concrete, practical, existing law is thus compared with or reinforced

by the abstract and sometimes inconclusive exposition of the commentaries, which are limited by the case made law up to their date. For instance: When the student is reading upon the constitutional provision which prohibits the states from passing any law impairing the obligation of contracts, I put into his hands the opinion of the late Chief Justice Gilfillan in the State Railroad Bond case. That great judge, when all of his mighty faculties were aroused by such a subject, displayed judicial powers of the very highest character, and his exposition of that provision of the Federal constitution is not excelled by those of any of the great jurists who have discussed, illustrated and enforced it.

I delight to dwell upon such a comprehensive judicial system, created and possessed by a commonwealth which has existed only thirty-seven years. In the law of contracts, of personal relations, of corporations, of real estate, of trusts and fiduciary principles, and especially remedial jurisprudence, all of which the bar and the courts are in the daily act of creation, Minnesota has advanced continuously and has often led the way.

But with all this much remains to do, and I should most unprofitably perform the duties of the present hour by restricting my observations to enumeration and praise of what has been accomplished. The law is a progressive scieuce, and the prinicple of momentum is cardinal in its system. The bar is a progressive body; it is, moreover, the only profession whose effects upon the temporal concerns of society and the state are daily, incessant and immediate. In this generalization I include the bench within the bar, for the judges are the umpires of the profession to which they belong, and the law is the only one of the learned professions which contains such a tribunal within itself.

And so, at the risk of being dogmatic, but in the hope of being useful, I venture to state some of the results of my studies, observations and experience concerning the needs of the law, and upon the duties and power of the bar to consummate the desired result. I cannot be unconscious that, in doing this, I shall excite latent prejudices which exist in all professions.

We are inclined to love the ways in which we have been taught and have prospered, even if those paths have become devious and overgrown and run upon courses, necessary in former times, but which, in the marvelous changes of social and physical conditions, are no longer identical with them, which too often do not now touch them at all and cannot be made to touch them except by forced turns and windings which make the wayfarer long for the application of the geometrical axiom that a straight line is the shortest distance between two points.

Existing and inveterate conditions demand many reforms in the body of the law. They demand not only codification, but demolition, reconstruction and institutional rearrangement.

I think that the profession approves this as an ideal proposition, but I fear that a majority of its members either apprehend that it is impracticable or are so appalled by the evils and defects which are so inextricably imbedded in the structure that they repress expression of the desire under the weight of the apparent difficulty of its gratification.

And yet, in all the stages of human progress, from its first emergence from barbarism into the most rudimentary and primitive governmental forms, into the pastoral and paternal

status, thence into the agricultural state, thence into the maritime, mechanical and commercial condition which includes all its predecessors, through tribe and clan, through despotism, limited monarchy and the republic successively, through repressive ecclesiasticism up to the summits of free thought and liberty of speech, which also include their forerunners—through and in all these great cycles of human progress mounting in an ascending spiral to the existing lofty altitude of civilization, one of the most functional agencies of this immemorial evolution, this ever-continuing genesis and exodus of humanity, the reform and codification of laws institutional and fundamental, as well as laws incidental, collateral and ancillary, have been the most marked and enduring process of the development. From Moses, Manu, Zoroaster, Mahomet; from the Decemvirs to Justinian and down to Napoleon this truth conclusively appears. And this legistic work has survived all their other achievements. Many of the precepts of the Hebrew law-giver guide the actions of men today. The Code, the Institutes and the Digest of Justinian have exercised upon Europe from the date of their promulgation an influence more imperious and enduring than the conquests of the "mightiest Julius" and all his successors. They illumined the dark ages; they tempered the irruptions of the barbarians. As kingdom after kingdom rose above the surface of that universal and raging deluge which had submerged the Roman empire, they found ready for adoption that immortal system of jurisprudence which Leibnitz called the noblest product of the human intellect.

A single disastrous campaign destroyed that empire, while the genius of Napoleon but extended over the greater portion of Europe. His own astounding personality, which had dilated to the limits of the world, was crushed and contracted within his island prison. Yet his Code survives his conquests, and will preserve his memory when history will murmur of them almost inaudibly. It rules the nations which no longer feel the impress of his sword, which no longer cower under the eagles of his victories.

It is a remarkable fact that the English speaking people have never been inclined even to attempt processes which have elsewhere and in all time produced consequences so momentous and beneficent. The causes of that indisposition can readily be ascertained from the history of that nation, but they cannot be described here except by the merest indication. The dominion of Rome in Britain terminated even while she appeared to be the mistress of the world. Every trace of her laws, polity, language and civilization vanished. Barbarism darkened the land for centuries. England was invaded and conquered by the Saxon, the Dane, the Norman. The feudal system, which was in reality a vast military codification based upon the simple conception of tenure of real property by the allegiance and service of the soldier, remained, except to a slight degree, untempered and uninfluenced by the civil law. The great religious reformation of the sixteenth century produced an aversion in the English people to any influence proceeding from the continent, and this was confirmed in its obstinacy by their insular position. The consequence has been no attempt to codify their juristic system. It was transplanted with all its excellencies, defects and anachronisms by English colonists to Asiatic and American

continents and to the islands of the sea. The inherited antipathy continued and was aggravated by the achievements of our race. That system of law was called the perfection of reason at a time when it was the most barbarous, inhuman and imperfect code by which any civilized nation was ever governed.

There was one most salutary element, and it was the most precious legal heritage of our race, which assisted and confirmed this antipathy. This was those guaranties of personal liberty and right, trial by jury and representative government, which were the very life centers of the English political system. The civil law provided no such safeguards. It furnished only the hope of the enlightened action of an irresponsible monarch, and this was no safeguard at all. One consequence of this aversion of the English speaking people is that the common law has never been popularly studied in countries not subject to it. It has never been adopted by the founders of foreign states or colonies as a matter of choice, even by those which have incorporated into their own systems its leading guaranties of liberty and popular rights. The civil law, original or adopted and modified, has, on the contrary, been studied in the continental universities ever since the twelfth century, and before then it worked in some degree upon jurisprudence through the canonical law as it was administered within narrower limits of jurisdiction by ecclesiastics. It has become the system of Western Europe, with trial by jury and representative government added to its forces. In the Code Napoleon it still holds in subjection the nations which he conquered.

I am not disparaging the common law. But I can see its limitations and the fields of administration and affairs which have spread far beyond its powers and functions. Its defects are matters of method and arrangement principally, and they exist to this present day. Slow and dislocated amendment, redundant phraseology, utter lack of classification, patch work supplement, superstitious retention of old forms and old principles after they have become impotent for anything but evil, have confined this great system to limits of space and language, and have made it impregnable heretofore against reform and method, with the few exceptions which have been enforced by absolute necessity.

Consider the state of our own printed law today. It is a tangled mass of statutes, in which amendment is heaped upon amendment. They are too often drawn with such inaccuracy and are so inexactly attached to or inserted in the original that rational construction is impossible. The courts do the best they can, and in doing so they are compelled to legislate. They legislate too much or too little, and this legislation produces other amendments often limited to the special and some times sinister purpose of the person who drafts them, or the case which calls for them. The unintelligible, stammering and sightless monster reappears in the courts, who again interpret its utterances as but they may. The process is repeated for years with a confusion which increases with its development. The disorder spreads inevitably into the reports. They become full of cases overruled, limited or qualified, and the uncertainty over all the obscure field of construction and exposition breeds lawsuits, darkens counsel with words and disturbs business. I do not think that there is today any

method of intellectual exertion so destructive of the logical faculty and of fruitful judgment as the preparation of a brief in a close case. Who thinks, who is at liberty to think, under existing conditions of the principle or the logic of the case? It is dangerous to do so. The holy fetiches of the printed decisions stand to be worshipped and tendered as sacred and efficient offerings in the temple of justice. He who brings the most finds favor. I am happy in saying that we are slowly escaping from these conditions. The courts, within the last few years, have begun to assert the independence of the human mind, and to emancipate themselves from the miscalled authorities.

The statute laws of Minnesota relating to corporations confirm these criticisms. I do not believe there is to be found in the body of any printed statutes on earth such a chaotic, contradictory and deformed specimen of legislation. And yet it governs the creation, operation and control of one of the most powerful functions of modern civilization, whereby capital is given an immortal individuality under the administration of an unending succession of men of the highest genius.

There is one piece of legislation so unique and potent in its obscurity and uselessness that it has stood for many years without substantial amendment. It was derived from New York. It was said that the man who drew it never understood it. It is certain from the decisions that have coped with it that no court ever understood it. It has existed for many years in several of the states an unassailable fortress of words without wisdom, or even meaning. I refer to that portion of our statutes which pretends to pertain to powers in trust. The wiser any counselor looks on this portentous farrago of nonsense the less you may be sure he knows about it.

The statute of frauds has stood for more than 200 years. It was intended to prevent perjuries and make clear the terms of contracts. It is said to have been drawn by Sir Matthew Hale. And yet nearly a century ago it was declared by an eminent judge that every line had cost more than a subsidy. The courts of every state by which it has been adopted have been compelled to construe and misconstrue it. Huge text books in three volumes have expounded it, and yet it still remains a controversy in itself and a cause of controversy in all things to which it pertains, in every tribunal from that of the justice of the peace up to the supreme court of the United States. Let the wisdom be doubtingly conceded of the principle of such of its provisions as require certain contracts to be in writing, expressing the consideration and signed by the party to be charged. The purpose to be attained could be accomplished far better by the French system of registering contracts by a notary in his books, with exceptions, of course, in special cases when the action of such an officer necessarily cannot be invoked.

The statute of wills, derived from England and being substantially the same in many states, is in need of reformation in direct proportion to its vast importance. It has been involved in more complicated and contradictory decisions and learning than almost any other legal topic. It has been the subject of numerous text books and of unnumbered opinions. Look at the title "Will" in the last American Digest, at the long array of statements of the points said to have been decided; read any one of the decisions, which, like the un-

pirage of Chaos, "by decision more embroil the fray."

The entire subject should be reformed and codified. It has come to this, that no rich testator can die with any safety to his estate. The Davis will case in Montana, and the many propounded wills of the late Senator Fair, demonstrate the defects in the statute, while the innumerable questions of construction, testamentary capacity, genuineness of signatures and insufficiency of attestation are an ever-recurring reproach to the existing legislation. I assert, with a confidence inspired by some research, that on the continent of Europe, especially in France, not a tithe of a tenth of these controversies ever arises or can possibly be engendered.

One single feature of the foreign system, if accepted by us, would destroy the most copious source of these disgraceful litigations. I refer to the olographic will as defined by the codes of Louisiana and South Dakota, a testament which is entirely written by the testator himself, and dated and signed by his hand. This was one of the kinds of wills authorized by the civil law. It is manifest that such a will barricades many avenues of attack. Written, dated and signed entirely in the handwriting of the testator, and requiring no witness, there can be no question of attestation, whether the testator signed in the presence of the witnesses, all of them being together in his presence, or whether they all, being so together, signed as witnesses in his presence. Such a will in itself makes any attack upon it as a forgery a matter of extreme hardihood. If not genuine, it furnishes the best evidence of that fact from its appearance and contents. The testator may copy from a draft prepared by counsel, but it is written by himself, nearly always privately, and this exempts him from the undue influence of legacy hunters or family combatants who torment or cajole such a man, and finally have ready at the crisis of conquered weakness or induced despair or of imminent death the false physician, the complaisant, mercenary and accessory scribe and the colluding witnesses. Its provisions, composed and written by the testator, generally furnish by their expression, arrangement and proportion the most conclusive test of testamentary capacity. I am also inclined to approve of the statutes of some of the states that the testator may deposit his will with the effect of recording it in some proper public office, and that it must be contested, if ever, in his lifetime.

The problems of municipal government are becoming every year more difficult and insoluble. They are the most important of any with which a self-governing people have to deal. Maladministration in state or national affairs rarely affects to an appreciable degree the actual daily welfare and prosperity of the people, or to any extent so disastrously as corrupt or incompetent administration of municipal concerns. The heaviest and most enduring burdens are those of our municipality. The most corrupt popular elections are municipal elections. The most ruinous and unblushing peculations, jobberies and rings are those of the municipalities. They can be repressed much more easily than the more remote and covert evils of national and state administrations. But the attempt has not heretofore been made except in a few instances, as in New York, where it has been easily successful. It is one of the singularities of the American character that the business man, the man of sub-

stance, of political sagacity, influence and ability, will, though not a politician, spend months in a presidential campaign, and will not give a day or a thought or a dollar or a curse even to the spoliation which plucks him in his own door yard.

Other nations excel us far in municipal legislation and administration. Their best intellects have attended to it. Birmingham is one of the most wisely governed cities in the world, and that it is so is largely due to the ability of Joseph Chamberlain. Glasgow is well administered. Her method of disposing of sewage ought to be adopted by every considerable American city. I have referred to municipal government not at all in a political way, but because its problems are more immediately soluble by direct legislative treatment than any other with which the people have to deal.

The Constitution of Minnesota has been operative for thirty-seven years. During that time it has been modified by thirty-five amendments, nearly one for every year of its existence, and more than one for every legislature. They have been of increasing frequency year after year. This is most cogent proof, not only of the imperfections of the original instrument, but of the more important fact that, in the march of events, the changes of relations of various subject-matters, the intervention of new and the unexpected expansion of old material interests, the changes in the social and municipal structure, and the general and unexampled pressure of new necessities, new methods and new subjects of government which have been the most distinctive features of the state and national life during the last thirty years, the fundamental laws of the beginning of that period have become inadequate to and out of adjustment with existing conditions.

Our constitution is patched with these amendments from Bill of Rights to Schedule. Amendment has been pasted over amendment until the instrument has become a superannuated scrap book, useless in many parts and sightly in none.

The best constitution for a republican form of government is that one which, while it secures the essential and primary rights of the people by large and general provisions, leaves the greatest possible power to legislative action. It is true that legislatures may enact unwisely and corruptly, but, in the general average of many years, it is the experience of all free governments that these aberrations are corrected and annulled. The corrupt use of money, the leg-pulling bill, the coprophagous knot of boodlers, small and great, these larvae of the political dung-heap, held together by the nasty cement of the bribery of their job-lot of humanity, the purchase of legislation and offices—all these have their day. The perpetrators come radiant with the phosphoresence of incipient corruption; they will go in the last rottenness of an accomplished putrefaction, leaving a mephitic odor lingering outside the walls of the penitentiary or clinging to their garments as they move unconvicted yet condemned among their fellow men.

I believe in the people more than I do in their servants, and when the people maim their own powers for fear of their servitors the ultimate result is adverse to the constituency.

I do not think that the substitution of biennial for annual sessions of the legislature has produced the good results that were expected. The experiment was a critical one in a new and unfinished State in which two years have frequently worked important changes demanding immediate remedial or assistant legislation.

The fact that a noxious statute cannot be repealed for two years is a temptation to legislate viciously or corruptly for private interests and advantages. Besides, it is well that the legislator shall be tried and judged by his constituents as frequently and quickly as possible. The worthy servant is more likely to be rewarded by promotion or re-election, and he who has betrayed his trust will more probably be condemned by his constituents if the electoral judgment is had six months instead of a year and a half after the adjournment.

I think that the long time that must elapse before hurtful legislation can be repealed has enforced the adoption of several constitutional amendments that would not otherwise have been thought necessary, and which in themselves abstractly are very unwise limitations of legislative power.

The amendment adopted November 8, 1892, prohibiting special legislation, is a most striking example of this abdication of legislative functions thus in some degree coerced. It will, in my opinion, in some of its particulars. prove more injurious than the undoubted evils it was intended to avert.

But the present occasion does not permit anything more than the merest suggestion upon this topic. It is not made in the spirit of disparaging criticism, but as one argument why the constitution ought to be revised all throughout.

During the last thirty years great advances have been made in speculative, practical and philosophic thought upon political, social and economic questions. The people universally are better informed and discuss these topics more than they ever did before. The constitutions of other states have received the benefit of this new knowledge, of this popular appreciation and discussion.

The highest statesmanship of that period has been displayed in the formation of constitutions. Illinois, Pennsylvania, California, New York and the recently admitted states have furnished examples and precedents of the most valuable character, based upon long-suffering experience, and upon the wisdom which springs from reflection upon practical political evils. I think Minnesota should provide for a constitutional convention as soon as possible.

My views in favor of codification have already been expressed. The illustrations and criticisms which I have applied have been employed to excite reflections that will prove its necessity. Let it not be supposed that it is intended to draw a circle of condemnation around the present system or all of its methods. In many respects it is admirable. A discourse for reform is always partisan in its character, in the assurance that sufficient will always be advanced in opposition or qualification to elucidate the entire subject. But it is certain that the practice of our profession, the administration of the law by the courts and the enjoyment of justice by the people are impeded and are made to a degree inefficacious, and will so continue in intensifying progression by the condition of our statutory and judicial law. We long ago came to the predicament in which other people in ages remote and also in modern times have been involved.

The development of the Roman law and that of the common law from their beginnings presents a most remarkable parallelism and duplication of history. From primitive simplicity the growth of the civil law had proceeded by amendments and special legislation in its various methods of enactment until the people were

overwhelmed by the weight and variety of new laws which, "at the end of five centuries, became a grievance more intolerable than the vices of the city." They were engraved on these thousand plates of brass. Some of them contained more than one hundred chapters. These were decrees of the Senate, laws of the people, edicts of praetors, dictators, tribunes, aediles and proconsuls. Those of the praetors were amended and added to annually as those officers succeeded each other. In the reign of Hadrian all these were digested into a code known as the Perpetual Edict, by which, it is to be remembered, that the administration of law and that of equity were reconciled and consolidated as they have been in our own time. But the reforms were not sufficiently thorough. This body of law was modified continually by the constitutions and rescripts of the emperors. History repeated and anticipated itself. Gibbon asserts that "the infinite variety of laws and legal opinions had filled many thousand volumes which no fortune could purchase and no capacity could digest." The indispensable reform was accomplished by Tribonian and his associates under the direction of Justinian, and the product was the Code, the Institutes and the Pandects, out of which all modern law, excepting feudalism and its survivals, has been as veritably built as modern Rome has been constructed out of the ruins of the imperial city. The ancient commentaries, the *receptae sententiae*, the edicts and constitutions went into oblivion. Their citation and study even were forbidden. The single fact that this work of a vanished empire stands entire and efficient to this present day, as potent for utility as it ever was, demonstrates the necessity and value of the codification of such a body of laws as our own.

Twelve hundred years after Justinian history again repeated itself. France was governed by several complicated systems, each applicable to its particular geographical province, the product of processes similar to those which have just been described. A great ruler was set over the people. He ordained the Code Napoleon, and this embodies various codes of the several divisions of the law. It was produced between the years 1803 and 1811 by Tronchet and his co-laborers in sessions and consultations, in which Napoleon labored with a knowledge and insight that amazed the jurists. It was the civil law in modern garb, equipped with modern instrumentalities. It is now the foundation and the essence of the laws of France, Western Germany, Belgium, Holland, Switzerland and Italy. It is the basis of the civil code of Louisiana, and through that channel it has imparted many of its benefits to the statute laws of the states that have been wise enough to profit by it. I commend the code of Louisiana to all students as an elementary text book of living, operative law and to legislators as a most instructive tutor in legislation. Minnesota derived the statute of intervention from that code, and no lawyer will deny its remedial benefits in a field where even the equity practice could furnish no relief. I especially advise all students, those preparatory and even those in practice, to read the chapter on Things and their different modifications of ownership; on Conventional Obligations, especially as to damages; on Successions and on Testaments.

He who believes that the law should grow and should be made to grow in harmonious proportions within itself and in adjustment with the subjects of its action, should also give most considerate attention to the civil codes of California and South Dakota.

In them we see more of the familiar features of the common law than in the statutes of Louisiana. But they are codifications of principles largely derived directly or indirectly from the civil law.

The civil code of South Dakota was adopted by the legislature of the Territory of Dakota in 1866. It is the civil code which had been prepared for New York, but which that state had rejected. Some singular features resulted from its unqualified adoption by Dakota. Shipping generally, bottomry, respondentia, jettison and general average are elaborately provided for in a state whose chief sources of water are artesian wells.

The provisions of this code as to contract obligations and personal relations of all kinds, including trusts, are minute and admirable. The result is that South Dakota is possessed of a body of statute law infinitely superior to that of Minnesota.

The law of Minnesota, statute, unwritten and judicial, should be codified all throughout. It should be reedified, as the most useful and enduring material structures are built, slowly and deliberately, but as one continuous task by the most expert constructive talents that we possess, using the plan of other codes, ancient and modern, and at an expense which will secure the most perfect result.

I do not venture to hope that this work will be done by those who are now the seniors of our profession. Perhaps many of them will not approve it.

I speak now more particularly to the juniors and the students. They should study for this task. I would have them thus instructed in the offices and in the University. Law, like the Nile, has many sources. Let the student seek all these and direct them to the broadening and deepening of that stream upon which float all property and every personal right.

Francis Bacon, who presides over all thought and all methods of classifying and using knowledge, was the glory of our profession and the shame of the bench. In his youth he "took all knowledge for his province." In his old age, in the agony of retirement, poverty and disgrace, that imperial intellect reverted to the condition of the laws which, in common with the chaotic form and unphilosophic use of other learning, had not escaped his censure. As one of the last of his intellectual conquests he proposed repeatedly to James I. to compile, amend and digest the laws of England. The concluding words of his last appeal to be allowed to undertake this work are of moving pathos. He said: "As for myself, the law was my profession to which I am a debtor; some little helps I have of other arts which may give form to matter. And have now, by God's merciful chastisement, and by His special providence, time and leisure to put my talent, or half talent, or what it is, to such exchanges as may perhaps exceed the interest of an active life." Surely what Francis Bacon offered to do because of its necessity, cannot be unworthy of performance by his pupils of these aftertimes dealing with juristic systems of aggravated complexity and confusion.

It would be instructive to hear the opinion of Tribonian, Francis Bacon and Tronchet upon our laws in their present condition of method, codification and administration.

Upon a larger field exterior to our state and including it, many questions are forcing themselves imperiously towards solution. They must be solved. The new wine is bursting the old bottles. And because our profession has in all time been the conservative agitator and the thorough reformer, and has thus often averted civil tumults

and even wars, I venture to proceed for a moment into the field of thought where the lawyers must become statesmen.

If I were asked to define the controlling political and social elements and questions of this age, I should unhesitatingly say that they are the present and ever-increasing necessity of regulating the internal concerns of the state by government. This is the question throughout the world. By the operation of many beneficent causes, such as universal education, the general use of labor-saving inventions, the instantaneous intercourse of great and distant masses of men and their thoughts by electricity and steam; the great campaigns of industrial production in which a nation shakes with the tread of mightier hosts than were ever arrayed in war and mourns over defeats in these peaceful hostilities more disastrous than was ever inflicted by arms; the disbanding of the hosts without provision for the future; the enormous waste of unemployed labor; the rich rewards to commercial, financial and professional genius which make their possessors so indifferent to governmental affairs that, too often, they do not take part in them except to deteriorate and corrupt them; the debauchery of the electoral franchise; the discontents engendered by vast disparities in wealth and actual power; the impotence of the law to deal with some of the most threatening elements of society and of the body politic; the debility of legislaton in the same respects; the unquestionable fact of the insufficiency in many particulars of the state and federal constitutions, ordained, as they were, in other times, and not for conditions then unforseen—all these and much more prove the correction of the definition which I have given.

It is demonstrated by other contrasts. The liberties achieved by our revolution were the liberties of states as communities. International relations which we once found so difficult to maintain and regulate have, within the last fifty years, become comparatively tractable. These were formerly the most difficult problems. Internal administration was easy in comparison.

But now while wars are infrequent, sedition is common. Questions with other nations are adjusted by negotiations and arbitrations. Internal dissension has not yet been made susceptible to such compositions. It seems easier to maintain peace abroad than at home.

We are in the midst of agitations of
—"Right and Wrong,
Between whose endless jar Justice resides."

I am confident that they will be composed peacefully and justly. In this adjustment the bar will, as it always has under similar conditions, enact a leading part. There are those now living who will do this work, and who will be arrayed in the Pantheon of history with Coke, Bacon, Pym, Somers, Burke, Madison, Hamilton, Adams, Jefferson and Lincoln.

WHAT IS LAW?

Law governs the sun, the planets and the stars. Law covers the earth with beauty, and fills it with bounty. Law directs the light and moves the wings of the atmosphere; binds the forces of the universe in harmony and order; awakens the melody of creation; quickens every sensation of delight; molds every form of life. Law governs atoms and governs systems. Law governs matter and governs thought. Law springs from the mind of God, travels through creation, and makes all things one. It makes all material forms one in the unity of system. It makes all minds one in the unity of thought and love.—Tappan.

THE MINNESOTA LAW JOURNAL.

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DISTRICT COURT.

Reuben F. Little v. Chicago, St. Paul, Minneapolis & Omaha Railway Company.
(District Court, Ramsey County, 61800.)

REAL ESTATE—INJURIES TO—PLACE OF TRIAL.

An action for injury to real estate situate without this State cannot be maintained in this State, but must be brought in the State where the land is situated.

Plaintiff declared for injuries to his real estate situated in the State of Wisconsin, alleged to have been caused by the careless and negligent acts of defendant. Defendant answered, alleging, among other things, "that the District Court of Ramsey County has not jurisdiction of this action, because it says that the Legislature of the State of Wisconsin, prior to the time at which the damages alleged in said complaint arose, did enact that all actions for an injury to real property shall be tried within the county in which the subject of the action is situate, which said legislative enactment was in full force and effect at the time at which the injury to the lands described in the complaint is alleged to have been caused."

To this portion of the answer plaintiff demurred.

BRILL, J.: Under the stipulation of the parties, the only question raised and argued is whether the Courts of this State have jurisdiction of an action to recover for injuries to real property situated in Wisconsin.

At common law the action was real, and it could not be maintained outside the state or county where the land was situated. Watts v. Kinney, 6 Hill, 82; Dodge v. Colby, 108 N. Y., 445; Du Bruil v. Pa. Ry. Co., 29 N. E. Rep., 909. The statutes of this State have not changed the common law upon the subject, but, on the contrary, they recognize the local nature of such actions. (Statutes 1894, Sections 5182 and 5183.) The provisions of Section 5185 do not enlarge the jurisdiction of the Courts of this State, but, like the preceding sections, they fix the place of trial of actions which may properly be brought in this State.

The Wisconsin statute referred to in the portion of the answer demurred to does not affect the question. It would seem that the complaint was demurrable, and that the rule that a demurrer reaches the first defective pleading would apply here.

Demurrer to answer overruled.

The Glencoe Produce Co. v. E. H. Whitcomb and C. E. Chapel.
(District Court, Ramsey County, 60671.)

COSTS—PLEADING.

Costs ordered to be paid in order sustaining demurrer with leave to party pleading to amend, do not become due if the pleader do not amend.

R. A. WALSH for plaintiff. JOSEPH SCHROLL and OTIS & GODFREY for defendants.

Defendant Chapel demurred to the complaint, which demurrer was sustained with leave to plaintiff to amend on payment of $10 costs. Plaintiff did not amend, but at the trial dismissed as to said defendant. Defendant endeavored to tax said $10, and from an

order of the Clerk refusing so to do appealed.

KELLY, J.: The costs ($10) allowed by order March 25, 1895, in sustaining demurrer of defendant Chapel were conditional upon plaintiff electing to further amend its complaint. Plaintiff did not seek to further amend. The order, therefore, never became operative. The dismissal on the trial, it is admitted, was not on the merits. Defendant was entitled to tax but $5 costs. The affidavit of the witnesses for defendant is not sufficient in the face of objection. Osborne & Co. v. Gray, 32 Minn., 53.

Thsett Bros. v. C., St. P. M. & O. Ry.
(District Court, Ramsey County, 54333.)

MEASURE OF DAMAGES — RAILROADS — SHIPMENT OF STOCK—NEGLIGENCE.

Shippers are liable for any loss occurring to live stock shipped by them which results from the habits or propensities of the stock. Where stock shipped is received in bad condition and consignees refuse to accept same, whereupon it is sold by the railroad company, and plaintiffs are unable to show negligence on the part of the company, or that such sale was not fairly and honestly made, the amount of plaintiffs' recovery is the amount received at such sale.

EDGERTON & HOPPAUGH for plaintiffs. S. L. PERRIN for defendant.

KELLY, J.: This action is brought to recover the value of certain horned cattle, calves, hogs and sheep, shipped by plaintiffs October 4th, 1893, from South St. Paul, in a car of defendant company over its railroad, and consigned to one Hanley at Ashland, Wisconsin. The total shipment consisted of six steers, one heifer, forty-one calves, twenty-four hogs and twenty sheep. By contract plaintiffs assumed all risks resulting from the manner of loading the stock, and by law they are bound for any loss resulting from the habits, vices and propensities of the stock. The contract fixed the value of the steers at $50 per head, heifers $30, calves $10, and the testimony tended to show the hogs were worth $10 each and the sheep $3 each. Of the consignment only four steers, eight hogs, twenty-one calves and twenty sheep reached Ashland. These defendant tendered plaintiffs and were refused. Defendant then sold them, realizing $375.15 over expenses. This sum defendant tendered plaintiffs and plaintiffs refused to accept it. Defendant's answer avers that it "now tenders to plaintiffs said sum." Plaintiffs sue, first, for the value of the stock which died in transit, alleged at $550, and, second, in *conversion* for stock sold by defendant, value alleged at $557.46. The jury found for plaintiffs for $850. The defendant asks for a new trial on three grounds: 1st, that the verdict is not sustained by the evidence; 2nd, errors of law; 3rd, excessive damages. There is testimony sufficient to sustain a verdict in favor of plaintiffs, and no errors of law, excepted to, have been pointed out. The question remains, Are the damages excessive? From the amount it is plain the verdict was not intended to cover the whole consignment. The jury, no doubt, endeavored to give the plaintiffs the value of the stock which reached Ashland and of the calves which escaped at Spooner. At the values stipulated in the shipping contract, and those proven at the trial, this would amount to $750, giving plaintiffs the benefit of the highest figure. This is clearly $100 in excess of plaintiffs' rights. But I am of the opinion that it follows from the logic of the verdict that plaintiffs are entitled to recover as follows, and no more:

1. Proceeds of sale of stock by defendant $375.15
2. Value of twenty calves lost at Spooner 200.00

$575.15

This upon the theory that the jury by this verdict have determined necessarily that defendant was not guilty of any negligence whereby some of the stock was killed or injured. The only

negligence found against defendant was in permitting the escape of the calves at Spooner. It therefore follows that plaintiffs could not legally refuse to receive that portion which reached Ashland safely, even though in bad condition, and are obliged to accept the proceeds of the sale. While there was no proof of this, yet the case was tried and submitted to the jury on the theory that this sale was fair and to the best advantage, and that plaintiffs could recover in this action for at least the amount so realized. Technically speaking, under this verdict there was no conversion, but in view of the fact that no objection was made or exception taken to the jury determining the whole matter, as it was submitted, the verdict should not now be disturbed on that account.

Being of the opinion that the evidence will not support the verdict except upon the theory just stated, there must be a reduction of $274.85, or a new trial.

NOTES ON RECENT CASES.

In Minnesota a statute forbids "the mortgaging of crops before the seed thereof shall have been sown or planted for more than one year in advance," and makes such a mortgage void. But the Court holds that a chattel mortgage executed on the 15th day of August in one year, mortgaging the crops to be grown the next year, is not a violation of the statute, and is valid.

According to the decision of the Minnesota Supreme Court in the case of Weide v. the City of St. Paul, where an indebtedness consists of principal and interest, and a payment is made by the debtor which is not applied by him or the creditor to any part of the indebtedness, the law applies the payment first to satisfy the interest and then the principal.

A justice of the peace acting in excess of his jurisdiction by rendering judgment and issuing execution against a person outside of his territorial jurisdiction is held, in Thompson v. Jackson (Iowa), 27 L. R. A., 92, to be protected from personal liability. A note to the case raises doubt as to the correctness of the decision, by quoting authorities to the effect that judges of superior, as well as those of inferior, courts are not exempt from liability where they act entirely without jurisdiction.

According to the Supreme Court of Missouri, the grant to an illuminating company of the right to make and distribute gas, and any substance that might thereafter be used as a substitute therefor, and to lay down any fixtures required therefor, having been made when electric lighting was unknown, does not include the right to adopt any method for distributing electricity for lighting, but that right must be exercised according to the regulations prescribed by law; and when the power to regulate the use of the streets has been delegated to a municipality before the company adopted electricity for lighting purposes, it must conform to the regulations prescribed by the municipal authorities. State v. Murphy, 31 S. W. Rep., 594.

Since the acts of a Sheriff in seizing, upon a writ of attachment, property of the debtor which is exempt, and refusing to deliver it on demand of the debtor, are, though unlawful, nevertheless done by him under color and by virtue of the office, they constitute a breach of the condition of his bond, and the sureties thereon are liable. Hursey v. Marty (Supreme Court of Minnesota), 63 N. W. Rep., 1090.

HUMORS OF THE LAW.

The most popular man in a Western town had got into a difficulty with a disreputable tough who was the terror of the place, and had him done up in a manner eminently satisfactory to the entire community. It was necessary to vindicate the majesty of the law, however, and the offender was brought up for trial on a charge of assault with intent to kill. The jury took the case and were out about two minutes, when they returned.

"Well," said the old judge in a familiar, off-hand way, "what does the jury have to say?"

"May it please the Court," responded the foreman, "we, the jury, find that the prisoner is not guilty of hittin' with intent to kill, but simply to paralyze, and he done it."

Some months ago a young lawyer of Milwaukee, not over bright, faced Judge J. at the opening of Court and presented an affidavit of prejudice in a case marked for trial on that day's calendar. The Judge, who dislikes affidavits of this nature more than anything else in the world, held it up and said to the rest of the bar assembled in the room, as well as to the young lawyer: "Well, here is another of these affidavits; don't you know, sir, (looking directly at the young man), that I do not know either of the parties to this action." The young man looked downcast for a moment, and then looking suddenly up as though a happy thought had struck him, said: "No, your honor, but they know you." The Court and the bar were considerably startled, but the matter ended in a universal shout. —Green Bag.

The duties of the court and bar are mutual—each to assist the other in the administration of justice.

A lawyer, whose eloquence was of the spread-eagle sort, was addressing the jury at great length, and his legal opponent, growing weary, went outside to rest.

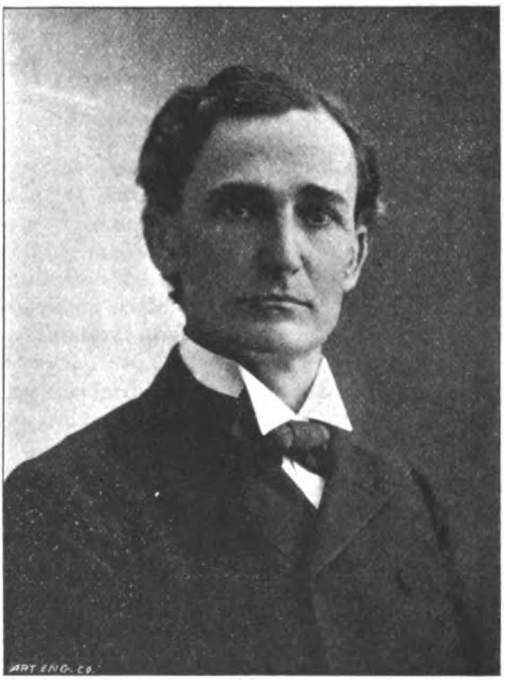
"Mr. B. is making a great speech," said a countryman to the bored counsel.

"Oh, yes, Mr. B. always makes a great speech. If you or I had occasion to announce that two and two make four, we'd just be fools enough to blurt it right out. Not so Mr. B. He would say:

"'If, by that particular arithmetical rule known as addition, we desired to arrive at the sum of two integers added to two integers, we should find—and I assert this boldly, sir, and without the fear of successful contradiction—we, I repeat, should find by the particular arithmetical formula before mentioned—and, sir, I hold myself perfectly responsible for the assertion I am about to make—that the sum of the two given integers added to the two other integers would be four!"

This reminds us of an incident said to have occurred in Lord Justice Davey's court, in which the Lord Justice is said to have asked Mr. Oswald to "kindly state to the Court the exact point of law that he was obscuring by his eloquence."—The Law Student's Helper.

In arguing a point before a judge of the Superior Court, Col. Folk, of the Mountain Circuit of North Carolina, laid down a very doubtful proposition of law. The judge eyed him for a moment and queried: "Col. Folk. do you think that is law?" The colonel gracefully bowed and replied: "Candor compels me to say that I do not, but I did not know how it would strike your honor." The judge deliberated a few moments, and gravely said: "That may not be contempt of Court, but it is a close shave."—Green Bag.



HON. PAIGE MORRIS,

District Judge, Eleventh Judicial District.

...THE...

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CONTEMPT OF COURT.

From recent events in the administration of justice in Chicago and elsewhere, the power of courts to punish for contempt has been brought into more than usual prominence, and has received much comment and criticism from various sources, the general tenor of which, has been against its exercise.

It is quite natural that in free America, where personal rights, and the liberty of the citizen are held in such sacred reverence—where trial by jury is regarded as the citadel of every man's protection from arbitrary or capricious punishment, and where the exercise of authority by any branch of the government which infringes upon the natural rights of the citizen is watched with jealous care, that imprisonment without the usual forms and solemnities of trial, should excite, alarm, and engender apprehension among our people—yet with all persons who are conversant with legal procedure, it is well known that courts have always possessed the power to inflict summary punishment for contempt of their dignity, by disobedience to their orders, or offensive conduct committed in their presence, or in obstruction of their proceedings, and also that it would be utterly im-

possible to administer the law in the absence of such power.

Contempt of court is defined in law dictionaries to be "where a person who is a party to a proceeding in a court of record, fails to comply with an order made against him, or an undertaking given by him, or where a person, whether a party to a proceeding or not, does any act which may tend to hinder the course of justice, or show disrespect to the court's authority." "Contempt of court is an offense punishable summarily by fine or imprisonment, or both."

It must be understood that the whole majesty and power of the State is vested in its courts. The legislature enacts what the law shall be, and the courts administer, and (with executive aid when necessary,) enforce it. A court that was powerless to enforce its orders and decrees, would be the laughing stock of every one; it could not even hold its sessions; it would be degraded to utter insignificance, and cease to exist by its inherent weakness. The functions of a court are to decide what is right and what is wrong, where such results cannot be arrived at by convention and agreement; and to decide between guilt and innocence, punishing the one, and protecting the other. It must possess all the power necessary to command respect, and enforce obedience. It must be largely the arbitor of the conduct of its own proceedings. Its potentiality must be so unquestionable as to inspire awe in rulers as well as subjects. It can show no partiality or respect for persons, but must treat all alike; In a word, a Judge to perform successfully the duties of his high office, must be clothed with sufficient power to strike down at once and without discussion all attempts to impede the full and effectual administration of the law.

To curtail these powers would be to emasculate the law, and destroy the State. They have always existed wherever civilization held sway, and will only cease when anarchy prevails.

The recent fearless exercise of the power to punish for contempt by our courts, will do more to keep the peace, allay the fears of the public, and maintain good government, than anything that has happened since the suppression of the Rebellion. Of course, parties whose avocation is law-breaking, and inciting others to its violation, will not agree with me.

"No rogue ere felt the halter draw,
With good opinion of the law."

An illustration of the vigor with which the courts of England have maintained their dignity by the aid of this power, is found in an exercise of it which occurred under very exceptionable circumstances. The Prince of Wales, who became afterwards King of England, as Henry the Fifth, was provoked at a decision of Sir William Gascoigne, then a judge of the King's Bench, which in some way involved the Princes' servant. He was insolent to the Judge in court, and was immediately committed to prison. The incident has been rendered immortal by Shakespeare who refers to it in his play of Henry the Fourth. Second part. After the prince has become King he meets the Judge, who evidently thinks the King will resent the punishment he had inflicted upon him when a prince, and in vindication of his conduct addressed him thus.

Chief Justice—

I then did use the person of your father,
The image of his power then lay in me;
And in the administration of his law.
Whiles I was busy for the commonwealth,
Your highness pleased to forget my place,
The majesty and power of the law and justice,
The image of the King whom I presented,
And struck me in my very seat of judgment,
Whereon, as an offender to your father
I gave bold way to my authority
And did commit you.

The King answers like a just ruler, and not only upholds the judge, but heaps new honors on him.

King—
You are right, Justice, and you weigh this well;
Therefore still bear the balance and the sword;
And I do wish your honors may increase,
Till you do live to see a son of mine
Offend you, and obey you as I did,
So shall I live to speak my father's words,
Happy am I, that have a man so bold
That dares do justice on my proper son;
And not less happy, having such a son,
That would deliver up his greatness so
Into the hands of justice. You did commit me;
For which I do commit into your hand
The unstained sword that you have used to bear;
With this remembrance—That you use the same
With the like bold, just, and impartial spirit
As you have done gainst me. There is my hand.

We have here an expression of the sentiment that was entertained for the purity and fearlessness of the courts by the people of England, as far back as the time of the Henry's While it is to be hoped that the occasions for the exercise of this necessary power by the courts, may be few and far between, it is also to be desired that when the necessity does arise, our courts will meet it with the fearlessness and promptitude that has characterized them in both ancient and modern times.

CHAS. E. FLANDRAU.

GOOD LAW.

The supreme court of Minnesota has announced and formulated three new and indestructable principles of law, not known to have been heretofore announced by any other court, and based upon such self-evident logic and common sense, that all courts and writers will sooner or later adopt them. When it is remembered that the main object of this court seems to be the quantity and not the quality of the decisions turned out, these well-considered decisions seem to be oasis' in a vast waste.

Chancellor Kent assumed, on his elevation to the bench, to mould the English equity jurisprudence to the new civilization and hence his decisions are immortal, and it was the duty of the Minnesota court from the beginning to mould the fragmentary jurisprudence of Minnesota into a consistent and harmonious whole, by reviewing all prior decisions in

every case brought before it, because a decision is only valuable in so far as it announces a self evident principle or a rule of the common or statutory law or equity jurisprudence, supported by authority well considered or logically proved. If the court has not had or does not have time to carefully consider every case and evolve such a principle or rule, the remedy was and is not in grinding out the quantity of matter, but by enacting a law, confining appeals to final judgments and final orders.

The principles announced in these well considered opinions, are the rule of vice principal, and the rule in Johnson v. The Insurance Co. governing the contractual liability of infants, both the work of Judge Canty, and the rule in Howe v. The Minneapolis, St. Paul and S. S. M. Ry. Co., that contributory negligence is a question for the jury.

In Howe v. The Railroad, the plaintiff was riding in a vehicle on the invitation of and driven by the owner and in crossing the defendant's track, its train running at a high rate of speed and without warning struck the wagon and severely injured the plaintiff. The evidence showed that the plaintiff was riding on the invitation of the owner and did not know that the owner was not keeping watch for approaching trains; that he had no control over the management of the vehicle or horses, and that there was no relation of master and servant, principal and agent or engaged in any enterprise of a joint nature. The question was whether or not the negligence of an independent driver was imputable to an occupant of the vehicle, and the court held that this was for the jury, notwithstanding that the evidence showed that if the driver had exercised any degree of care, he would have discovered the approaching train in time to have avoided the injury.

The value of this rule is, that the negligence of the driver of a vehicle, is not per se the negligence of a passenger in the vehicle, and whether the passenger was guilty of negligence depends upon all the facts and circumstances to be decided by the jury as a question of fact.

In Ryder v. Kinsey, 64 N. W. 94, the Minnesota Supreme Court announces the correct rule of patent and latent defects in buildings and the liability for injuries caused by the falling of a wall, and it seems remarkable that such a well settled common law rule should be the subject of contention.

In that case the court held, that negligence or a patent defect will be presumed from the falling of the wall and to release the owner from this presumption he must show that he exercised ordinary care to keep the building in safe condition and to discover patent defects. If the evidence shows that the wall fell because of latent defects,—such as defects in the sheeting on the inside of the studding concealed by the brick wall on the outside, the owner is not responsible unless it is shown that he, by the exercise of ordinary care, could have discovered and remedied the defect before the accident occurred.

The rule that a patent defect and a priori the negligence of the owner, will be presumed from the fall of the wall in the absence of evidence showing a latent defect, is the common law and common sense, and announced in

Muller v. St. John, 57 N. Y. 567, and Engle v. Eureka Club, 137 N. Y. 100, and that there is no liability for latent defects unless the defendant knew or could have known the defects by the exercise of ordinary care. Hence the distinction, logically following from Morris v. The Straebel & Wilkin Co. 81 Hun. 1, that if the defendant constructed the wall he would be liable for latent defects, or if the falling of a sign caused the injury, it was the duty of the defendant, in the first instance to secure the same so that it will withstand the ordinary vicissitudes of the weather and also the force of gales which experience has shown will be liable to occur, and thereafter exercise ordinary care in inspecting the same.

In other words the rule can be boiled down to the sentence that the defendant must be honest. If he constructed the building he must make an honest job. If he did not construct it, he must exercise honest care to remedy defects. If he was honest in the construction, or the care and inspection, he cannot be held responsible, because the cause of the effect did not flow from him.

"I will charge for my services what my judgment and conscience inform me is my due, and nothing more. If that be withheld it will be no fit matter for arbitration, for no one but myself can adequately judge of such services, and after they are successfuly rendered they are apt to be ungratefully forgotten. I will then receive what the client offers, or the laws of the country may award; but in either case he must never hope to be again my client."—Hardwicke's "Art of Winning Cases."

Promise to Pay the Debt of Another.

In Spear v. Farmers and Mechanics Bank, 41 N. E. Rep. 164, the supreme court of Illinois seems to follow the unreasonable distinction made by "discussionists" that the statute of frauds requiring a written promise to answer for the debt, default, or doings of another is divided into two parts, original and collateral. If the promise to answer is an original and independent one, it is not within the statute, and if it is collateral to the agreement of the other person whereby the promise is to answer for the debt or default of that other, it is within the statute; hence, if two creditors of a common debtor agree that each will share the loss which the other sustains against such debtor,such agreement is collateral and must be in writing.

There should be no distinction. The language of the statute is that the promise to answer for another must be in writing, and means that the "other" incur the "debt, default or doings" and the promise be made by a person who did not do it. This is simple. If one man incurs the debt and another promises to pay it, the promise must be in writing. If one man defaults and another promises to answer for it, the promise must be in writing. If one man has done anything and another promises to answer for it, the promise must be in writing. And notwithstanding such a plain, and simple statute, the courts since 29 Car. II, Chap. 3, Sec. 4, and the law book "discussionists" have covered it all over with mist and mystery.

Edwin Hill has been appointed judge of the newly established municipal court at St. Charles, Winona county.

AN INVITATION.

All lawyers and judges are invited to send to this Journal for publication any discovered defect in the statutory law and the suggested remedy; any defect or obscurity in the practice of the law and the proposed rectification or statement of principle; any defect or obscurity in the laws applicable to justices of the peace and municipal courts and the proposed remedy or correction.

This of course invites discussion but as the space of the Journal is limited, the discussions should contain purely meat and be as brief as possible.

The principles involved in this matter are that our statutory law, copied as it was from New York and Wisconsin is based upon the common law and equity jurisprudence and has these for its foundation; hence in order to understand our statutes we must know the common law and equity jurisprudence, and in consequence of the absence of this knowledge, our judicial system has been and now is, topsy turvy, a structure of patch work, inconsistent, inharmonious and nauseating.

This is true with respect to the practice of justices as well as municipal courts, and the fault is not so much in the inherent defects of the law per se, as in the misconstruction and misinterpretation of the law. The fact is that there are only five sections in Chapter 66 which were not taken from and based upon the common law, and hence it is impossible to understand our procedure unless we know the material from which it is derived.

An instance of an inherent defect in the law is found in Section 105, Ch. 73, Gen. Stat., which empowers the jury to determine the law and the fact in libel suits. The truth is that the language in this section was a part of the Wisconsin constitution and copied from the constitution into the Wisconsin Statutes, and as the constitution gave this power to juries the statute embodied the power for fear, the constitution did not operate propria vigore, as it had the right to do. But as our constitution does not contain this provision, but on the contrary affirms the common law jury, in asserting that the right of trial by jury shall remain inviolate, the jury cannot determine the law, because the common law jury could not do it. It therefore follows that this section of Ch. 73 was put into our law without a proper knowledge of the common law and our constitution, because the reading of the section would suggest that it infringed the common law and could not prevail in the face of the constitutional affirmance of the common law jury.

An instance (and a very expensive one) of the misconstruction of the law is the practice of requiring a copy of the stenographer's report of the case and calling it a proposed case, for the basis of a motion for a new trial and afterwards as the record of the case on the appeal, in what is called the paper book; (as if there were any other kind of books, a name given by the English barristers hundreds of years ago). The law for this is found in Section 254, Ch. 66 Gen. Stat.; which provides that the motion for a new trial is made upon a bill of exceptions or a statement of the case or upon affidavits. The New York Commissioners, who originally framed this section, state in their report that this section is based upon the common law with the exception that the bill of exceptions was at common law made after the motion for a new trial was denied, because then it was to be used

and hence it was not to be made until there was use for it, whereas under this section it must be made before the motion whether it was used or not, because it frequently occurred that the lawyers and judges differed as to what the bill should contain; and the exception that a statement of the case was for the purpose of meeting the chancery procedure then used and thus prevent voluminous records, which could also be and was then generally used in law cases. The commissioners expressly state that the statement of the case provided for, meant a concise statement of the facts and the rulings on the law if any, and expressly retained to prevent voluminous records and costly appeals which was then the practice.

At common law the bill of exceptions was used to show the error of the nisi prius court, because the testimony was given orally in court. In chancery, the testimony was taken in writing and the appeal carried the bill, answer and testimony to the appellate court, and at the time of the commissioners the statement of the case, or as it was usually named, an agreed statement of the case, dispensed with this voluminous record. Then it had to be an agreed statement of the case because the law did not provide for such a procedure, but was allowed by agreement, but after this law, it was provided by law, and means what the commissioner said it meant and what was at that time known as an agreed case.

The intention of the commissioners was to put the statement of the case on the same footing with the bill of exceptions, and if not agreed to by the attorneys for the judge to settle it.

This is only one of the hundreds of instances where the courts of this jurisdiction have gone wrong, and instead of the simple and inexpensive statement of the case, the courts have injected the old chancery practice of an artificial and ruinously expensive record, filled with wind and chaff, instead of a record of the precise point involved, and thus justice and right is blown out of sight by the wind in the record.

Fellow Servants.

The West Virginia Court of Appeals in Flannegan v. Chesapeake and Ohio Railway defines a fellow servant as well as has been done in late years, except, perhaps, the late opinion of Justice Canty of our own Supreme court. The West Virginia court said:

"The definition of 'fellow servant,' as settled by recent decisions, is, those 'who are so far working together as to be practically co-operating, and to have opportunity to control or influence the conduct of each other, and have no superiority, the one over another' (Madden v. Railway Co., 28 W. Va. 619), while it is held that those who act in a superior position, and have the right to direct and control the conduct of others are not fellow servants of such others, especially in discharge of superior duties. Riley v. Railway Co., 27 W. Va. 146; Core v. Railroad Co., 38 W. Va. 456. The rear brakeman or flagman on a train is the fellow servant of the front brakeman, for each has his respective, separate, yet dependent, duties to perform in the running of the train; and they may influence, and even control, each others conduct, yet they are neither superior to, nor can they control each other. Yet the flagman occupies a far different relation towards the trainmen of all other trains, for, in giving them

warning of the obstruction of the track by the train to which he belongs, he performs a duty delegated to him by the master; and for his failure to discharge it the master is liable, for it is one of the master's personal or non-assignable duties to keep the track free from obstructions, for the safety of his employees. So a flagman, in discharging the same duty, acts as a fellow servant to some, and as the superior or master to others, of his coemployees. Two persons who are called upon to perform the same duty, in effect, may occupy a relatively different position to the same employee, in its discharge. For instance, the flagman protects his coemployes by warning the approaching train, while the master, the dispatcher, and the operator render them the same protection by not allowing the train to use the track until it is clear. One stops the train. The other holds it back. The one is a part of the train, while the other belongs to an entirely different department, which has the supervision and management of all trains, and yet it is no part of any train, but is entirely stationary. The one acts for self protection. The other, being in no personal danger, acts for the safety of others, and the dispatch of his master's business. In this case the defendant, seeking to discharge its personal duty and provide a safe track, and at the same time facilitate the rapid movement of trains, established the signal station, and placed the operator in charge, with full authority, by means of a code of signal orders, equally as effective as any other kind could possibly be, to control the running of all trains over this block; and all trainmen, of every train, were under absolute rule to watch for and obey her orders before they dare enter upon the block. If she had been attentive to her duties she must have known the block was occupied and obstructed, and her knowledge was the knowledge of the master, yet, in the face of that fact, she negligently gives a peremptory signal for the train to proceed. In what way could she possibly be the fellow-servant of the trainmen, who are entirely at her command and who can neither influence nor control her independent actions? She is as much the master of her section block as the master of the whole road. The doctrine, as recognized and enforced in this state, is that it is the personal or non-assignable duty of the master (1), to exercise reasonable care in providing and keeping in repair suitable machinery, and all necessary appliances, including a safe place to labor; (2) to exercise a like care to provide and retain suitable servants for each department of service; (3) to establish, confirm to and enforce compliance with proper rules and regulations. These are the superior duties for the proper performance of which the master is responsible, whether he intrusts them to a department, or any employee, of any grade, and the neglect of which by the agent or agents to which they are entrusted renders the master liable to any one injured by reason of such neglect, against whom and to whom contributory negligence cannot be shown or imputed, from his own act or the act of a fellow servant, whether it be of commission or ommission. Daniel's Admr. v. Railway Co., 36 W. Va. 397; Cooper v. R. R. Co., 24 W. Va. 37; Schroeder v. Railway Co., 108 Mo. 323; Foster v. Railway Co., 115 Mo. 165. The decisions of many jurisdictions are not in line with our decisions on this subject. 7 Am. & Eng. Enc. Law, 821, tit. 'Fellow Servants.' The rule of stare decisis applies with impregnable force

in this instance, and from which there is no way of escape, even if the court were so inclined, unless by an utter and reprehensible disregard of all precedent."

Self Defense the Rule.

The recent cases of State v. Evans, (Mo.); Page v. State, (Ind.) Beard v. U. S., 15 S. C. Repr.; in line with Erwin v. State, 29 O. St. 186; and Martz v. State, 16, O. St. 162, asserted the rule of self defense to be that "where a person in the lawful pursuit of his business and without blame, is violently assaulted by one who manifestly and maliciously intends and endeavors to kill him, the person so assaulted, without retreating, although it be in his power to do so without increasing his danger, may kill his assailant if necessary to save his own life or prevent enormous bodily harm." Such a rule is not logical or true. It is true that a person, without blame, may resist an assault and make use of resistence proportionate to the force of the assault, but the resistence is for protection only. Self defense is protection, and protection is self defense. A person assaulted has two remedies—self defense or resistence to the assault so as to protect from the assault, or retreat so as to prevent it. If resistence will protect or prevent, he may use it, and if retreating will protect or prevent, he must do so; because the justification is to protect or prevent, and not to aggress, for, as soon as we pass from protection or prevention, we assault and are not acting in self defense. The true rule is that if the appearances of the assault are such that a person with ordinary understanding would believe that his life was in danger or that he would receive great bodily harm, and he could not, with safety, retreat, he may kill his assailant. The principle is that a person must not be killed if it can be avoided. If resistance or retreating will save life or bodily harm, that must be done. If resistance or retreat can not save life, or prevent bodily harm the killing is justifiable, because there is no protection left but that; and whether or not there should be retreat or resistance is to be measured by whether or not a person of ordinary understanding would have done so, and this is for the jury.

A well-known barrister relates the following story with great gusto. Some time ago he had under cross-examination a youth from the country who rejoiced in the name of Sampson, and whose replies were provocative of much laughter in the Court.

"And so," questioned the barrister, "you wish the Court to believe that you are a peacefully disposed and inoffensive kind of a person?"

"Yes."

"And that you have no desire to follow in the steps of your illustrious namesake and smite the Philistines?"

"No, I've not," answered the witness. "And if I had the desire I ain't got the power at present."

A sarcastic lawyer, during the trial of a case, remarked: "Cast not your pearls before swine." Subsequently, as he arose to make the argument, the judge said facetiously: "Be careful, Mr. S—, not to cast your pearls before swine." "Don't be alarmed, your honor, I am about to address the jury, not the court."—Irish Law.

Reporting and Writing Opinions.

The two pernicious evils now prevailing is bad reporting and the writing of opinions by Judges without previously well digesting the matter.

All opinions should be written at least twice, and not until all the matter is carefully and logically digested because it is the object of an opinion to furnish a clear and concise rule of action or principle to govern the case in hand and to give a rule for all subsequent cases, which cannot be done by turning out matter as first written or without careful and logical digesting.

In reporting, the most exact care should be taken to state the exact point decided and the principle which controlled the decision, so as to be the rule for subsequent cases, which is known as the syllabi. An instance is furnished by the case of Butler v. Ellerbe, 22 S. E. Rep. 425, where the whole syllabi of ten points, is erroneous. The question involved in the case was whether or not the registration law was constitutional, and to test this question an injunction was sought to restrain the payment of the appropriation for such registration. The court decided that such an action was against the state because it was against officers of the state to prevent the discharge of an official duty, inasual, who is a state officer, to restrain much as a state acts by and through individuals, and therefore, as leave was not first obtained, as the law requires, the suit was dismissed. The exact point decided was that the state could not be sued without first obtaining leave to sue, because the law requires this, and that a suit against an indivthe performance of an official duty ,is a suit against the state.

Suppose this erroneous and lengthy syllabus, is passed into the American Annual Digest, can it be anticipated, the harm that may come from this error. This instance is not an isolated one, it is really the normal condition of the reports except perhaps the Wallace Reports which were edited by an experienced, learned and exact man.

In writing opinions, our courts ought to follow as much as possible the rules used by Chief Justice Marshall and Chief Justice Taney which were to extract the meat of the case in the first instance, then arrange it in logical order and prove it and then, in writing the opinion, to first lay down the rule and prove that rule logically and by the authorities.

A Telephone Line

along a country highway, constructed under statutory authority, is held in Cater v. Northwestern Telephone Ex. Co. (Minn.) 28 L. R. A. 310, to be a proper use of the street, and not an additional servitude. But this case, as well as People v. Eaton (Mich.) 24 L. R. A. 721, is opposed to a majority of the decisions found in a note to the latter case, as well as to Eels v. American Teleph. are held in State v. Farrington (Minn.) & Teleg. Co. (N. Y.) 25 L. R. A. 640.

Second Indictment.

Evidence on which an indictment was found may be used by the grand jury to find a second indictment when the former is dismissed. State v. Peterson (Minn.) 28 L. R. A. 324. This case has a note on the sufficiency of evidence before a grand jury to sustain an indictment.

THE STEENERSON RATE CASE.

JUDGE KERR of the second judicial district, on appeal by the Great Northern railroad from the order of the State Railroad and Warehouse Commission, holds that that commission can fix reasonable rates only.

The commission fixed the rate for the entire state, based on a rate per 100 pounds per mile in sections of five miles. For five miles and under, 4 cents; over five miles and not exceeding ten miles, 4.25 cents; over ten miles and not exceeding fifteen miles, 4.5 cents, and so on up to 400 miles. The railroad appealed on the ground that prior rates were reasonable, that the rate fixed by the commission was too low, and that the commission had exceeded its authority in establishing rates all over the state instead of between the specified stations.

The court gives the history of the Great Northern and its cost, as testified to before him, and said that the present cost of its reproduction would be about $44,000,000.

Speaking of determining reasonable rates, Judge Kerr says:

"It is difficult to conceive of a problem more intricate and involving more matters which must be taken into consideration before a satisfactory answer can be reached." * * *

"I have refrained from any attempt to indicate what would be a just and reasonable rate between the points named; this because I believe it to be without the province of a court of law to determine such a question."

In conclusion, he says that he simply passes upon the validity of an order made a year ago. It does not prevent, and should not deter the commission from making at once another essentially similar order if present circumstances would justify it. The reasonableness of a rate changes with changed conditions and circumstances, that which would be fair and reasonable today six months or a year hence may be too high or too low, and so that which may have been an unreasonably low rate at the time of the commissioners' order may be reasonable now.

"If your honor please, I'd like to get off the jury," said a juryman to Judge Oakley, of New York, just as the trial was about to commence.

"You can't get off without a good excuse," said the judge.

"I have a good reason."

"You must tell it or serve," said the judge.

"But, your honor, I don't believe the other jurors would care to have me serve."

"Why not? Out with it."

"Well—" (hesitating)

"Go on."

"I've got the itch."

"Mr. Clerk,", was the witty reply, "scratch that man out."

"Now, Mr. Breeves," asked the chairman of the investigating committee, "is it not true that you took the case of Jones v. Brown on a conditional fee—that you agreed to accept a part of the amount recovered as your fee?"

"It is not true, sir," replied the lawyer; "I stipulated that I should have all of it and $500 besides."

"Gentlemen," said the chairman, "I fail to see where Mr. Breeves has been guilty of unprofessional conduct at all." —Green Bag.

Mortgage Without Consideration.

Parol evidence that a mortgage was without any consideration, but was taken merely to prevent squandering of the property, is admissible, Baird v. Baird, 145 N. Y. 659, 28 L. R. A. 375.

HON. PAIGE MORRIS.

Judge Morris, appointed by Governor Clough, to fill the vacancy on the Bench of the Eleventh Judicial District, caused by the resignation of Judge Lewis, was borne at Lynchburg, Va., in 1853. After passing through the preparatory schools, he entered William and Mary's College, where he remained for two years. He then entered a private school managed by his uncle who afterwards became president of the University of Georgia. Then he attended the Virginia Military Institute where he stood first in his class and took the degree of C. E. After graduation he taught for two years in this institute, occupying the Chair of Assistant Professor of mathematics and at the end of that time was made professor of mathematics in the Agricultural College of Texas. He resigned this position and began the study of law and was admitted to the bar at St. Louis, Mo., and immediately entered upon the practice, but not liking the place he went back to Virginia, practiced law there and took some part in politics under the leadership of the late Gen. Mahone. Judge Morris was postmaster at Lynchburg, Va., under President Arthur for about two years and moved to this state, settling at Duluth in 1887, where he resumed the practice of law. He was elected Judge of the Municipal Court and at the expiration of his term in February, 1892, he entered into a partnership with Hon. D. H. Twomey which continued until dissolved by his election to the bench. Judge Morris was serving his second term as corporation counsel of the city of Duluth with great benefit to the city and credit to himself. He is a public speaker, a thorough gentleman and a good lawyer.

COMMENTS.

The last of George Birkbeck Hill's A Talk over Autographs appears in the November Atlantic. Dr. Hill will contribute during 1896 further papers on the letters and journals of famous men.

In the Review of Reviews the part played by the liquor question in the New York campaign is very clearly described. The present difficulties of the U. S. Treasury and the bearings thereof on national politics are discussed. The opening of the Atlanta Exposition and the recent patriotic gatherings at Louisville and Chickamauga, the international yacht racing fiasco, the building of American battle-ships and Lord Wolseley's appointment as Commander-in-Chief of the British Army, are included. The Madagascar campaign, he massacre of missionaries in China, the Armenian question and progress in South Africa under Cecil Rhodes pass under editorial review. "Religious Journalnalism and Journalists" is an article by Mr. George P. Morris. Sir Frederick Frankland, Bart; contributes an account of "Matabeleland under the British South African Company." Messrs. Louis Becke and J. D. Fitzgerald contribute a fresh and suggestive study of the politics and social life of the Maoris.

The Parting of the Ways, in the November Atlantic, is a study of the question of physical culture for women.

An important decision was recently rendered by Judge Jamison of the Hennepin County District Court. An assignee in insolvency engaged a broker to sell real estate. There was a deficiency in the quantity of land contracted for, and the assignee refused to pay the commission. The broker

brought the assignee into court by an was made that an order to show cause order to show cause. The objection was improper, because the issue should be tried by a jury. The court overruled the objection. Subsequently a reargument was made but no authorities cited. The court then called attention to Ch. 54, Laws 1893, which is § 5174-76, G. S. 1894, holding that the second section entitled the assignee to a jury trial of the questions whether or not the broker had found a purchaser who was "ready, able and willing" to take the property at the price named and whether or not he had earned the commission, even conceding that there was a shortage in the land contracted for. This law after providing that an action can be brought against an assignee in respect to "any act or transaction in carrying on the business connected with such property or corporation without the previous leave of the court," directs that "such action shall be tried in the same manner and subject to the same rules of procedure as against the person or corporation for whom he acts under the court in case no receiver, assignee or manager had been appointed."

During 1896 the Atlantic will publish a number of papers upon the Race Elements in American Nationality.

NOTES OF DECISIONS.

Insolvent Banks.

The question whether claims against an insolvent national bank are to receive dividends on the full amount, is answered in the affirmative by the Federal circuit court of appeals in Chemical Nat. Bank v. Armstrong, 28 L. R. A. 231, where the subject was considered most carefully on two rehearings.

Trespasser on Railroad Grounds.

A person may be a trespasser when passing over private grounds by a dangerous route which the owner directs him to take in leaving the premises is held in Kansas City, Ft. S. & M. R. Co. v. Cook (Mo.) 28 L. R. A. 181, where he entered a railroad yard in violation of rules, and was ordered off by a different route from that by which he entered.

The Fight Between Federal and State Courts.

This time between the Missouri state court and the United States Circuit Court for the Western District of Missouri. After judgment of lien by the state court but before execution, the United States court assumed control of the property and appointed a receiver. The rule was laid down in Heidritter v. The Oil Cloth Co., 112 U. S. 305, that the court which first acquires possession or dominion of the property involved has the exclusive jurisdiction. This rule was discussed and applied in Riggs v. Johnson, 6 Wall. 187; Gates v. Buckie, 12 U. S. App. 69; 4 C. C. A. 116; 53 Fed. 961.

If congress had confined the federal judiciary to the jurisdiction in the judiciary act, or if that judiciary act had been framed so as to explicitly point out the specific jurisdiction under the general terms of the federal constitution, and not limited to general terms or words which cover more than one thing, there would have been no conflict.

The trouble with the federal judiciary is that ignorance and cupidity in congress seeks to accomplish some mercenary or selfish purpose by stretching the general language in the constitution or in the judiciary act, and confer on these courts too much or inspecific powers.

Corporation Consolidation.

A transfer of all the assets and property of a corporation to another company in consideration of stock in the latter as a permanent investment, and not as a mode of winding up, is held in Byrne v. Schuyler Electric Mfg. Co. (Conn.) 28 L. R. A. 304, to be ultra vires and subject to avoidance by any nonassenting stockholder, irrespective of the profitableness of the transaction.

The Insolvency of a Bank

which is represented in clearing-house exchanges by a member of the clearing-house, with which it has a contract for the clearance of its checks and with which it has deposited money and securities, is held in O'Brien v. Grant, 28 L. R. A. 361, 146 N. Y. 163, not to defeat the right of the member of the clearing-house to apply such deposit and securities to its reimbursement for clearing the checks on the insolvent bank on the morning after the insolvency was announced, as it was obliged by its contract to do.

The Doctrine of the Dartmouth College Case.

has a striking illustration in State, White v. Neff (Ohio) 28 L. R. A. 409, in which the property of a college is held to be private property within the protection of the constitution, and a statute attempting to give absolute control and management of its affairs to the directors of another institution is held unconstitutional.

Fellow Servant.

A railroad company over whose road another company is operating trains is held not liable to a servant of the latter company who is injured by negligence of his fellow servant. Baltimore & O. & C. R. Co. v. Paul (Ind.) 28 L. R. A. 216.

The Constructive presence of a Murderer

in the State where his victim is struck by a bullet fired across a State boundary is held in State v. Hall (N. C.) 28 L. R. A. 289, insufficient to make him a fugitive in the State from which the shot is fired. Who are fugitives subject to extradition? — is discussed in a note to this case. In Re Sultan, 115 N. C. 57, 28 L. R. A. 294, a person buying goods by false representations, goes to his home in another State to which the goods are sent, is held a fugitive in the latter State who may be surrendered.

Service of Infants.

Actual service of process upon infants is held in Sloane v. Martin, 28 L. R. A. 347, 145 N. Y. 524, to be not necessary to the jurisdiction of a Federal court, in an action in the nature of a suit in rem for the judicial sale of real estate, where appearance is entered for the infants and a guardian ad litem appointed who defends for them.

Fraud to Obtain Cheap Rates of Freight

which relieves the carrier from liability for loss of the goods, is held in Shackt v. Illinois Cent. R. Co., 94 Tenn. 658, 28 L. R. A. 176, to be shown where an intelligent man ships in a basket with a rope around it valuable goods, such as silks, satins, laces, curtains, and other things, most of which are kept for sale by his wife, and remains silent when he hears them designated as "household goods," on which the rate is much less than on merchandise.

Limitations.

A cause of action for taking coal from beneath the surface by extending a mine from adjoining premises accrues when the discovery of the trespass was reasonably possible. Lewey v. Frick, 28 L. R. A. 283.

PERSONAL.

Sutherland & VanWert have removed to rooms on the 7th floor of the new Phoenix building, Minneapolis

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Ex-Judge Hicks has returned to the practice of law and has gone in to the firm of Cross, Carlton & Cross. The firm name now being Cross, Hicks, Carlton & Cross, with offices in the New York Life Building, Minneapolis.

Dickinson & Lum is a new firm of pleasant young gentlemen with offices in the "Phoenix" Minneapolis.

Stanford & Arbury of Duluth have dissolved partnership, Mr. Arbury's time being wholly taken up with his duties as county attorney, Mr. M. H. Stanford taking rooms 601 and 2 Torry Building, the county attorney retaining the old quarters, 716 Torry building.

J. E. Stryker has removed to the Pioneer Press building, St. Paul.

A. R. Moore and S. E. Day occupy elegant rooms in the Globe building, St. Paul.

D. T. Calhoun, late of the firm of Taylor, Calhoun & Rhodes, which recently dissolved, and Jas. R. Bennett, Jr., have formed a copartnership in St. Cloud under the name of Calhoun & Bennett. Both are widely known, and practioners of the Stearns county bar for many years. Mr. Calhoun has been Mayor of St. Cloud and County Attorney of Stearns and proved himself conscientious and able. Mr. Bennett is a graduate of Yale and president of the board of education of that city.

A Forfeiture of the Charter of a Municipal corporation is held in Hornbrook v. Elm Grove (W. Va.) 28 L. R. A. 416, to be enforceable, if it can be enforced at all, by the State only and in a direct proceeding. In this case there was an attempt to enjoin the collection of taxes on the ground that the charter had been forfeited.

Wages.

The validity and effect of statutes requiring wages to be paid in lawful money is decided in Avent-Beattyville Coal Co. v. Commonwealth (Ky.) 28 L. R. A. 273.

A statute requiring manufacturers to pay wages of employees weekly, although applying to individuals as well as corporations, is held in Re House Bill No. 1230 (Mass.) 28 L. R. A. 344, to be within the power of the legislature under the Massachusetts Constitution.

General Allegations in an Indictment 28 L. R. A. 395, to be limited and qualified by allegations of specific facts upon which the general allegations are based.

Assessment of Railroads.

Railroad tracks are not benefitted by street improvements, and are therefore not subject to assessment for the same, Chicago, M. & St. P. R. Co. v. Milwaukee (Wis.) 28 L. R. A. 249.

Local Option.

A statute allowing the suspension of penalties of a liquor law by action of the electors is upheld in State, Witter, v. Forkner (Iowa) 28 L. R. A. 206, against objections that it is an unconstitutional delegation of legislative

A Policy of Insurance. issued by an agent to himself as receiver is invalid, Wildberger v. Hartford F. Ins. Co. (Miss.) 28 L. R. A. 220.

THE MINNESOTA LAW JOURNAL.

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

DISTRICT COURT.

C. E. Thorne v. Wm. Reedy,
(District Court, Wilkins County.)

COSTS IN APPEALS FROM JUSTICE OF THE PEACE.

In appeal from judgment of justice of the peace, if defendant in district court succeeds in reducing the justice judgment one-half or more, he is entitled to costs and disbursements whether he appeared and answered in the justice court or not.

HENRY G. WYVELL for Plaintiff. LYMAN B. EVERDELL for Defendant.

BROWN, J.: This action was commenced before a justice of the peace. The defendant did not appear in that court, and judgment was rendered in plaintiff's favor for $94.29. The defendant appealed on questions of law and fact, served an answer with plaintiff's consent, to which plaintiff replied. At the trial in this court plaintiff obtained a verdict for $39.57. The clerk taxed costs and disbursements in plaintiff's favor on the theory that the defendant having failed to appear and answer in the justice court, the action was not tried therein, and does not come within the meaning of section 14, chapter 67, General Statutes.

This section of the statute provides that "In civil actions tried before a justice of the peace * * * if the defendant appeals and the amount of the plaintiff's recovery before the justice is reduced one-half or more in the district court, the defendant is entitled to costs and disbursements." * *

The plaintiff contends that this statute has no application to an action wherein the defendant did not appear and answer in the justice court; that there can be no trial unless there be an issue joined. In view of the fact that the plaintiff is required (Sec. 30, Chap. 65, G. S.) to prove his case in justice court whether the defendant appeared therein and answered or not; the construction contended for by the plaintiff cannot be given the statute. Hearing plaintiff's evidence and deciding therefrom that he is entitled to a judgment would be a trial within the meaning of the statute.

The taxation of costs and disbursements by the clerk is hereby vacated and set aside.

Tillie Van Etten v. German-Am. National Bank of St. Cloud.

(District Court, Sterns County.)

MORTGAGE OF HOMESTEAD.

A wife need not acknowledge the husband's mortgage of the statutary homestead, the title to which is in the husband. The signature of the wife is sufficient, even, if she did not know it was a mortgage.

OSCAR TAYLOR for Plaintiff. GEO. H. REYNOLDS for Defendant.

The plaintiff's husband being indebted to the defendant corporation executed a mortgage on the homestead, the title to which was in his name. The plaintiff, his wife, was joined in the mortgage and signed the same at the request of her husband, but did not know the contents, or know that

it was a mortgage, or acknowledge the same before a person authorized to take acknowledgments.

The notice of foreclosure did not contain a recital that the lots would be sold separately, and was not served on the plaintiff four weeks before the day of sale, but was served on the husband who was the owner of the fee and in the actual occupation and possession of the same. The mortgage was foreclosed by advertisement under the power of sale contained therein.

SEARLE, J.: The only question for the determination of this case is, whether it is necessary for the wife to acknowledge a mortgage given by her husband upon the statutory homestead, the title to which is in the husband.

Section 5522 of the 1894 General Statutes of Minnesota, provides "Such exemption shall not extend to any mortgage thereon lawfully obtained; but such mortgage or other alienation of such land by the owner thereof, if a married man, shall not be valid without the signature of the wife to the same, unless such mortgage shall be given to secure the payment of the purchase money, or some part thereof." This provision of the statute is constructed in Lawver v. Slingerland, 11 Minn., 447, (Gil. 330): "A mortgage * * * of such land by the owner thereof, if a married man, shall not be valid without the signature of the wife to the same, etc. The signature alone of the wife is required. The mortgage spoken of is, 'a mortgage by the owner and his wife.' The signature is required in token of her assent to a mortgage by the owner, her husband, not for the purpose of making her a party to the mortgage in the same sense in which her husband is a party. It is objected that to hold that the signature is sufficient without attestation or separate acknowledgment, is to introduce an anomaly into our law relating to the conveyance of real property or interest therein by married women. It was in the power of the legislature to fortify the homestead by whatever safeguards were deemed necessary. If, in the exercise of legislative discretion, it was deemed only necessary to provide that the homestead should not be mortgaged without the signature of the wife, no consideration of public policy can authorize us in putting such construction upon the law as will render the attestation of the signature or an acknowledgment, by the wife indispensable, however imperfect, in our opinion, may be the protection which any other construction would throw around the homestead. Under the old homestead law, Rev. Stat. (1851) p. 363, sec. 93, it was provided that 'no release or waiver of such exemption shall be valid, unless the same shall be in writing, subscribed by such householder and his wife, if he have one, and acknowledged in the same manner as conveyances of real estate are by law required to be acknowledged.' The difference between this language and that of the statute of 1860, by which a signature only is in terms required, to render a mortgage of the homestead valid, is significant, and furnishes no inconsiderable ground from which to infer that the change in the mode of waiving or conveying the homestead right was made ex industria; and it is proper, perhaps, to add, that following on, in the same direction, the legislature of 1866 repealed the statutory provision by which a separate acknow-

ledgment was required when a deed was executed by a married woman."

And in construing a statute in the same language as the section above quoted, Justice Ryan, of the Supreme Court of Wisconsin, in Godfrey vs. Thornton, 46 Wis. 677, uses the following language, * * * "whenever the wife executes a mortgage or conveyance to pass her separate estate, she is required to execute and acknowledge the deed, according to the general provisions relating to all grantors, so as to admit it to registry. In the provision under consideration, the mortgage or alienation is that of the husband, which shall not be valid without the signature of the wife to the same. It would be a violation of all the judicial rules of construction, to overlook this contract of language, going to the substance of the thing to be done, or to confound one provision with the other. It is apparent that the legislature has not done so, although it appears that this court once did. The one provision clearly relates to conveyances by a wife, which she must execute, whether the husband joins in the deed or not; and the other to mortgages or conveyances by the husband, in which the wife does not join, but which the husband cannot execute without her written assent. In the one case, the wife passes her own estate, actual or inchoate; in the other, she passes no estate, but simply assents to her husband's passing his. The one is a conveyance by the wife; the other is the wife's signature to relieve the husband from disability to convey his own estate. The statute requires the wife's conveyance to be witnessed and acknowledged so that it may be recorded; but requires the wife's consent to her husband's conveyance of his own estate, to be evidenced only by her signature. If the statute had intended the wife to join in the mortgage or alienation of the homestead, it would have said so; if it had intended the signature of the wife, which it requires, to be witnessed and acknowledged, it would have said so; then all the formalities necessary to entitle a conveyance to record should have been complied with. But the statute does not say so, and the court cannot do violence to the language which it uses, and torture the mere signature of the wife, by way of assent, into joining in the conveyance and formally executing and acknowledging it or the signature by which she assents to her husband's alienation of his own estate."

I am therefore of the opinion that it is not necessary for the plaintiff to acknowledge a mortgage given by her husband upon the homestead, the title to which was in him, neither was it necessary that the wife should acknowledge the instrument in order to entitle it to record. The acknowledgement by the husband, with the proper certificate by the acknowledging officer attached to the mortgage, was sufficient to entitle the instrument to record; it was valid without any acknowledgement by the wife, and the foreclosure under the power passed to the defendant the title in fee to the land in dispute.

The plaintiff and her husband joined in the covenants in the mortgage. I am of the opinion that the plaintiff would be estopped by the covenants from raising any of the questions raised by her in this action.

The point was also made by plaintiff's counsel that the mortgage was invalid for the reason that the plaintiff, at the

time she signed the same, did not know the contents of the mortgage, or as it was stated in the complaint, "she did not knowingly sign the same." The law in this state is well settled that it is the duty of a person signing an instrument of this character to know its contents, and that it is negligence upon either party not to know the same before executing it. In the language of Lawver v. Slingerland, supra, "if she signed it in ignorance of its contents, it would seem that she must attribute the consequences to her own neglect and carelessness." And in a more recent case, Quinby v. Shearer, 56 Minn., 534, Chief Justice Gilfillan, uses the following language: "The court also found that neither of the plaintiffs ever read or knew the contents of that deed. That fact is immaterial in this case. When a man executes a contract, the bare fact that he did not read it or know its contents will not relieve him from it. If it would, written contracts would be on a very insecure footing.

The conclusion of law is that the plaintiff is not entitled to any of the relief demanded in her complaint, and that the defendant is the owner in fee simple and entitled to the possession of all the land mentioned and described in plaintiff's complaint.

Let judgment be entered in accordance with these findings.

In the matter of the Estate of Josiah E. Hayward.

(District Court, Stearns County.)

COMPENSATION AND DUTIES OF SPECIAL ADMINISTRATOR AND ATTORNEYS.

A special administrator is only empowered to collect the goods, chattels and credits of the deceased and care for and preserve the same for the executor or administrator who may afterwards be appointed and receive a reasonable compensation for the labor performed.

An attorney employed to represent an heir cannot act for the special administrator nor receive compensation therefor, but is limited to the interests of such heir and be compensated by him.

SEARLE, J.: The question on this appeal, is the amount of compensation which the special administrator and his attorneys are entitled to.

As to the compensation of the special administrator the statute clothes him with limited powers only, namely, the power to collect the goods, chattels and credits of the deceased and care for and preserve the property for the executor or administrator who may afterward be appointed, and he can only receive compensation for such services.

Regarding the claim for attorney's fees. During all the time they were employed by the special administrator, they were the attorneys for one of the heirs in the contest of the will and in matters adverse to the appellants.

The larger portion of the services alleged to have been performed by the attorneys for the special administrator involved transactions in which the heir was interested adversely to the others.

No person belonging to either of the contending factions could have acted as special administrator, and none of the attorneys of either faction could properly counsel or advise the administrator where the interests are or could be conflicting. Nor can an attorney under the law recover fees for services rendered about or concerning such conflicting interests.

The law in this country is well settled that an attorney cannot accept conflicting interests with those of his client, and that any deviation in this respect may expose him not only to an action for damages but to discipline on the part of the court. An attorney cannot act in a suit in which he is employed as a commissioner to take testimony, nor as master to execute a decree, nor as administrator of an estate against which he is pressing a hostile claim.

In White v. Haffaker, 27 Ills. 354, the court said "In all legal proceedings,

and at every stage of a cause, courts scrupulously guard against entrusting the execution of its mandates, to persons having any interest in the cause. The law, for wise purposes, acts alone through disinterested agents. It will not tempt those having an interest in any way to abuse its process, for the purpose of promoting selfish ends. The relation of attorney and client is so intimate, and the duty of attorneys to protect the interest of the client is so rigid, that it can hardly be supposed that he would be willing, even if he were a disinterested person, to be entrusted with the enforcement of the legal rights of his client."

"An attorney oweth to his client secrecy, diligence and skill, and cannot take a reward on the other side."

"An attorney cannot serve professionally both parties to a controversy, and where he has been retained by one, he cannot recover for professional services rendered in the same matter to the other."

"An attorney is not at liberty to desert his client and take up against him in the same cause or a similar cause based upon substantially the same facts, for the purpose of getting better pay or even any pay. To allow such change of sides would reduce the attorney to a mere mercenary, always open for employment by the highest bidder. It would compel the poor man to surrender his supposed rights without contest, or enter into competition as a bidder for any legal talent with his more wealthy opponent. It would supplant the confidence which clients rightfully have in their counsel by a baneful suspicion and distrust. Eminent professional learning and ability will naturally command appropriate compensation; but professional integrity is not the subject of purchase, sale, or traffic. Such integrity is absolutely essential to the continued usefulness of the profession. Its untarnished preservation is as essential to the honor of the bar as it is beneficial to the public." (Dikeman v. Struck, 76 Wis. 332.)

The attorneys in this case are not entitled to compensation for the services performed by them in any matters in which the interests of their client, one of the heirs, were in conflict with the interests of the other heirs or devisees under the will or in matters in which the duties of the administrator to represent all the heirs and devisees and all parties interested came in conflict with the interests of such heir.

Willard Graves v. Village of Fairmount.

(District Court, Martin County.)

DEFECTIVE VERDICT—DISREGARD OF INSTRUCTIONS BY JURY.

A general verdict, which on its face discloses that the jury disregarded the instructions of the Court will be set aside.

T. S. FISK and M. E. L. SHANKS for Plaintiff, WARD, DUNN & WARD for Defendant.

Action to recover for personal injuries by falling from a defective sidewalk. The jury returned a general verdict for plaintiff, as follows, "We the jury find for the plaintiff in the above entitled action and assess his damages in the sum of $550.00 — this includes doctor's bills and nursing expenses." The court had instructed the jury not to consider or allow for nurse hire because there was no evidence of the value. The defendant excepted to the verdict when returned and moved for a new trial on a settled case and the whole record.

CALDWELL, J.: The verdict by its terms includes nursing expenses incurred by the plaintiff contrary to the express instructions of the court. The

plaintiff alleged in his complaint that he had been compelled on account of the alleged injury, to hire medical attendance and care, and to procure medicines and nurse hire. The evidence on the trial was sufficient to entitle him to recover for medical attendance and medicines, but did not to recover for nurse hire because there was no testimony showing or tending to show the value thereof. The jury was instructed that if they found for the plaintiff to allow him the expense incurred for medical care and attendance and medicines but not to consider or allow anything for nurse hire. This instruction the jury disregarded and for this reason a new trial must be granted.

PROBATE COURT DECISIONS.

Estate of D. E. Rosselle.

(Ramsey County.)

Defects in proceedings intervening between inception and final termination of the administration, do not defeat jurisdiction.

WILLRICH, J.: Is the order of Court, of September 20th, 1892, allowing the claim of Trask, void on its face for want of jurisdiction, on the ground that the citation upon which the order is founded was served on the administratrix by Trask, who is the party interested, such service being void under the Statute?

The Supreme Court has decided that when the jurisdiction of the Probate Court is once legally obtained, it continues over the administration as one proceeding until it is closed, and that whatever jurisdictional defects occur subsequently cannot be taken advantage of but by appeal.

In State v. Probate Court, 40 Minn. 299, the Court said: "The allowance of a claim by the Commissioners has the effect of a judgment, if not appealed from is conclusively binding upon all parties interested in the estate."

In Barber v. Bowen, the Supreme Court held, that although the claim which was allowed was not a proper claim against the estate, yet the allowance by the Probate Court had the effect of a judgment, it not having been appealed from, and it was conclusively binding upon all parties.

In State v. Ramsey County Probate Court, 35 Minn. 26, the Court said: "We do not think it was intended that any party might neglect his opportunity to contest a claim before the Commissioners or on appeal, and then contest it on an application for its payment, but that the award of the Commissioners, if not appealed from, and the judgment of the Appellate Court, in case of appeal, should be final and conclusive upon all parties interested in the estate, in all subsequent proceedings for its administration; the judgment on the claim of Coffin was, therefor conclusive."

It follows that the remedy of the Administratrix, was by appeal. This court has no right to vacate, or annul the former order although it appears of record that the party interested served the citation. Such service is only an irregularity which did not divest the Court of jurisdiction, and having heard and determined the claim and passed judgment, the same is conclusive upon all parties interested in the estate.

Estate of Carrie R. Fradenburg.

(Ramsey County.)

The wife's estate is liable for the expenses of her last illness and funeral though paid by the husband after her death.

WILLRICH, J.: The undertaker and the physicians make out their bills against the deceased, but finding no Letters Testamentary granted or no no-

tice to Creditors, present them to the surviving husband, who pays the same and files his itemized claim and verification in this court for the amounts so paid by him for expenses of last sickness and burial.

The executor objects on the ground that the claimant was the husband of the deceased and as such was liable to pay these expenses under the law; that they were living together at the time of her last illness; that it was his duty and obligation as a husband to employ doctors, purchase medicine, and after her death to employ undertakers, and that having voluntarily fulfilled these obligations he cannot now charge such expenses against the estate.

It is admitted that had these expenses been paid by any one upon whom rested no obligation to so pay them, then the estate would be clearly liable, and that where a person dying leaves an estate, the first claim upon it should be the expenses of last sickness and the interment.

The law, G. S. 1894, Sec. 5533 empowers a married woman with an ample estate to contract for medical expenses of this character for which the husband is not liable, unless it is proved that he employed the physician, and agreed to pay him, and the services were so rendered at his request and upon his credit.

Funeral expenses are of necessity contracted by the nearest surviving relative, husband, wife, or children. Hence these expenses are incurred and paid by persons upon whom rests the moral obligation to incur them, and the law makes no difference, whether they were incurred by a surviving husband or widow or children, and raises an implied promise on the part of the representative to pay them.

In Dampier v. St. Paul Trust Co., 46 Minn. 527, the court said: "It appears to have been settled beyond dispute in this country as well as in England, that an executor or administrator, having sufficient assets in his hands, is liable upon an implied promise to a third person, who, as an act of duty or of necessity, has provided for the interment of a deceased person, if the funeral was conducted in a manner suitable to his situation in life, with proper reference to the means of the estate, and the charges are fair and reasonable."

In McNally v. Wild, 30 Minn. 209, the surviving wife assumed and paid the necessary medical and funeral expenses of her deceased husband, and the court held, "a proper charge against his estate."

The conclusion is that the funeral expenses and the expenses of the last illness are to be paid from the wife's estate, the former to be passed upon by the probate court when the representative of the estate presents the account for allowance, and the latter filed and allowed the same as all other debts incurred in the life time of the decedent.

A few years ago the State's Attorney of a northern county in Vermont, although a man of great legal ability, was very fond of the bottle. On one occasion an important criminal case was called on by the clerk, but the attorney, with owl-like gravity, kept his chair.

"Mr. Attorney, is the State ready to proceed?" said the Judge.

"Yes—hic—no—your honor," stammered the lawyer; "the State is not in a state to try this case today; the State, your honor, is—drunk."

HON. FRANCIS CADWELL,

District Judge, Eighth Judicial District.

...THE...

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Writing Opinions.

The majority of, not to say all, the judges in this country, both federal and state; appellate, chancery or nisi prius, seem to forget when it is accurate and when inaccurate to use the word "court" instead of "judge."

When a judge is hearing and trying a case without a jury, his acts, opinions, rulings and decisions are rightly termed those of the "court;" but when he is hearing and deciding interlocutory matters, motions, etc., or when a case is being tried by a jury, the judge is but one constituent part of the court over which he presides as judge, and his words and rulings and his charge to the jury are the acts of the "judge," not of the court.

Yet everywhere in decisions of our appellate courts over the entire country, one may read expressions like these: "The learned court below erred in charging the jury," or "the trial court erred in denying the motion for a new trial,"or "the court below erred in excluding the evidence offered," etc. In all such sentences the word "judge" should be used.

Nor can a judge—without logically appearing egotistical—when charging the jury, say, "The court instructs you so and so." The judge is not the whole court. Theoretically, all attorneys, the sheriff, clerk and the grand and petit jury panels are each and all constituent parts of any given court, each with distinct offices therein.

Again, picking up at random any number of the National Reporter System,

and glancing over the decisions therein reported, one may find these expressions, "We are of the opinion that," or "We are convinced that," or "It is evident that," or "It is certain that." These words are utterly superfluous, and weaken rather than strengthen the point decided, or commented upon. A supreme court is of last resort. Its decisions are ultimate. It is impersonal. Therefore, what is said in a decision should come, so to speak, ex cathedra. Personal pronouns should be avoided, and instead of a sentence reading, "We are of the opinion that the findings of the trial court are supported by the evidence," how much better and forcible to read, "The findings of the court below are supported by the evidence." Instead of "We are convinced that so radical a change," etc., how much stronger and authoritative "Such a radical a change," etc., would sound.

In dissenting or concurring opinions, which are at best unnecessary and somewhat egotistical, and conducive to uncertainty and disrespect of the court, the use of the personal pronoun is correct. They are the personal opinion of one or two judges. But the majority opinion, being the law decided upon, should read impersonally and with the force of unalterable and ultimate authority.

Careful perusal of the reports of the English appellate decisions, will show that the judges there clearly and forcibly write and speak along these lines. Their decisions aptly illustrate these two points, i. e.. the correct use of the words "judge" and "court," and the authoritative and forceful use of decisive words without circumlocution and weakening adverbs or adjectives.

M. S. SAUNDERS.

Personal.

H. M. Farnam has removed to the Guaranty Loan Building, Minneapolis.

Ambrose Tighe and Jno. W. Lane are comfortably located in fine quarters in the Manhattan building. St. Paul.

Fifield & Fifield, of Minneapolis, Minn., announce that they have disposed of their St. Paul law office and business to J. F. Hilscher.

Hon. Everett P. Freeman, of Mankato, died Nov. 26, 1895. Deceased was one of the leading attorneys there. He had held the offices of city and county attorney, state senator and register of the Jackson and Marshall land offices. He was president of the Blue Earth County Bar association, which body will have charge of his funeral. He was 58 years old and a pioneer resident of Mankato. He was also an active Republican politically and was also a member of the Masonic lodge of that city.

The law firm of Jayne, Morrison & Lewis, with offices in Temple Court, Minneapolis, and in Little Falls, Minn., show evidences of deserved prosperity and increased business. Mr. Lewis, who has charge of the Little Falls office, has been for the past two years with Messrs. Jayne & Morrison in their Minneapolis office in the capacity of chief clerk. He is a graduate of Michigan University Law School at Ann Arbor, and has been admitted to practice in Michigan, Nebraska and this state. The degree of Master of Arts was recently conferred on him by this university.

The firm of Munn, Boyeson & Thygeson will remove to the new building known as "Newspaper Row" about Jan. 1st. The location is central and the offices and library room will be as fine as any in the state.

Minneapolis, Minn.—Another Gibraltar of the Hennepin County bar has been established in the law firm to be known henceforth as Shaw, Cray, Lancaster & Parker. The personal titles are John W. Shaw, Willard R. Cray, William A. Lancaster and Hazen M. Parker.

Our Portrait.

Hon. Francis Cadwell was born in Fulton county, Ohio, May 28th, 1842. Settled in Minnesota, 1864. Is married and lives at Le Sueur. He is a graduate of Hillsdale college, Michigan, and studied law at the Northwestern Christian University at Indianapolis. Has been county attorney two terms and school superintendent one term in Le Sueur county. Was appointed Judge in 1891 to succeed James C. Edson, and elected Judge of the 8th judicial district at the general election in 1892.

Law Book Thief.

The attention of lawyers is called to a Law Book Thief who hails from Iowa. When last seen he was attempting to dispose of a lot of Text books taken from offices in Cedar Rapids, Des Moines, New Hampton, etc., etc. He had on, when in St. Paul, a slouch hat, dark blue rain coat and gray suit—face rather thin and small chin—small black moustache and rather weak harsh voice. Watch for him.

Lost and Found Books.

Edwin A. Jaggard, St. Paul, writes:

I would respectfully suggest that you add to the Minnesota Law Journal a column to be filled with notices of books lost and found. I have in my possession Volumes II and III of American and English Encyclopedia of Law. These volumes do not belong to me. There is nothing on them to indicate to whom they do belong. I have no desire to appropriate them, but what am I to do? On the other hand the gentlemen to whom they belong are caused continually inconvenience and perhaps put to considerable and unnecessary expense. Some time ago some good fellow borrowed my copy of Innis on Torts. I am very anxious to recover it. If I knew who he was and could call his attention to it, he would be very glad to return it. There are hundreds of lawyers in the same predicament, viz., of having books they would like to return and books they would like to have returned.

Literary.

The Review of Reviews for November reviews the events of the preceding month, the possibilities of war in the far East; the progress of Christian missions in the Orient; the prospects of Japan and Russia as Eastern powers, and also comments on the relations of Russia and France, the Italian celebrations, the French victory in Madagascar, the Cuban situation, and British policy in Venezuela.

It contains interesting portraits of Pasteur, and presents an account of the illustrious French chemists life work, and publishes for the first time a curious pen sketch of the late Professor Huxley, drawn by himself in 1848. The recent progress of Italian cities is ably described, showing progress made for Rome, Milan, Genoa, Turin, Florence, Naples, Palermo, and Venice. This study of Italian city renovation is full of suggestion to our American municipal reformers. An illustrated account of the recent General Convention of the Protestant Episcopal Church, at Minneapolis, also appears. An article on international sports, calls attention anew to the proposed athletic meeting at Athens in 1896.

The Atlantic Monthly for December has another of John Fiske's historical studies. "The Starving Time in Old Virginia," and is an important historical contribution.

Also contains three short stories: Witchcraft, by L. Dougall; The End of the Terror, by Robert Wilson; and Dorothy, by Harriet Lewis Bradley.

This rather remarkable legal question is bothering the lawyers of Wichita, Kan.: Can a judge compel a witness to drink beer, and, if the witness declines to indulge, can he be committed for contempt of court? In a recent case brought against a beer agency, an expert who was summoned to the stand refused to taste the liquor when ordered to do so by the judge. The witness did not pretend that he had any conscientious scruples against beer

drinking, but merely declined to drink at that time. He is now languishing in jail, but the action of the judge will be reviewed on habeas corpus proceedings. The case is apparently novel, and the final decision will have a bearing on the action of witnesses is similar cases.

A story is told of one of her majesty's judges who is as remarkable for the quickness of his eyes and ears as for the keennness of his intellect. The other day a stranger in court, espying a friend, addressed him in a stage whisper with:—

"Hallo, old man! I haven't seen you lately. Are you all right?"

The remark was hardly heard beyond the nearest bystanders, and there was, consequently considerable bewilderment among those engaged in the case before the court when the judge looking up from his notes, observed:

"If the old man is all right, he had better go outside and say so."—Green Bag.

In a recent decision the Minnesota Supreme Court declares that the common law rule making the husband liable for damages for slanderous words uttered by the wife, even though he was neither present nor a participant, is not abrogated by any statute, and therefore holds good in that state. If a husband is civilly responsible for slanderous words spoken by his wife, on the same principle and logically he is criminally responsible. Yet, even in Minnesota, no jury would convict or court sentence a husband on this ground, because it is contrary to justice to punish one person for another's crime. Civil responsibility is equally unreasonable and obnoxious, and the lawmakers of the state will be derelict in duty if at the first opportunity presented they shall fail to abolish it. The rule was perhaps good enough when the wife was the husband's chattel, drudge and slave, but in these days of bloomers, bikes and woman's rights, it is absurd and an anachronism. —Ex.

Students--Voters.

In In re Garvey, 41 N. E. Rep. 439, the court of appeals of New York has re-asserted the principle laid down by it in In re Goodman, 146 N. Y. 484; 40 N. E. Rep. 769, that, under the constitution of that state, Art. 2 §3, which provides that "For the purpose of voting no person shall be deemed to have gained or lost a residence, by reason of his presence or absence * * * while a student of any seminary of learning," the intention to change the legal residence must be shown by acts independent of a person's presence as a student in order to entitle him to vote in the new locality; and applying this rule to the facts of the particular cases before it, decided (1) That evidence that a student coming to attend a seminary as a student notified the registrar of the place of his former residence to strike his name from the voting list, as he had changed his legal residence, and also notified the authorities of the seminary that he had become a resident of the town in which it was situate, his object in so doing being to render himself eligible as a postulant, showed an intent to change his legal residence by acts independent of his presence as a student; (2) That evidence that a person went to a seminary as a student; that he engaged in the business of book selling, and was also lay reader in a church; that he was not obliged and did not intend, to leave the seminary after his course of study should be ended, did not establish a legal residence in the town where the seminary is situated; and (3) That evidence that a person went to a seminary as a student, and also as a teacher, and intended to establish his residence at the seminary after his course of study should be ended, was not sufficient ot show a legal residence in the seminary town.

Judge William E. Clarke of Marengo County, Alabama, is a man of marked individuality, and conducted the court in the Mobile circuit with promptness and decision. During one of the many

trials of a famous insurance case in Mobile, some years ago, a juror was objected to as an agnostic. He was excused at the request of both sides. At recess for dinner, a juror going down the steps with the judge said that he had observed a man was excused because an agnostic, and asked, "What is an agnostic, judge?" Judge Clarke took the matter under advisement for a moment, and then replied, sententiously, "An agnostic is a d—d fool!" In some theological quarters this definition would probably be accepted as strictly correct.—Green Bag.

A transfer of stock, pledged as collateral, on the books of the corporation is not necessary in Minnesota.

Cross-Examination---Attachment for Witnesses.

The objection to the opinion in Barnes v. Christofferson, 64 N. W. 821, is that it does not state the rule and support it by approved decisions as well as Minnesota cases, if any, and then fit the facts of this case into that rule.

The conclusions of the opinion are correct, except, perhaps the second, but what the bench and bar alike need for their guidance is a statement of a general rule, logically reasoned out, and supported by approved and well considered decisions. They do not need rules made to fit the particular facts of each individual case for the facts of no two cases are alike. The value of such rules must of necessity be limited to that case and they cannot operate as guides for future litigation, as they are merely specific opinions based on a specific combination of facts and circumstances.

The facts in this case were that the defendant cross examined the plaintiff concerning a conversation not brought out by the examination in chief. It was new and material matter. The plaintiff then introduced further testimony as to that conversation, to which the defendant did not object, but after it had been introduced the defendant moved to strike it out and the court denied the motion because the defendant brought out the new matter in cross examination.

The rule is that new and material matter elicited by defendant in the cross examination will let in further testimony by the plaintiff concerning this new and material matter; because the purpose of a trial is to ascertain the truth and if the new matter brought out by defendant belonging to that issue could not be investigated by further testimony on behalf of the plaintiff, the truth of the issue would not be ascertained. Justice would be thwarted and the trial would become a snare by which unprincipled lawyers (if there are any) would win regardless of the merits of their case.

It seems difficult to understand the logic of the custom, not practice, to move to strike out testimony. Strike it out from what. From the stenographer's notes. The stenographer performs no legal function in the trial of a cause. He merely assumes to put down that which takes place at the trial and the truth or accuracy of his notes depends upon his expertness. In a majority of cases this report is only approximately correct and can be only an approximate guide for the parties in after proceedings. The testimony cannot be stricken out from the recollection of court or jury because it is already in their ears and mind. But it can be excluded from being considered as in the case, and hence the motion at common law was to exclude incompetent testimony. If incompetent testimony got in without objection, the remedy was by motion to exclude, but when it was offered, the remedy was by objection to the introduction, because testimony can be objected to before introduction and excluded from consideration after being introduced. It cannot be stricken out, however, because it has entered the mind of the judge or jury or both.

The second ruling in this case is that an attachment for a witness cannot issue on the statement of the defendant's

attorney (moving for the issuance) that the witness had been subpoenaed and the fees paid, when coupled with a motion for continuance; because, in this case, there was no proof that the witness was not present, that the subpoena had been served, his fees paid or that his testimony was material. The affidavit in the paper book showing the service and non-attendance was not a part of the settled case nor the basis for the motion for attachment.

G. S. Ch. 73, Sec. 1-5, provides for the issuance and service of the sub poena and the liability for failure and empowers the court to issue an attachment to bring the witness before it to answer for the contempt and also to testify as a witness. Section 9, Ch. 70, requires the payment of one day's attendance and mileage. The service is made by any person exhibiting and reading the subpoena to the witness or giving the witness a copy or leaving a copy at the place of his abode (G. S. Ch. 73, Sec. 2) and of course the affidavit showing this service is a part of the subpoena.

If therefore the subpoena and affidavit have been filed or are in court, it is evidence to that court of the issuance and service of the subpoena and "if any person," as the law reads, "duly subpoenaed and obliged to attend as a witness, fails to do so, the court may issue an attachment to bring such witness before it." It therefore follows that the affidavits of service is a part of the subpoena and the presentation of these two papers in the papers of the case, or in court without filing, is evidence of the issuance and service, and upon the failure of the witness to appear when called, the court must issue the attachment, because the law says when the witness is duly subpoenaed the attachment "may" (meaning must) issue. There is no law which says there must be proof that the witness is not present or that the testimony of the witness is material or that the subpoena and proof of service must be a part of the settled case. It is true that the record for the appellate court, properly known as the writ of error, should contain the errors complained of, committed by the trial court, but these errors can appear in the record as well as the bill of exceptions (or settled case as this jurisdiction calls it) and to prove this, it is only necessary to recur to the common law practice.

At common law the service was made by the sheriff and his return written on the subpoena. If the witness did not appear when called, the court, upon exhibition of the subpoena and the return and on motion of the party, issued a rule nisi for the witness to show cause why he disobeyed. If the court refused to issue the rule, the party excepted and put in his bill of exceptions the statement that the subpoena and return as shown in the record were exhibited to the court and the party thereupon moved for a rule nisi which the court refused and he then and there excepted. Instead of this the issuance and service and presentation to the court could be incorporated in the bill of exceptions, but when part of the record and the bill of exceptions showed the erroneous ruling, the error of the trial court was properly presented to the appellate court, because both combined showed the error of the nisi prius court. Hence if the record of this case, that is the papers before the lower court, showed that the witness was "duly subpoenaed" and the settled case, as it is called, showed the motion or request for the attachment, the presumption arises and is conclusive that the witness was not present, that he failed to appear as the law provides, that the court and its officers performed their lawful duty and called the witness; and if the court refused to issue the rule nisi, or attachment as the statute calls it, it erred in its ruling, because this is due process of law as known to the common law, and because this due process of law is guaranteed by the constitution.

Fraudulent Chattel Mortgage.

The question of fraudulent intent at the time of the execution of a chattel mortgage arose in Blakely v. Hammond, 64 N.W. 821, and while the court decided according to the rule laid down by the statute, no general rule is asserted, no case or statute is cited and no Minnesota case reviewed. On the contrary the opinion is expressly limited to the facts and circumstances in that case by the language "the question of fraudulent intent at the time of the execution of the mortgage was of such a character that it should have been submitted to the jury as a question of fact and not determined by the trial court as a matter of law" The words "of such a character" limits the decision.

The facts were that in September, 1893, the owner of a store gave a chattel mortgage on the stock and fixtures, designating the mortgagee as trustee and providing that the mortgagor act as agent for the mortgagee to sell and dispose of the goods in the usual course of trade and as explained by the testimony to keep up the stock, pay expenses and pay the mortgagee the profits which were $186.86. in eight months while the debt was $466. The mortgagee assigned the mortgage to the plaintiff in May, 1894, and in July, 1894, the defendant as sheriff levied on the goods as the property of the mortgagor and sold them; whereupon the plaintiff sued for conversion.

If a general rule can be framed from this opinion, it is that the question of fraudulent intent at the time of the execution of a chattel mortgage is one of fact and not of law. This is the rule in G. S. Ch. 41, Secs. 15,20, and Ch. 39, Sec. 1.

Mutual vituperation as affecting liability for slander is regarded as a defense in Goldberg v. Dobbertine (La.) 28 L. R. A. 721, but the note to the case shows that in Louisiana, as in other states, the mutuality of vituperation affects the damages rather than the cause of action.

Children on Turntables.—The recent New York case of Walsh v. Fitchburg R. Co., 145 N. Y. 301, annotated in 27 L. R. A. 724, held that a turntable on an unfenced lot near foot paths which the public were permitted to use was not a trap for the unwary and that the owner was not liable for injuries to children going on or riding thereon; thus following Illinois, New Hampshire and Massachusetts and rejecting the more sensible rule laid down by the Supreme Court of the United States and a majority of the state courts.

The moment it is admitted that a minor is not sui juris, the converse should follow that he cannot commit contributory negligence, because if, he is not sui juris ex contractu, he should not be ex delicto. If a court should reject this logic it should at least allow it in proportion as the proof showed that the plaintiff's age, discretion and judgment affected his knowledge of the danger and his ability to foresee the contingencies and results and hence sui juris pro tanto. If it could be proved that the child knew the specific danger and had the discretion to judge and understand it, it could be said that the presumption of non sui juris is rebutted, because after majority the presumption is that he has judgment and discretion. Hence, as the law arbitrarily says that a person has reasonable discretion and judgment at and after majority and has none during minority, there are only these two logical conclusions: that a minor either has or has not discretion and judgment to avoid or commit contributory negligence. If he has, he is accountable and if he has not, he is not accountable and if the courts assume the former in the face of this presumption and inference they ought to allow it to be determined as a fact, the same as any other fact.

It is natural for a child to go on a turntable or seek any other thing that apparently presents an opportunity to play, and equally unnatural for him to judge closely or discriminate accurately. It is very easy for the owner of the turntable to keep it locked and not un-

reasonable to require him to do so, just as it is not unreasonable to require an owner to fence his pond, a dangerous excavation or any other thing where there is hidden danger or indeed, apparent danger. But there is a wide distinction between an unlocked turntable on a travelled way and a pond or dangerous excavation, or even a railroad track open to trespassers. Hargraves v. Deacon, 25 Mich. 1; Klix v. Meinan, 68 Wis. 271; Clark v. Manchester, 62 N. H. 578; Overhalt v. Vieths, 93 Mo. 422; Gillespie v. McGowan, 100 Pa. St. 144; Pierce v. Whitcomb, 48 Vt. 127; McEachen v. R. R. Co., 150 Mass. 515; Gay v. R. R. , 159 Mass. 238; Beck v. Carter, 68 N. Y. 283; Gun v. R. R. 36 W. Va. 165; 32 Am. St. Rep. 842. These cases are not logical, however, for if a child strays on a railroad track and is hurt, the question ought to be, could the Ry. Co. have avoided the injury. If it could not, then it should not be liable for the accident and if it could, it should be held liable because the child is non sui juris. In the case of the pond or excavation, the question ought to be, whether or not it was dangerous. If it was, it should have been fenced, and this question should be left to the jury in the absence of legislation.

Miscellany.

A Queer Verdict.—In Stanley, Wis., a case was tried three times, twice the jury brought in the following verdict, "We, the jury, find the defendant guilty, but we disagree." At the last trial of which the jury brought in one of the above verdicts, the justice entered it on the record and underneath he made the following entry: "The defendant is discharged from custody" and another day was set to again try the case. On the day set the defendant did not appear nor his attorney, but later on his attorney moved for a dismissal of the case on the grounds that the record said that the defendant was discharged from custody, which was granted.

Admiralty Jurisdiction.—An interesting decision in admiralty has been filed by Judge Nelson in the case of Inman v. The Steam Tug Lindrup. The vessel was seized under a libel by the United States marshal of Minnesota, who made return that he had seized her "In the open waters of Lake Superior about 3,000 feet from the pier at Sault Ste. Marie, Michigan." On motion to discharge the tug for want of jurisdiction Judge Williams held that the court had jurisdiction because the seizure was made in the open waters of Lake Superior. It was thereafter shown by testimony that the tug was seized on Sunday July, 15, 1894, at a point in the St. Mary's river not more than 3,000 feet west of the south pier light, at St. Mary's canal.

It was claimed that the marshal's return was conclusive and could not be impeached, also that the question of jurisdiction was res adjudica. Judge Nelson holds that Judge Williams merely passed upon the point, that a vessel seized in the open waters of Lake Superior was within the jurisdiction of the District of Minnnesota, and that the present question is not res adjudicata; further that the statement in the return of the marshal as to the point indicated being within the open waters of Lake Superior, was a conclusion which the marshal had no authority to find, and preclude the claimant from showing to the contrary and that as the actual point of seizure may be either in the State of Michigan or Canada, this court has no jurisdiction. The libel is dismissed, each party to pay the costs incurred by it.

The much discussed question in recent Federal decisions, whether or not there is a national common law, is decided in the negative in Gatton v. Chicago, R. I. & P. R. Co. (Iowa) 28 L. R. A. 556, with the result that interstate shipments before the Interstate Commerce Act are held to be unaffected by any common law doctrine against discriminating charges.

Monroe Doctrine.—"Nobody in America ever pretended that the Monroe doctrine is a proposition of international law. It is a declaration of policy and one which people in America have always sustained, and in my opinion always will sustain as of vital importance to the people of the United States. Its bearing upon the subject matter of the Venezuelan dispute is very simple. Each country is entitled to what its predecessor held and no more, for no new rights have been acquired in the interval by either people.

"The question is, what was the true boundary between the Dutch and Spanish possessions? That question can properly be settled by arbitration. To refuse arbitration and to seize and hold by force disputed territory would open the doors, if England pursued such a course, to any other European power that desired to acquire any additional territory in Central or Southern America. It would fatally infringe on the Monroe doctrine. The people of the United States could not regard it as otherwise than the movement hostile to them.

"The Monroe doctrine, it should be remembered, is quite distinct from any question of reparation for injuries received by the subjects of foreign powers at the hands of the people or governments of Central or South American republics. With such questions we have nothing to do, but we cannot permit, under cover of a demand for reparation or in any other way, new territory to be acquired by any European power.

"Thus far the Monroe doctrine has remained a mere statement found only in President Monroe's message, but it is my belief that in the next congress both house and senate will, by formal resolution, declare it to be an intregal part of the policy of the United States to be maintained at all hazards.

A boy's description of having a tooth pulled expresses it about as well as anything we have seen. "Just before it killed me the tooth came out."

Immunity of Witness.

In Theodore F. Brown v. John W. Walker, U. S. Marshal, the United States Circuit Court, W. D., of Pennsylvania, held that the act of February, 1893, amending the interstate commerce act, affords the witness complete immunity from prosecution and from penalty or forfeiture for, or on account of the offense to which the questions propounded to him relate, and therefore his answers can not tend to criminate him. As he can not be subjected to any prosecution, penalty or forfeiture, his case is not within either the letter or the spirit of the Fifth Amendment to the Constitution of the United States. The act is constitutional and the witness can be compelled to answer.

The court said: The fifth amendment to the constitution provides: "No person * * shall be compelled, in any criminal case, to be a witness against himself," and in Counselmen v. Hitchcock, 142 U. S. 547, it was held this provision was not confined to a criminal case against the party himself; that its object was to insure that one should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show he had committed a crime. It was also held that R. S. Sec. 860, which provides that no evidence given by a witness shall be in any manner used against him in any court of the United States in any criminal proceedings did "not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitution for that prohibition," and afforded "no protection against that use of compelled testimony which consists in gaining therefrom a knowledge of the details of a crime, and of sources of information which may supply other means of convicting the witness or party."

The provision that "No person * * * shall be compelled in any criminal case to be a witness against himself," placed the bulwark of constitutional protection around that which had long been a recognized right of the citizen

under the rules of evidence, and was summed up in the time honored maxim "Nemo tenetur se ipsum accusare." 1 Starkie on Evidence, 71, 191; 1 Greenleaf on Evidence, Sec. 451; Wharton's Criminal Evidence, Sec. 463, and cases cited, p. 464 of 142, U. S. supra.

It was meant to protect him from self-crimination, to exempt him from making disclosures which might lead to his subsequent conviction. It was embodied in an amendment which in its other provisions secured his rights in criminal cases, viz.: The safeguard of a precedent indictment or presentment; against him being put twice in jeopardy for the same offense, and insured him due process of law when life and liberty were at stake. Clearly its purpose was to shield him from compulsory disclosures which might lead to his conviction of a crime. If the constitutional purpose was to shield him from disclosures which would merely tend to humiliate or disgrace him in the eyes of his fellows, it was not so expressed.

But the obligation of a witness to answer questions of that character, if pertinent to the issue, is well recognized: 1Roscoe's Criminal Evidence, 234; 1 Greenleaf's Evidence (14th edition), Sec. 455, 456, 458 and 459; Thompson on Trials, Sec. 287; Jennings v. Prentice, 38 Mich. 421.

And in Parkhurst v. Lowton, 1Merivale 400, Lord Eldon said: "Upon the question of character, I hold that supposing a man to be liable to penalty or forfeiture, provided he is sued within a limited time and that the suit is not commenced till after the limitation expired, he is bound to answer fully, notwithstanding his answer may tend to cast a very great degree of reflection upon his character and conduct."

In Commonwealth ex rel. Kellar v. Roberts, Brightly's Reports, 109, it was held that it was competent for the legislature of Pennsylvania to pass an act under which a witness may be compelled to answer questions which may not show him to be criminal but which involve him in shame and reproach.

To our mind it is clear that infamy or disgrace to a witness which may result from disclosures made by him are not matters against which the Constitution shields, and that so long as such disclosures do not concern a crime of which he may be convicted, the provision quoted does not apply.

But does the act of congress give the petitioner as broad protection as the constitutional provision? Unquestionably it does. It says he "shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify or produce evidence, documentary or otherwise." This affords him absolute indemnity against future prosecution for the offense to which the question relates. The act of testifying has, so far as he is concerned, wiped out the crime; it has excepted him from the operation of the law, and as to him, that which in others is a crime has been expunged from the statute books. If, then there exists, as to him, no crime, there can be no self-crimination, in any testimony he gives, and if there can be no self-crimination, if neither conviction, judgment nor sentence can directly or indirectly result from his testimony, what need has he for the constitutional provision? For says Broom's Legal Maxims, p. 654, in speaking of the maxim quoted above, "Where, however, the reason for the privilege of the witness or party interrogated ceases, the privilege will cease also; as if the prosecution to which the witness might be exposed on his liability to a penalty or forfeiture is barred by lapse of time, or if the offense has been pardoned or the penalty or forfeiture waived;" a doctrine approved as we have seen above, by Lord Eldon.

In practical effect, the legislative act throws a greater safeguard around the petitioner than the constitutional provision. Before he testified, he could have been charged with a violation of the interstate commerce law, in which case the amendments only protected him against compulsory self-crimination. He was liable to a possible verdict of guilty if the necessary proofs

were given, but under the legislative act, when he has testified, the law excepts him from its operation, makes that which was before a possible crime, a mere matter of indifference and shields him from subsequent prosecution. The sweeping words of the statute — as broad as the human language can make them—afford absolute indemnity to the witness; no crime exists as to him; it is not a pardon; not an act of amnesty; no charge can be made against him for it is illegal to even prosecute him, viz: "No person shall be prosecuted."

To our mind, the constitutional provision, in words and purpose is plain. In the Counselman case the witness was protected from the manifestly self-criminating answers which would have disclosed facts upon which a prosecution—to which he was still exposed—could be based. But owing to the act of 1893 no such consequence can ensue if the present petitioner is made to answer.

Such being the case, the constitutional provision does not concern him, and if it does not, the act which compels him to testify is not unconstitutional.

In reaching this conclusion, we have given due regard to the case of the United States v. James, 60 Fed. Rep. 257, where the act was held to be unconstitutional. While we regret to differ from this only Federal decision on this matter, we find support for our position in the opinion of the Supreme Court of New Hampshire, in The State v. Nowell, 58 N. H. 314; and of the Supreme Court of California in ex parte Lewis Cohen 26 L. R. A. 423.

The prayer of the petitioner to be discharged will therefore be denied and he will be remanded to the custody of the marshal.

ACHESON, C. J.: I entirely concur in the views expressed by Judge Buffington in the foregoing opinion. That opinion is so full and satisfactory that I need do little more than announce my concurrence. The act of February 11, 1893, affords the witness complete immunity from prosecution and from penalty or forfeiture for or account of the offense to which the questions propounded to him relate, and therefore his answers can not extend to criminate him. As he can not be subjected to any prosecution, penalty or forfeiture, his case is not within either the letter or the spirit of the fifth amendment to the Constitution of the United States.

Business Secrets Enjoined.

There is an implied obligation on the part of a servant that he will serve the master with fidelity. This implied obligation was discussed by the Court of Appeal (Eng.) in Robb v. Green, L. R. Vol. 2, Q. B. (1895), p. 315.

The employe surreptitiously copied from his masters order book a list of the names and addresses of customers, with the intention of using them for soliciting orders from them after the termination of his service, in a business carried on for his own account. Subsequently he used the list and was enjoined. Held, that it was an implied term of the contract of service that good faith is observable towards the employer during the existence of the confidential relation between employer and employe and that the latter's conduct was a breach of that contract which entitled the plaintiff (employer) to an injunction and damages. The courts, in such cases, proceed as for a breach of trust and confidence, although different grounds are sometimes assigned for the exercise of this jurisdiction. But whether it rests on contract, property rights, or breach of confidence, the courts fasten the implied obligation of fidelity on the conscience of the offending party and enjoin the offense.

The right to money damages arises out of the breach of the implied contract, to treat the employer with good faith.

The president and general manager of a corporation are held personally liable in Nunnelly v. Southern Iron Co. (Tenn.) 28 L. R. A. 421, for damages caused to a riparian proprietor by the operation of ore washers in the company's business.

Premature Action on Note.

In State v. Humphreys, decided by the Supreme Ciurt of New Jersey (32 Atl. R. 706), the court said:

"Suit can not be commenced on a promissory note, payable at bank, on the day it falls due, after the close of banking hours of that day. The maker is entitled to the whole of the due day in which to make payment."

"The only question which it is necessary for the decision of this case, to discuss, is whether suit can be commenced on a promissory note, payable at bank, on the day it falls due, after the close of banking hours of that day. The note in this case was drawn in the State of Pennsylvania, and made payable at the National Provincial Bank of England, in London. The note matured on the 4th of August, 1894, and was on that day protested for nonpayment, and thereupon on the same day, after the close of banking hours in London, suit was instituted by attachment in this State to recover the amount due on said note.

"The authorities upon this subject are very conflicting. Under the rule which prevails in Massachusetts, the action in this case was not premature. In Staples v. Bank, 1 Metc.(Mass.) 43, 53, Chief Justice Shaw discusses the question elaborately. After commenting upon the English cases, he says: 'No doubt there is a prevailing understanding in England that the maker or acceptor has, by right or by courtesy, the whole of the last day to make payment in;' and he further observes that it does not appear by any decided case in England whether an action may be commenced on the due day after demand and refusal to pay. In Smith v. Aylesworth, 40 Barb., 104, the note was payable at bank, and the Supreme Court of New York held that an action commenced against the maker on the last day of grace, although after the close of banking hours, was premature, and the plaintiff was non-suited.

"In Oothout v. Ballard, 41 Barb. 33, the rule was adhered to that the maker of a promissory note has the whole of the last day of grace within which to pay it; and although he should in the course of the day refuse payment, which will entitle the holder to protest it and give notice to the indorsers, yet if he subsequently, on the same day, makes payment, it is good, and the notice of dishonor becomes of no avail. Hence, an action on the third day of grace, though after protest, cannot be supported. This must be so upon principle, as the law does not recognize the division of a day, in the absence of an express agreement to that effect. In Bank v. Hollister, 17 N. Y. 48, the New York Court of Appeals recognized the right of a holder of a note payable at bank to present it for payment and protest, so as to bind the indorser, at an hour after the closing of the bank on the due day if an officer of the bank can be found to receive or refuse payment. If the indorser can be held upon such demand of payment and refusal, the maker must have the right to make payment at any time after banking hours on the last day of grace.

"In Pennsylvania, suit on a note payable at bank can not be commenced before the full expiration of the last day of grace (Bevan v. Eldridge, 2 Miles, 353). The court said that interest is charged to the end of the last day of grace, and therefore the maker should have the full time for which he has contracted and paid. The same view was taken by Chief Justice Gibson in Taylor v. Jacoby (2 Pa. St., 497). The note in the case before us having been drawn in Pennsylvania, and made payble in England, the right of the maker should be governed by the rule which prevails in those jurisdictions; and as a matter of policy in questions relating to commercial transactions, we should adopt the rule which pertains alike in New York and Pennsylvania. In my opinion, the writ of attachment was prematurely issued and the judgment below should be affirmed."

Chattel Mortgage.

In the case of Heim v. Chapel 64 N. W. 825, what was the question? A chattel mortgage was given for about four thousand dollars more than the actual debt. The mortgagor testified that the excess was named to prevent creditors from attaching. The mortgagee testified that the excess was named to secure future advances. Other evidence tended to show that the mortgagor was running behind in his business and had other creditors at the time the mortgage was made, but no evidence that such creditors were existing creditors at the time of the insolvency, although some creditors had proved their claims. The sheriff took the goods by virtue of this mortgage. The assignee of the mortgagor sued for the conversion. The verdict for the assignee was set aside by the trial court and a new trial granted, from which order the assignee appealed.

The question whether or not the assignment carried with it the mortgage, does not appear in the opinion, nor whether or not the conversion took place before the assignment, but the question tried to the jury seems to have been that the mortgage was fraudulent, and the trial court seems to have granted the new trial on the ground that the verdict was not sustained by the evidence. The appellate court says that "while we cannot resist the conclusion that the verdict was supported by the evidence, yet taking the record as we find it we cannot say that the preponderance of the evidence is manifestly and palpably in favor of the verdict, hence the granting of a new trial was a reasonable and proper exercise of discretion in the trial court."

The jury determined that the mortgage was fraudulent after hearing testimony that it was and was not fraudulent. For the affirmative the testimony was the excess, the mortgagor's positive statements and existing creditors. For the negative, that $8,200 was an honest indebtedness and that the excess was inserted to secure future advances. The item of excess being a mere presumption of fraud is explained so as to show the truth, hence that item stands upon the evidence that it was and was not inserted by a fraudulent intent, with the concurrent assertion and admission that there was an honest indebtedness, and hence the item should not have been a factor, but the question limited, to whether or not the mortgage was made to secure an honest indebtedness though to defraud other creditors and this would bring the question to one point whether there were existing creditors and whether that fact was evidence of the intent to defraud.

The question is answered by the law, Gen. Stat. Ch. 41, Sec. 20, which says that the question of intent is a question of fact and not of law and therefore the sole fact of making a mortgage when there are existing creditors and an ample remnant in the hands of the mortgagor to satisfy them, is not proof of the fraudulent intent and hence the verdict was unlawful because this, after the elimination of the question of excess, was the only evidence before the jury.

If the question then was, whether or not the jury had enough evidence to find the intent, it can be seen, that they had no evidence and therefore the question before the appellate court should have been whether the jury had some evidence or no evidence, and not whether the evidence was so manifestly and palpably in favor of the verdict that it should not be disturbed. What evidence was there before the jury to prove the fraudulent intent further than the evidence of the fact that there were existing creditors at the time of the making of the mortgage. None, so far as can be learned from the opinion. The excess is explained and therefore does not come within the rule in Twynes case, 3 Co. 81. The fact of the mortgagor running behind is no evidence of fraudulent intent, nor is it evidence when coupled with the fact of excess or the fact that there were ex-

isting creditors, because a man can run behind and yet have no fraudulent intent.

The assumed rule that a verdict should not be disturbed if the preponderance of evidence is manifestly and palpably in favor of it, is only another way of expressing the common law rule erected upon the statute of joefails and the rule laid down in the statutes, Gen. Stat. Ch. 66, Sec. 122, which is that the weight of the evidence is for the jury and when there is no evidence the question is for the court, and that provision of the law G. S. Ch. 66, Sec. 253, Sub. Div. 5, that a new trial may be granted when the verdict is not justified by the evidence or contrary to law, is based upon the same principle, that the weight is for the jury, because it is justified when it is a question of weight and for the same reason it is not contrary to law when it rests upon the weight.

A Good Excuse.—"If your honor please I'd like to get off the jury," said a juryman to Judge Oakley, of New York, just as the trial was about to commence.

"You can't get off without a good excuse," said the judge.

"I have a good reason."

"You must tell it or serve," said the judge.

"But, your honor, I don't believe the other jurors would care to have me serve."

"Why not? Out with it."

"Well," (hesitatingly).

"Go on."

"I've got the itch."

"Mr. Clerk," was the witty reply, 'scratch that man out."

The use of a bicycle in the highway is held lawful in Thompson v. Dodge (Minn.) 28 L. R. A. 608; and the rider of the wheel, if not negligent, is held not to be responsible for the damage caused by a horse driven on the highway, which became frightened at the wheel and unmanageable.

The Minnesota statute providing for the adoption of a standard insurance policy by the insurance commissioner is held in Anderson v. Manchester Fire Assur. Co. (Minn.) 28 L. R. A. 609, to be an unconstitutional attempt to delegate legislative power. The same decision had been previously made in the Pennsylvania case of O'Neil v. American F. Ins. Co. 28 L. R. A. 715.

A Minnesota statute providing for nominating conventions of delegates is held in Manston v. McIntosh (Minn.) 28 L. R. A. 605, not to prohibit mass nominating conventons without delegates.

An elaborate review of the question of liability for making misrepresentations which induce another to enter into a contract with a third person, when they were made in good faith, is found in Nash v. Minnesota Title Ins. & T. Co., 163 Mass. 574, 28 L. R. A. 753, deciding that an action for fraud will not lie in such a case.

An information is held not to be a sufficient basis for the surrender of a fugitive from justice from another state, as a substitute for an indictment, in the case of Ex parte Hart (C. C. App. 4th C.) 28 L. R. A. 801; and the note to this case presents the authorities on the question, what papers are necessary to obtain the surrender of such fugitives?

The authority to quarantine persons who refuse to be vaccinated when they are not infected with and are not shown to have been exposed to small pox is denied in Re Smith, 146 N. Y. 68, 28 L. R. A. 820, although N. Y. Laws 1893, Chap. 661, § 14, authorizes the isolation of persons infected with or exposed to contagious diseases, and provides for vaccination of persons in need of it. The fact that an expressman may work in a district where there were many cases of small-pox was held not to justify his detention in quarantine for refusal to be vaccinated.

The doctrine of comity in respect to contracts made in other states is limited in Pope v. Hanke, 155 Ill. 617, 28 L. R. A. 568, by refusing to recognize the validity of a negotiable note, even in the hands of a bona fide holder, where it was given to settle an illegal option contract, although in the state in which it was made it was valid.

MUNICIPAL COURT.

Consolidation of Actions.

The Municipal Court of Minneapolis recently denied a motion of the Minneapolis Fruit Company to consolidate two separate suits brought against it by Celfalu & Co. The ground of the motion was the alleged existence of a counter claim exceeding in amount the aggregate sum demanded by the complaint in both actions and the impossibility of dividing that counterclaim or pleading it separately in either suit. The facts were that at defendant's request the plaintiff agreed to deliver on a certain date three car loads of fruit, but failed to do so, nine days having intervened between the first and last shipments. The defendant, in expectation of the daily arrival of this fruit, kept his employees under pay during that intermission and the expense thereby incurred constituted the counterclaim. Separate actions were brought for the two shipments. The motion to consolidate was denied on the ground that consolidation would deprive the court of jurisdiction. We submit that the reason assigned by the court is wrong because the enforcement of an individual right should not depend on the mere vesting or divesting of jurisdiction.

This question is governed by G. S. 1878, Ch. 66, Sec. 118, Sub. 1, which provides that all causes of action arising out of the same transaction, or transactions, connected with the same subject of action, must be joined.

Hence if the whole transaction must be one indivisible action, the transaction cannot be divided. But suppose it is divided as in this case, the remedy cannot be to consolidate, because the principle of consolidation applies only to the consolidation of independent transactions arising out of the same subject matter. Section 129, G. S. 1878, Ch. 66, authorizing the consolidation of two or more actions which are pending in the same court between the same parties upon causes of action which might have been joined, applies to causes which would form different counts, and not a cause which should form but one count, or one cause which has been unlawfully divided; hence the remedy is to plead the non joinder as at common law, and if it then appears that both actions arose out of the same cause they must be made one action, because there can be but one action for one cause. If the joinder so made shows a cause beyond the jurisdiction of the court, the action should be dismissed.

Another rule is that a plaintiff can sue for a sum within the jurisdiction of a court of limited jurisdiction but thereby abandons the excess; hence to a second suit for the excess, the plea of res adjudicata or former suit pending, as the case may be, is the proper remedy, and to the first suit the counterclaim is pleadable, keeping the sum within the jurisdiction of the court.

But do the facts in the case under review constitute a counterclaim. It is doubtful, because the loss was not the effect of any cause produced by the plaintiff, but was the result of the judgment or action of the defendants. It was not a cause arising out of the original contract or transaction or connected with the subject of the action. G. S. Ch. 66, Sec. 97, Sub. 1. It arose out of the independent action of the defendants in hiring the men. If the goods did not come at the time contracted for, the cost of unloading the second shipment in excess of what would have been the cost had the shipment arrived at the contract date would be a counter claim, but such is not the defendant's view of the law.

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DISTRICT COURT.

John Wilkes by Guardian v. C. Shields.

(District Court, Ramsey County.)

The words dangerous, able and seditious agitator are libelous.

To the complaint alleging "that the defendant published, issued, declared, displayed and parted with to one T. Lyons the following libelous publication charging said John Wilkes, a minor with being a dangerous, able and seditious agitator and responsible for a great deal of trouble that had taken place at South St. Paul, the defendant demurred and the demurrer was sustained.

McDONALD & BARNARD for Plaintiff; D. W. LAWLER for Defendant.

OTIS, J. The question is whether the words charging plaintiff with being "a dangerous, able and seditious agitator" are in themselves defamatory and actionable per se, for there is nothing in the complaint to explain their meaning or to show in what sense or connection they were used. Whether sedition was ever a common law offense in this country seems doubtful. (21 Am. & Eng. Ency. L. 1008; subject, Sedition.) It is neither a high crime or misdemeanor under the provisions of our criminal code, and the words used do not charge plaintiff with being a criminal. But this is not necessary to make out a cause of action, for if the words used "hold the plaintiff up to contempt, hatred, scorn or ridicule, and by thus engendering an evil opinion of him in the mind of right-thinking men, tend to deprive him of friendly intercourse and society," they are libelous. (13 Am. & Eng. Enc. Law, 299.)

Sedition is "a factious commotion in a state; the stirring up of such a commotion; incitement of distrust against the government and disturbance of public tranquility, as by inflammatory speeches or writings or acts tending to breach of public order." Century Dictionary.

According to Webster, sedition is "a factious commotion of the people, or a tumultuous assembly of men rising in opposition to law or the administration of justice, and in disturbance of the public peace."

To say, then, that a person is a dangerous, able and seditious agitator is to charge him with being a disturber of public tranquility and guilty of acts by writings, speeches or otherwise tending to the breach of public order, all of which is inimical to good society and the highest and best interests of the people.

Such acts and conduct even in this free country must make the person therewith charged an object of public distrust, reproach and contumely, and such chrages are clearly defamatory.

If such language has ceased to be a term of reproach among us, then patriotism is a thing of the past, love of country and good government is not in us, and we are wholly given over to anarchy, and this the most pessimistic will hardly venture to maintain.

EJECTMENT---SECOND TRIAL.

Louis Larocke et al., v. Frederick Knack and Emma Knack.

(District Court, Washington County.)

Injunction cannot be granted or receiver appointed pending the second trial in ejectment.

E. H. MORPHY for Plaintiff; C. B. JACK for Defendants.

This is an action in ejectment. Plaintiff recovered and entered a judgment which adjudged him the owner of the premises involved, and that he was entitled to its possession. Before the ap-

plication, hereinafter mentioned, was made, defendants served upon plaintiffs demand, in writing for another trial under the statute, paying plaintiff the costs, disbursements and damages awarded in the judgment.

After this demand for another trial the plaintiff, upon order to show cause, petitioned the court to appoint a receiver of the land involved, and asked for an injunction restraining defendants from removing any of the crops thereon.

The order to show cause was discharged, application for receiver denied, and motion for injunction denied.

WILLISTON, J: In actions for ejectment, when the defeated party has duly demanded another trial of the action, and has in all things complied with the requirements of Sec. 5, Chap. 75, Statutes 1878, (Sec. 5845, Stat. 1894) the policy of the law, as I apprehend, is, that the party in possession of the premises at the time of the making of such demand, is to retain possession until the final determination of the action, and that the status of the parties at the time of such demand is to continue until the time of such final determination.

If such be the policy of the law the plaintiffs are not entitled to an injunction, or the appointment of a receiver.

MANDAMUS.

State of Minnesota ex rel Joseph Dahm v. A. C. Hoopes, as City Treasurer of the City of Stillwater.

(District Court, Washington County.)

Mandamus is not the remedy to obtain satisfaction of judgment against a city when the charter provides the way

COMFORT & WILSON for Relator; H. H. GILLEN City Attorney, for Respondent.

Relator had recovered a judgment against the city of Stillwater, and had demanded payment of same from the city treasurer who refused to pay it. Relator then sued out an alternative writ of mandamus.

Respondent demurred to the writ, and on the return day thereof moved to quash the same. Relator moved that respondent be declared in default, and that a peremtory writ issue as prayed, basing his motion on the ground that respondent could not demur; that he should have answered.

The court sustained the demurrer, granted the motion to quash, and denied the motion for peremptory writ.

WILLISTON, J.:

In proceedings such as these the alternative writ stands in the place of a complaint, and the ordinary rules of pleadings, so far as applicable, apply. The right to demur to an alternative writ is recognized in Clark v. Buchanan, 2 Minn. 346.

State ex rel., vs. Nelson Co. Tr., 41 Minn. 25.

The relator bases his right to the relief prayed upon Sec. 1499, Stat. 1894, which requires, among other things, the delivery to the city treasurer of a certified copy of the docket of the judgment, and also, that at the time of the demand for payment, the treasurer, as such, have in his hands funds with which to pay the judgment, not otherwise appropriated.

Relator's writ did not contain allegations showing these requirements to have been complied with, and therefore, failed to show prima facie the right of relator to demand payment.

Further, the city of Stillwater is a municipal corporation, and its powers, and the duties of its officers, are defined in its charter. Among other things the charter provides the manner in which city funds shall be paid out. It provides that "No money shall be paid out of the city treasury, except for principal and interest on bonds, unless such payments shall be authorized by vote of the city council, and shall be drawn out only upon orders signed by the mayor and countersigned by the clerk."

The writ does not allege that relator demanded payment of the city council, nor the delivery to the city treasurer of an order for the amount.

Said charter provides in express terms the mode for collecting a judgment against the city. It is provided, in substance, that the city council shall, at the time of making the last annual tax levy after rendition of a judgment against

the city, levy and assess a special tax on all property in the city to pay the same. In case the council neglects so to do, then the court in which the judgment to be collected was rendered, may appoint a special referee to levy such tax and return the same to the county auditor, which levy shall have the same force and effect as if levied by the city council.

These provisions afford the relator a speedy and adequate remedy at law, consequently relator is not entitled to the peremptory writ. Sec. 5976, Stat. 1894. Sec. 1502, Stat. 1894, does not apply, as the charter of the city of Stillwater provides an efficient mode for collecting this judgment.

For these reasons the respondent could not lawfully pay the judgment, and a writ could not issue to compel him to do an act not lawful for him to do. Clark vs. Buchanan, 2 Minn. 346.

Comfort & Wilson for Relator. H. H. Gillen, Esq., City Attorney, for Respondent. Hon. W. C. Williston, Judge.

INJURY ON SIDEWALKS.

Florence Lemieux v. The City of St. Paul.

(District Court Ramsey County.)

The charter of the city of St. Paul provides that the city shall not be liable for any injury occurring where a sidewalk would naturally be laid by reason of any condition of the ground unless the city had constructed a sidewalk.

If the court would set aside the verdict without argument a non-suit may be granted.

A notice of claim for personal injuries required by the city charter can state the locus with reasonable certainty.

HUMPHREY BARTON for Plaintiff; ROBERTSON HOWARD for Defendant.

The complaint alleged that the sidewalk was built and maintained upon a steep incline; that for many weeks prior to the accident the city had negligently and carelessly permitted children, with sleds, to slide upon and over the sidewalk, and the snow and ice upon the same, by reason of which the sidewalk for six weeks next prior to the date of the accident, became and remained slippery, dangerous, smooth and hard, and the defendant negligently and carelessly permitted the sidewalk to continuously remain in such dangerous, smooth, slippery and hard condition for six weeks prior to said accident, and made no effort to remove the same; that during all said time the defendant (city) had full knowledge and notice of the condition of said walk; that in the night time the plaintiff, who did not know the condition of the walk, came along upon the same, slipped and fell and broke his arm.

The defendant demurred to the complaint. The demurrer was overruled.

The facts were. Arch street runs east and west from Rice street to Jackson street and across Park avenue a distance of four blocks. As originally platted the street and lots abutting on it were much lower than the ground to the north. When the streets further north were graded the surplus dirt was hauled and dumped in these lots, as well as into Arch street, so that the roadway was partially graded, and made passable for teams. The surface as thus raised was made level out to the full width of the street, but no wooden or other artificial sidewalk was ever laid by the city. Foot travel had worn a path on both sides of the street where sidewalks would usually have been laid. On the north side heavy rains had washed deep gullies, and the plaintiff, while walking in the night time along the beaten path, stepped into one of these gullies, the earth gave way and she was thrown down, sustaining serious injuries.

The notice served on the mayor located the place of the accident "on the west side of Arch street between Park avenue and Rice street." Section 631 of the City Charter provides that "no action shall be maintained against the city of St. Paul on account of any injuries received by means of any defect in any street, sidewalk or thoroughfare unless notice shall have first been given in writing to the mayor of said city, or the city clerk thereof, within thirty days of the occurrence of such injury, or damage; stating the place where and the time when such injury was received * * * nor shall any such action be maintained for any defect in any street, until the

same shall have been graded, nor for any insufficiency of the ground where sidewalks are usually constructed when no sidewalk is built."

After plaintiff had rested, Mr. Howard, for defendant, moved to dismiss, first, because of the insufficiency of the notice; second, (on the ground that the plaintiff had failed to prove that the street where the accident occurred was a graded street within the meaning of the charter; and third, because it was admitted of record by the plaintiff's attorney, that the place where the accident occurred was a place where an artificial sidewalk would have been laid if there had been any sidewalk, and no sidewalk had been laid.

KERR, J. Counsel know very well that motions of this character are not allowed except under circumstances which leave no reasonable doubt on the mind of the court as to the insufficiency of the evidence to entitle plaintiff to recover. I am extremely averse to taking a case from the jury, and never do it unless the facts are such that I feel it to be my absolute and unqualified duty to set aside the verdict without argument. That is the test always, in my mind. Should a verdict be rendered under this testimony, would I, without argument, set it aside? If I would not, I do not take the case from the jury.

With respect to the first ground of the motion that the notice does not definitely or correctly state the locus I think that with a reasonably liberal construction of the law, and especially in view of what our supreme court has said upon it in the Harder case, 40th Minnesota, that the notice is sufficient.

With respect to the second ground, that the city has never graded this street. The evidence does not show that the city ever established a grade on this street. It fails to show, perhaps, with certainty, that the city ever undertook specifically to grade this street; but it does show that having a large amount of surplus earth on hand for disposition, and this section of the country lying low and manifestly needing to be filled to make either the residence property or the streets of practiced utility, it used that earth to fill this whole section of country, including the streets, so as to make a level surface of the lots and streets over that entire section of country, including Arch street between Park avenue and Rice street. This placed that street in a condition where it could be used; and, perhaps by a liberal construction, (and would require a very liberal construction) it might be said that the city in that way put the street in a condition where the public were invited to use it as a roadway.

The third ground upon which the motion was based, that the city had never constructed or opened, so as to invite the public to use it, any sidewalk in this street between Park avenue and Rice street. The evidence simply shows, that the street, in connection with all the surrounding country, was raised a considerable distance by the filling in of this earth. The evidence does not show that any sidewalk was marked out on either side by any disturbance of the surface of the ground; that any material whatever was placed upon either side of this street to distinguish the sidewalk in any way from the roadway of the street either by the city or by anyone else whose acts the city might be said to have adopted. The evidence shows that a pathway about twelve or fifteen inches wide, had been worn along there by parties who did walk on this street; and I think perhaps the evidence shows, that on the part of this street where a sidewalk would be constructed or laid, if any were to be laid, there was a beaten path.

The charter of the city provides that the city shall not be liable for any injury occurring where a sidewalk would naturally be laid, by reason of any condition of the ground there, unless the city had built and constructed a sidewalk. That provision was construed to some extent in Graham v. City of Albert Lea, 48 Minn. 201, which was cited by counsel for plaintiff. It seems to me

that a careful examination of that case and the evidence in this case will show a material and radical distinction between that case and this. There the city had constructed a sidewalk, a board sidewalk, on the southerly side of the street. On the northerly side of the street it had designated the place where the sidewalk should be laid by ploughing and terracing. It had permitted, and, in effect, adopted the construction of that portion of the street for the purpose of a sidewalk by Mr. Morin, who owned the adjoining property. That sidewalk was constructed of gravel in such a way, as to make it suitable for a sidewalk and to indicate that the city invited foot passengers to use that part of the street for a sidewalk over that gravel construction. And the supreme court said that in such a case the city is as much liable to keep that sidewalk so constructed of gravel in repair as if it had constructed it itself; and it is not necessary that a sidewalk should be constructed of wood or stone or any other particular material, but that it is constructed manifestly for the purpose of being used as a sidewalk.

Now, has that been done, or anything of that kind in this case? It also appeared in that case, that the city had constructed board cross-walks from this sidewalk to the sidewalk across the street, which was another evidence of intention that that gravel sidewalk should be used by foot passengers as a sidewalk. I think it will not be disputed that the city may open a street for travel as a roadway, and in the exercise of its legislative functions determine not to open it for travel by foot passengers on sidewalks. It has the power and the discretion accorded it by law to provide sidewalks, to fit and set up for use by foot passengers, when it sees fit, when it thinks best, and cannot be held accountable, until it does exercise that legislative function of opening that street for use by foot passengers on the sidewalks of the city. Now, if you will read a few words from the case in the 48th Minnesota, (201), they will show the distinction very closely. In speaking of this provision of the charter, which was the same in that case as our own, the supreme court say: "It was established upon the trial of this action that a "way, (that is, a side-way) of proper "width, and of material which served "the purpose, had been built for side-"walk uses; that the city authorities had "recognized its proposed use by connect-"ing it with other sidewalks; and that "with their knowledge it had been more "or less used as a sidewalk by footmen "having occasion to go that way for a "number of years." Now, evidence of that kind is absolutely wanting in the testimony in this case. There is no proof that this was ever changed in any way or manner from the rest of the surface of the street and surrounding country so as to indicate to anyone that the city intended that it should be used as a sidewalk, or that it had determined to open that street for use by pedestrians as in the way of side-walks. It simply was used by parties who went along there, who had made for themselves in such use a narrow path. Now, it would be a most dangerous proposition to establish in such a case as that that the city would be liable for damages under the provisions of the charter. I have no doubt of the question at all after a very careful examination of this authority; and the order of this court is that this action be dismissed.

Gentlemen of the jury, you are excused from further attendance on this case.

(Note by Editor.) The exact point decided is, that the city was not liable because its charter so provides, although the real question seems to be whether or not this provision of the charter applies to and overrides the doctrine of misuser or is it limited to the rule of nonuser? The principle in the doctrine of misuser is, that when a city commences to do anything, it must complete it and make that thing reasonably good and safe. The principle in nonuser is, that the city is not liable when it does not act. If this provision of the charter applies to nonuser, it does not apply to this case, because the city had acted but did not do itcompletely.

If it applies to misurer, then it overrides a natural right which is protected by the constitution, Art. 1, § 8. This is apparent by the use of a little logic. It is an inherent principle of right that all persons natural or artificial are responsible for injuries resulting from any failure to do completely that which they undertake to do, because it is their fault. In this case the city did not do completely that which it undertook to do, namely, good for vehicles but not for pedestrians whereas to be complete it should be good for both. Therefore the city is liable; and conversely stated the major premise is that the city made the road way so it could be used by the public, and is laible for injuries to vehicles and occupants on the roadway because it made the roadway to be so used, but is not liable for injuries to pedestrians because it did not construct a sidewalk. Again, the city put the roadway in a condition to be used by the public, but is only liable to one class of the public, namely, vehicles and not liable to another class, namely, pedestrians. Again, the city put the roadway in a condition to be used by the public, but is not liable for injuries to pedestrians because the roadway was not made for pedestrians although it was open to the public generally. Again, the city can put a roadway in a condition for use by the public, but pedestrians must take notice that it is not to be used by them. Once more, the city can construct a roadway for use by vehicles and need not construct a sidewalk on this roadway, in which case pedestrians cannot travel on this street although it is open to the public.

If the doctrine of misuser cannot be applied to this case, then the city is not liable for a trap and a snare.

The fact that a person made the first assault upon another whom he killed in the course of their quarrel is held in People v. Button (Cal.) 28 L. R A. 591, to be sufficient to defeat his claim of self-defense if before killing the other he had endeavored to avoid further combat.

ATTORNEY GENERAL'S OPINIONS.

LORD'S PRAYER HELD ILLEGAL

If it is used to open public schools.

Hon. W. W. Pendergast, Superintendent of Public Instruction—Dear Sir: You inquire whether it is lawful to open a public school with a recital of the Lord's Prayer. The question involves a construction of section 16, of article 1, of the constitution, wherein it is, among other things, provided:

"Nor shall any man be compelled to attend, erect or support any place of worship."

In the absence of that provision I should not hesitate in answering your question in the affirmative. Indeed, there is a strong array of well considered cases in states whose constitutions are not thus characterized to the effect that it is a question for the school authorities to determine whether or not a public school shall be opened with prayer and the reading of the Scriptures. Wisconsin and Minnesota, so far as my examination extends, stand alone in respect to such a provision. In the first-named state the supreme court after exhaustive argument and in a carefully considered opinion, held that the reading of the Scriptures in a public school was in violation of the constitution, in that it compelled one to support a place of worship. (State v. School District, 76 Wis. 177.)

No occasion has arisen for a construction by our own court of the said provision. It was held by one of my predecessors at an early day and some time prior to the decision reached by the Wisconsin court that the reading of the Scriptures is a matter over which the board of education or board of trustees has complete control. (Op. Attys. Gen. 83.) But on a later occasion it was said that "when the use of the Scriptures in a common school is objected to by the parents or guardians of pupils on account of religious or conscientious scruples, their adoption as a text book is improper, and the pupil may decline to use them for the same reason with-

out being liable to be deprived of the privilege of the school." (Op. Attys. Gen. 229.)

No distinction can in principle be drawn between the opening of a school with prayer or the reading of the Scriptures, so far as the question pertains to the violation of the provision above named. If one is unlawful, the other is also.

It is the purpose of the law of this state to permit no intrusion into our public schools of any religious teachings whatsoever They are to be kept purely seculiar in character and as places where the children of parents of every shade of religious belief may assemble for purposes of instruction in authorized subjects and incidental moral improvement. The judicious teacher will never attempt to institute such a practice in schools against the wishes of the parents of his pupils. In view of the decision by the Wisconsin court, you are advised that the practice, however frequently tolerated or indulged in, is violative of the constitution. I am, very respectively,

H. W. CHILDS,
Attorney General.

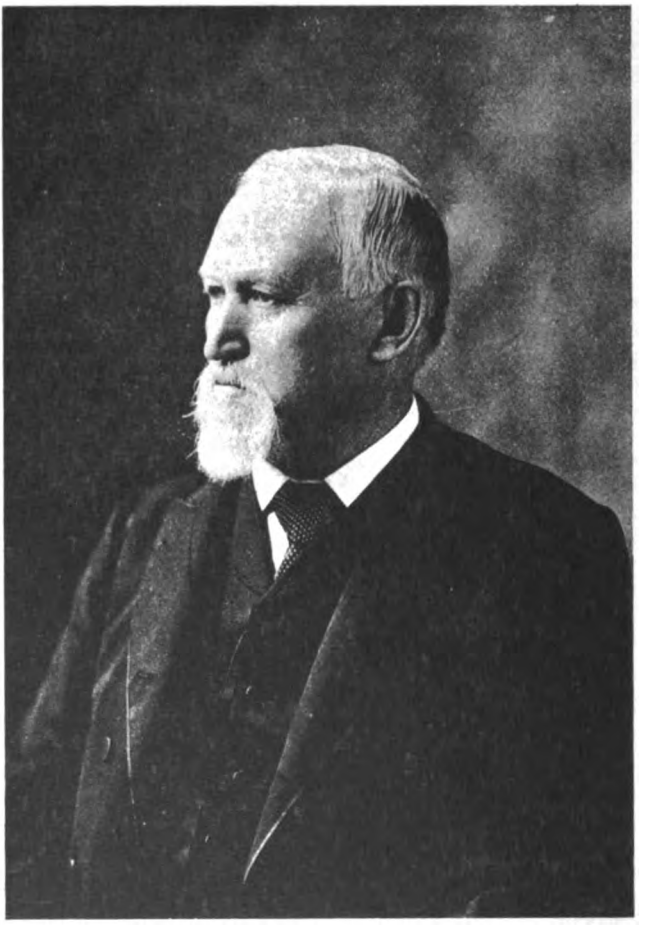
A peculiar case as to the right of a person to marry while under a contract of employment is that of Edgecomb v. Buckhout (N. Y.) 28 L. R. A. 816, holding that the marriage of a housekeeper while under a contract requiring her personal attendance on her employer during his life did not justify her discharge.

Monopolies in contracts for the removal of garbage in cities are the subject of some recent decisions. In Smiley v. McDonald (Neb.), 27 L. R. A. 540, such a monopoly is held lawful by virtue of the police power to control the business. But in re Lowe (Kan.), 27 L. R. A. 545, the decision is to the contrary. A note to these cases shows that the former is supported by the decisions in other states.

Discharged Employes.

In the recent case of Wallace v. Georgia C. & N. Ry. Co. the Supreme Court of Georgia held that "An act to require certain corporations to give their discharged employes or agents the causes of their removal or discharge, when discharged or removed," is unconstitutional, and that an action founded thereon for the penalty or arbitrary damages fixed by the statute for noncompliance with its mandate cannot be supported.

The court said: The public, whether as many or one, whether as a multitude or a sovereignty, has no interest to be protected or promoted by a correspondence between discharged agents or employes and their late employers, designed, not for public, but for private, information as to the reasons for discharges, and as to the import and authorship of all complaints or communications which produced or suggested them. A statute which undertakes to make it the duty of incorporated railroad, express, and telegraph companies to engage in correspondence of this sort with their discharged agents and employes, and which subjects them in each case to a heavy forfeiture, under the name of damages, for failing or refusing to do so, is violative of the general private right of silence enjoyed in this state by all persons, natural or artificial, from time immemorial, and is utterly void, and of no effect. Liberty of speech and of writing is secured by the constitution, and incident thereto is the correlative liberty of silence, not less important nor less sacred. Statements or communications, oral or written, wanted for private information, cannot be coerced by mere legislative mandate at the will of one of the parties and against the will of the other. Compulsory private discovery, even from corporations, enforced, not by suit or action, but by statutory terror, is not allowable where rights are under the guardianship of due process of law.



HON. W. C. WILLISTON,

District Judge, First Judicial District.

...THE...

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The Journal with this number completes the third year of its existence. While other periodicals of similar character have died or suspended, it is still alive with a larger list of subscribers than ever before and with the assurance of its readers that it is filling satisfactorily an important field. The Journal itself is modest about itself and while it knows that its aims are high, it admits many short comings in its actual achievements. It is grateful to those of the profession who have aided its progress by kind words of appreciation and by the prompt payment of their annual subscriptions. But it can reach the ideal it is striving for only if lawyers will employ its columns for the purposes for which they are designed. Every practitioner who finds valuable the references the Journal makes to the unreported decisions of the Supreme Court or to the holdings of our trial judges in cases before them, can see from his own experience the good he would do should he send in information on similar matters with which he himself is acquainted. Even tho this paper had a score of paid reporters to investigate in these directions, it would not discover these cases without the co-operation of those who were actually engaged in them. But with such co-operation even without the score of paid reporters much of interest can be presented to our readers month by month. The publisher of the Journal will do his share to make it indispensable to every active lawyer in Minnesota if every active lawyer in Minnesota will aid him in this way.

Legal Holidays in Minnesota.

The statutory enactments of Minnesota as to what days are "legal holidays" upon investigation show that neither of the two days usually extolled as signally national in character, i. e., Independence Day and Thanksgiving Day, is a "holiday," or "legal holiday," using these words in their proper sense and definition. Nor are Christmas Day, Good Friday, and New Year's Day—days on which especially rest the very origin and value of our boasted religion. In their stead our legislators have given us "quasi holidays" to commemorate the birth of two presidents; to extol the dead; and to commemorate Labor, leaving Sunday, as it always was at common law, a day of rest, *dies non est* and *non juridicus*.

This incongruity is common to more States than Minnesota. The confusion is doubtless due to a failure to distinguish between *dies non est* and *dies non juridicus:* between Judicial acts and Ministerial acts, and to a misconception of the meaning of the two classes of holidays, i. e., festivals and days of rest, arising from the religious character of some holidays and the disestablishment of State Religion in the United States. To understand this one must go back far into history.

In the early period of Christianity, courts were held on Sunday. (3 Black. Com. 275.) The Church afterwards by canon prohibited this and incorporated the prohibition into the Theodosian Code, which was confirmed by William I —himself a Romanist—and Henry II who was subservient to Becket working for papal interests. The prohibition became part of England's common law. These canons referred solely to Judicial acts. In 9 Coke's Reports 66, all the judges of England resolved that no Judicial act ought to be done on Sunday, "but ministerial acts may be lawfully executed on Sunday, for otherwise, peradventure, they can never be executed, and God permits things of necessity to be done on that day, and Christ says in the Gospel, *bonum est benefacere in Sabbatho.*"

The statute 29 Car. 2, ch. 7, sec. 56, prohibited the service or execution on the Lord's Day of "any writ, process, warrant, order, judgment or decree, except in cases of treason,felony or breach of the peace" and "that the service of every such writ shall be void." 3 Bur. 1596. This doctrine of common law is recognized in this State, for in Rev. Stats. 1851, Art. 2, ch. 69, sec. 7, it was enacted that "no one of the courts of this state shall be open for any purpose on Sunday, other than to receive a verdict, or discharge a jury; but this section shall not in any wise prevent the judges of any of said courts exercising jurisdiction in any case where it is necessary for the preservation of the peace, the sanctity of the day, or for arresting and committing an offender"; and also in Ch. 107, sec. 21, it is provided that "no person shall serve or execute any civil process from midnight preceding to midnight following said Lord's Day, but such service shall be void," etc. These enactments have remained unchanged to the present time. By Penal Code, Minn., Sec. 222 et seq., Sunday is made a public holiday with prohibition against all kinds of labor, with exceptions. Thus Sunday is properly both a "public holiday" and a "legal holiday" or *dies non juridicus;* and also, in the law merchant, *dies non est.*

Since the enactment of Rev. Stats. 1851, ch. 5, sec. 47, election day has been a *quasi dies non juridicus*, in that no civil process shall be served that day. At first it extended to any general or special election day,but by amendments it now only refers to the 1st Tuesday after the 1st Monday of November in all even numbered years, and all "public business" only is prohibited on that day. (Vide the legion of Election Laws to the present time.)

The statute of August 9th, 1858, sec. 7 provides "that the governor shall by proclamation set apart one day in each year as a day of solemn and public thanksgiving, etc., and no business shall be transacted on that day at any of the

departments of state," and has escaped both the rip-saw and veneering of legislative amendments to the present time. It is the only authority for calling Thanksgiving day either a "holiday" or a "legal holiday." Nor is there any Federal statute on the subject except for the District of Columbia. By Laws 1858, Aug. 12, sec. 14, Sundays; July 4th; Thanksgiving day; Christmas day; New Year's day and February 22nd, were "holidays" for the State Treasurer alone. The revisors of 1866 took this privilege unkindly from him. By the act of March 1st, 1856, January 1st, July 4th;December 25th and Thanksgiving Day were made like Sunday, *dies non est* as to negotiable paper presentation, protest and expiration, but nothing more. The revision of 1866, ch. 23, sec. 3, added February 22nd to this list and eliminated January 1st. Laws 1871, ch. 46, sec. 1, added Good Friday and January 1st to the list which has remained undisturbed by legislative improvement to the present time. In 1860 the legislature enacted that February 22nd shall be observed in this state as a legal holiday hereafter. No public business, except in case of necessity shall be transacted on that day, and no civil process shall be served on said day. Ch. 23, sec. 1. By Laws 1889, ch. 96,sec.1, May 30th,or Memorial Day,was added. By laws 1891, ch. 122, sec. 1, General election day was added. By Laws 1893, ch. 89, sec. 1, the 1st Monday in September was added as Labor day. By Laws 1895, ch. 352, sec. 1, February 12th, Lincoln's birthday, was added. In 1887, the legislature gave all school teachers and scholars an optional holiday on December 25th; January 1st; July 4th; May 30th and Thanksgiving Day. Laws 1887, ch. 122, sec. 1. This includes all statutory provisions on the subject of holidays.

To sum up the result, we have a good illustration of legal uncertainty, of mixed results arising from a misunderstanding of the meaning,distinction and effect of words, and the origin and history of laws and customs. Inacurrate definitions of the terms in Law Dictionaries may in part be the cause. The true definition depends upon the motive and terms of the statutes themselves, loosely worded and erroneously drawn as they are.

Drummond, J., in re Worthington, 7 Biss., 455-6, says: "Some days which under our practice are deemed non-judicial were at common law unknown as such. The inference would be that the prohibition extends no further than is named in the Statute."

Magie, J., in Phillips v. Innes, 4 Clark & F. 234, speaking of a case of a summons issued, tested and served on election day, says: "The statutory declaration that these days shall be legal holidays does not indicate an intent to assimilate their status to that of Sunday, What it fails to prohibit remains lawful to be done. Any person, officers of courts, or others, may work if they choose." See also Glenn v. Eddy, 51 N. J. L. 255.

Grier, J., in Richardson v. Goddard, 64 U. S. 28, speaking of the State fast day, said: "The proclamation of the governor is but a recommendation. It has not the force of law, nor was it so intended. A day is appointed by the governor because there is no ecclesiastical authority which would be acknowledged by the various denominations. Nor is it necessary to a literal compliance with the statute that all labor should cease, and the day be observed as a Sabbath, or as a holiday."

The aim of this article is to attempt to show that "legal holidays" as defined by our statutes are not to be confounded with Sunday; to show that with the exception of a prohibition against serving civil process, we have in this state nothing but "*quasi* legal holidays" or *dies non juridici* in a limited sense, and that we only derive Sunday as such a day fully from the common law recognized by statute; that we have no "public holidays" or days of festival or of rest, except Sunday, and to suggest the propriety of an intelligent amendment properly framed to make the matter of holidays, legal or public, clear and uniform upon our statute book.

As the matter now stands the public have no day of rest or of *fete* which they can legally enforce against their employers, and the sittings of any court and the performance of judicial acts by the judges will not be prevented by any liberal construction of the statutes prohibiting the transaction of "public business," taken in their ordinary and familiar significance together with the accurate definitions of the words "legal" and "holiday," and an intelligent understanding of the distinction between *dies non est* and *dies non juridicus;* and between the judicial and ministerial acts of a court or any officer public or private. For legal holidays are creatures of the statute, excepted, defined and separated from other days and, following the old rule of statutory construction, i. e., *expressio unius exclusio alterius*, are strictly construed. It is easy, however, for casual thinkers to give the liberal construction awarded by law to customs as in the case of Sunday enactments and to confuse the legal effect of the different classes of holidays.

We have decisions in our Supreme Court on this subject which are apropos, and distinguishing legal business from ministerial business along the uncertain line of acknowledgements, affidavits, delivery of deeds and similar unsolemn acts.

In State v. Sorenson, 32 Minn. 118, 121, the case, a charge of murder, went to the jury on February 22nd. The jury returned a verdict next day. Defendant claimed the trial was void by statute. Gilfillan, C. J. denying a new trial on appeal, said: "In the case of a court, at least, the necessity of transacting the particular business on that day must be conclusively presumed to have been presented to and passed upon by it (the court below). The only practical rule is to hold its decision on that question final."

See State v. Moore, 104 N. C. 743.

As to rendering judgment in Justice Court on Thanksgiving day (*dies non* in Missouri) see Bear v. Youngman, 19 Mo. App. 91; and as to a criminal trial held on January 1st, Dunlap v. The State, 9 Tex. App., 179, 187; As to a civil hearing on that day see Houston E. & W. T. Ry. Co. v. Harding, 63 Tex. 162, 164; As to entry of judgment on July 4th see Hamer v. Sears, 81 Ga. 288; Russ v. Gilbert, 19 Fla. 54, 60; As to a subpoena returnable May 30th, see Kinney v. Emmery, 37 N. J. E., 339; McEvoy v. Trustees, 38 Id., 420, 421.

As to the distinction made in Ministerial Acts as opposed to Judicial acts upon a legal holiday as defined in our statutes, see Slater v. Schack, 41 Minn. 269, (an acknowledgement taken by a Notary).

Docketing a judgment on December 25th. In Re Worthington, 7. Biss., 455. Judgment entered on February 22nd. Paine & Co. v. Fesco & Co., 1 Pa, County Rep., 562. A tax sale made on December 25th, Hadley v. Musselman, 104 Ind. 459, 462; Issuance of a summons by a justice, Weil v. Geier,61 Wis. 414; Smith v. Ihling, 47 Mich. 614.

The decisions in our Supreme Court bearing upon acts performed on Sunday are as follows:

Brimhall v. Van Campen, 8 Minn. 13.

Finney v. Callendar, 8 Id. 41.

Finley v. Quirk, 9 Minn. 194.

Durant v. Rhenier, 26 Minn. 362; Hanchett v. Jordan, 43 Id. 149; State v. Young, 23 Minn. 551; Schwab v. Rigby. 38 Minn. 395; Brackett v. Edgerton, 14 Minn. 174; Handy v. St. Paul Globe Pub. Co., 41 Minn. 188.

Notes of Recent Foreign Decisions.

Falsely publishing that a person would be an anarchist if he thought it would pay is held in Lewis v.Daily News Company (Md.) 29 L. R. A. 59, to be libelous because it imputes the possession of moral obliquity and turpitude, which would cause all honest and upright people to shun the person thus stigmatized.

A decision of Judge Otis of the Ramsey county District Court to the same effect was noted in the last number of the Journal.

Fraud of promoters in procuring a subscription to the stock of a corporation before its organization is held in St. Johns Mfg. Co. v. Munger (Mich.) 29 L. R. A. 63, to be no defense against an assessment on the stock after the subscriber has united in forming the corporation, but it is held that his remedy was against the wrongdoers.

A strong illustration of equitable doctrines is found in Eaton v. Robinson (R. I.) 29 L. R. A. 100, where offices of a corporation, who had received salaries which they had voted and paid partly and largely for the purpose of depriving stockholders of the funds of a pending litigation if it should be successful, although they were paid nominally and partly for services rendered, were compelled to account to the stockholders for all sums which had been withdrawn for salaries, with interest thereon.

That a hotel keeper is not liable for a theft by his night clerk, from the hotel safe, of money of a regular boarder who has lived in the house for some months, if ordinary care and diligence were used in employing the clerk, is decided in Taylor v. Downey (Mich.) 29 L. R. A. 92; and with the case is a note on the liability of a bailee for the wrongful appropriation by his servant of the thing bailed.

Forfeiture of stock in a building and loan association, if authorized by the contract of the parties, is held in Southern B. & L. Asso. v. Anniston Loan & T. Co., 101 Ala. 582, 29 L. R. A. 120, to be beyond the power of equity to relieve against; and the foreclosure of a mortgage given by the owner of such stock is allowed for the full sum without any abatement for payment on his stock; but the contrary rule is followed in Buist v. Bryan (S. C.) 29 L. R. A. 127, and Randall v. National B. L. & P. Union, 42 Neb. 809, 29 L. R. A. 133, which require the application of payment on such stock upon the mortgage. With the cases in 29 L. R. A. 120, is a collection and analysis of the authorities on this subject.

The Supreme Court of Minnesota has also ruled to the contrary in the recent case of Maudlin v. American Savings & Loan Association not yet published.

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

The right of a State or a municipality to priority or preference of payment from an insolvent estate after a general assignment for creditors, which passes the title, is denied in State v. Foster (Wyo.) 29 L. R. A. 226; and the numerous cases on the priority of a State or the United States in payment from assets of a debtor are reviewed in connection with this case.

The priority of claims of the State for taxes against assets of the taxpayer is considered in Bibbins v. Clark (Iowa) 29 L. R. A. 278, in which the claim is held not to have priority over pre-existing mortgages. This overrules a prior decision in the same State; and the whole subject of priority of such claims for taxes against a debtor's assets is presented in the annotation to the case.

A peculiar case as to the effect of the statute of limitations in respect to nonresidents is that of Mason v. Union Mills Paper Mfg. Co. (Md.) 29 L. R. A. 273, which decides that a nonresident against whom another nonresident attempts to enforce a claim by garnishment of a resident is within a provision denying effect to the statute of limitations as to any person absent when a cause of action against him accrues, so long as his absence continues.

When legal papers are served by mail the postage must be prepaid in full to make the service valid. Recently the office boy of a prominent New York firm put a two-cent stamp on a letter containing a summons and complaint in a case, and mailed it to the defendant's counsel. The postage was two cents short, and the defendant's counsel, after paying the additional two cents, was in a position to claim judgment by default, on the ground that he had not been legally served. The plaintiff's attorney immediately got an order to show cause why the default should not be opened. There was a long argument in court, and several lengthy affidavits were submitted. The case was finally reopened upon payment by the plaintiff of $30 costs. Thus, the time of the court for nearly two hours, $30 costs, and the fees of two leading lawyers were made necessary to correct a mistake of two cents by an office boy.

"Lands of the United States"--Control Over Settlers.

The definition of this quoted phrase, with respect to their treatment in the removal of timber under homestead entries, has never been made by the U. S. Supreme Court in the manner which the facts presented it in Shiver v. U. S., 16 Sup. Ct. Rep. 55. During the five years allowed for the completion of the government patent, the right of the settler as against third parties seems to be absolute—but as to the government, his right is only inchoate and conditional. With respect to standing timber, the privileges of the settler are analogous to those of a remainderman from whom good faith is required, excluding the commission of waste mala fide. Whether as between the State and the settler the property may be subject to taxation as his (limited) property was left undecided by the court. A settler, therefore, may be guilty of waste, and punishable criminally for abusing his rights as such, for he is bound to act in good faith to the government, and he must not pervert the law to dishonest purposes, or to use the lands for mere profit and speculation. The drift of the decision inclines to liberal treatment of the settler who acts in good faith to the government, with sufficient power in the latter to punish a hishonest settler.—N. C. Reporter.

Insane Fiduciary.

In Holden v. The A. O. U. W. the Supreme Court of Illinois decided that an insane beneficiary in a life insurance policy who kills the insured under such circumstances as would cause the killing to be murder if the beneficiary was sane, does not thereby forfeit his right to recover the insurance money.

The court reached this conclusion by the following exhaustive review of the cases:

That an assignee who was sane of a policy of life insurance caused the death of the assured by felonious means has been held sufficient to defeat a recovery on the policy: N. Y. Mut. Life Ins. Co. v. Armstrong Admr., 117 U. S. 591; The Prince of Wales, etc., Assn. Co. v. Palmer, 25 Beav. 605.

The general doctrine is that insane persons are liable for damages caused by their torts distinguishing these from criminal liability: Morse v. Crawford, 17 Vt. 499; Cross v. Kent, 32 Md. Taggard v. Innes, 12 Up. Can. C. P. 77. Williams v. Hayes, 145 N. Y. 442; McIntyre v. Sholty, 121 Ill. 660. By the weight of authority it is held in such cases, the lunatic not having the element of intention or malice, is only liable for damages that would be compensatory and not liable for vindicatory damages; and such is the rule in this state, McIntyre v. Sholty. The reason for the rule that an insane man shall be held liable for his torts is, where a loss must fall upon one of two persons equally innocent it must be borne by the one who caused it. The liability is in no way dependent upon the intent or design to commit the act, for a lunatic can have no will and can form no design or intent, and would not be liable for a tort wherein the in-

tent is a necessary ingredient. Such is the rule with reference to torts.

A very different question is presented with reference to a contract of insurance and the liability of a company on its policy. In the absence of an express stipulation relieving the company from liability in such case, where there is no fraud or design, a fire insurance company is not relieved from liability on its policy by reason of loss by fires through negligence of the assured or its servants: Shaw v. Robberds, 6 Adot. & E. 75; Walker v. Martland, 5 Barn. & Ald. 171; Bush v. Royal Ex., 2 Barn. & Ald. 73; Dobson v. Sotheby, 1 Moody & M. 90; Waters v. Ins. Co., 11 Pet. 213; Ins. Co. v. Laurance, 10 Pet. 507; Catlen v. Ins. Co., 1 Sumn. 434; St. Louis Ins. Co. v. Glasgow, 8 Mo. 713; Gates v. Ins. Co., 5 N. Y. 400; Nelson v. Ins. Co., 8 Cush. 477; Mathews v. Ins .Co., 11 N. Y. 14; Huckins v. Ins. Co., 11 Foster, 247; Johnson v. Ins. Co., 4 Allen, 388; Mukey v. Ins. Co., 35 Iown 174; Cumberland v. Douglas, 53 Pa. St. 453; Gove v. Ins. Co., 48 N. H. 41; National Ins. Co. v.Webster, 83 Ill. 470.

If a loss is incurred by a peril insured against, the liability exists even though the remote cause be the negligence of the assured of his servants, unless that negligence be so gross as to authorize the presumption of fraud. Kurow v. The Continental Ins. Co. of New York, 57 Wis. 56.

The reason for such a rule is that an insurance company for a consideration paid has assumed the risk of the property being destroyed by fire. That assumption of risk includes injuries to the property by fire resulting from the negligence of the assured or his servants where not expressly excepted. It also is an assumption of all risk of the assured becoming a lunatic or insane, and destroying the insured property, when in that condition, unless by the terms of the policy such liability is saved by an express exception.

An insane person may be liable for burning the property of another for the reason that where a loss must be borne by one of two innocent persons it must fall upon the one occasioning that loss, yet the burning of his own insured property does not necessarily injure the insurance company, if that company for a sufficient and valuable consideration assumes the risk. That assumption of risk is the contract of the company for a consideration paid to it. On no consideration of policy or justice should it be relieved from its contract in the absence of fraud, malice or design. These quantities can not exist in the mind of an insane person. To hold that the insurance company should be relieved from liability under such circumstances would be to change the contract of the parties at the instance of one for its benefit, to the prejudice of the other without his consent and where there is no misrepresentation, mistake or fraud, covin, design or malice. Such is not the law. A fire policy covers all risks of loss or damage by fire only such as are excepted by the terms of the policy and such as are caused by the intended voluntary act, design, assent or procurement of the assured.

It has been held by repeated adjudications in various courts of this country and in Great Britain where there is no express provision in a life policy that in the event of the insured dying by his own hand the policy shall become void, the right to recover thereon is not forfeited, and the policy is not vacated by reason of the suicide of the assured while in a state of temporary insanity. The proposition is so fully established and recognized that a citation of authorities to sustain it would be supererogation. Here again the reason for the rule is like that in case of fire insurance policies. The contract of the parties is to be construed as it has been made, and not to be changed at the request of one of the parties to it for that party's benefit without the consent of the other, where there has been no fraud, mistake, misrepresentation, deceit or other intentional wrong to induce the making thereof or to accelerate the time of payment.

These rules do no violence to what has been termed a maxim of the insurance

law of all nations, i. e., that the assured can not recover for loss produced by his own wrongful act: Thompson v. Hopper, 6 H. & Bl. 191. By which is meant an act intentionally wrongful. In a case before the Supreme Court of North Carolina, in 1888, it appeared the complainant instituted proceedings for the assignment of dower in the estate of her husband, for whose death she had been convicted as an accessory before the fact and sentenced to imprisonment for life. The trial court ruled against the allowance of dower and on appeal it was held: "We are unable to find any sufficient legal ground for denying to the petitoner the relief which she demands; and it belongs to the law making power, alone, to prescribe additional grounds for forfeiture of the right which the law itself gives to a surviving wife. Forfeitures of property for crime are unknown to our law, nor does it intercept for such cause the transmission of an intestate property to heirs and distributees, nor can we recognize any such operating principle.

We have searched in vain for an authority or ruling on the question and find no adjudged case; the fact that none such is met with affords a strong presumption against the proposition." Owens v. Owens et al., 100 N. C. 240. In the recent case, in the Supreme Court of Nebraskta of Shillenberger v. Ransen et al., Part 4 L. R. A., 564, it appears, A died owning an estate and surviving her husband, a son and daughter. The husband became tenant by the courtesy and the children took an estate in fee. Under the statute of that state on the death of a child the father inherits. The father murdered the daughter to obtain that inheritance. He conveyed the lands and the vendees filed a bill for partition against the son who set up the fact of the daughter having been murdered by the father, of which the vendees had notice, and prayed the court to find the father took no estate, etc. It was held:

"Knowledge of the settled maxims and principles of statutory interpretation is imputed to the legislature. To the end that there may be certainty and uniformity in legal administration it must be assumed that the statutes are enacted with a view to their interpretation according to such maxims and principles. When they are regarded the legislative intent is ascertained. When they are ignored interpretation becomes legislation in disguise. The well considered cases warrant the pertinent conclusion that when the legislature, not transcending the limits of its power speaks in clear language upon a question of policy, it becomes the judicial tribunals to remain silent," and held the father became vested with the estate of the daughter.

The line between legislation and interpretation is clear and for the courts to declare a forfeiture for crime where the legislature has remained silent is legislation by judicial tribunals, a subject with which they have no concern. No question of public policy is presented by this record. There can be no public policy in the punishment of such persons. This discussion brings us back to the first proposition with which this opinion commenced and we hold: where an insane beneficiary in a life policy kills the assured under such circumstances as would cause the killing to be murder if the beneficiary was sane, such killing does not cause a forfeiture of the policy, nor bar his right of recovery for the insurance money.

License of Counsel in Addressing the Jury.

The license of counsel in their jury addresses is often the source of complaint in the reviewing courts, and the method of review differs in the various American Supreme Courts. Some maintain the proposition that exception should be taken to hurtful remarks of counsel to be urged upon a motion of a new trial, and if no relief be granted by the trial court, to be further urged in the Appellate Courts. Other courts dealing in the same procedure, are lenient in this regard, and will not reverse, excepting in an extreme case. The Supreme Court of Pennsylvania, recommends the

practice of bringing these offenses to the notice of the trial courts, without interruptions or exceptions, and if the trial court deems the offense of a partisan or vindictive speech established, a juror may be withdrawn, and the cause continued as a punishment to counsel.

In a late case in the Supreme Court of Pennsylvania, Holden v. Pennsylvania R. R. Co., 169 Pa. St., p. 1, an action was brought by the Rev. Wm. Holden, rector of St. Peters Church. It was one of the "Stop, look and listen" cases, while crossing railroad tracks. The rector claimed that he "stopped, looked and listened," but his companion, in the carriage denied the statement, and this statement was corroborated by several other witnesses, while the rector was alone in the support of his statement. Notwithstanding, the jury gave a verdict of $10,000 damages, and the trial court approved of it. The coarse speech of the counsel abounded in abusive remarks, some of which were as follows: "If ever corruption was resorted to in a case, this is the case." "The company's detective is a ghoul with a human face, but the heart of a beast." "They may bully the venal, but the day has come when they must cease the attempted system of terrorizing witnesses who swear against them." "The witnesses (naming them) are lying with the hope of being paid for their dishonest and dastardly service." "These two infamous perjurers should be avoided. It becomes your duty and mine to stamp those perjurers as the tools of the company. They are infamous birds of prey. Those scoundrels that have gathered together shall not be successful until they have been scourged by the heavy hand of justice, etc."

The Supreme Court of Pennsylvania reversed the judgment and said: "When juries are so palpably regardless of their duty, and of the sanctity of their oaths, that they permit their verdicts to be rendered in obedience to their prejudices or their sympathy, as is too often the case, the trial courts should deal with them in a firm and decisive manner, and should reject their erroneous verdicts, without the least hesitation or delay. Otherwise the administration of justice is brought into public contempt and dishonor."

Referring to the abuse of counsel, the Court said the comments of counsel complained of, were of the most offensive and reprehensible character, not sustained by any evidence, and justly deserving the severe censure of the Court." We can discover nothing to palliate them in the least degree, and inasmuch as there was no efficacious remedy available to correct the mischief done, it was the plain duty of the Court to withdraw a juror and continue the cause. Many judges are in the habit of doing this on proper occasion, and the practice deserves to be widely extended, so that counsel who indulge in the habit of making such comments, may be properly admonished that they cannot do so except at severe cost to their clients and themselves."

In Judge Gibbons' court, at Chicago, the other day an old farmer from De Kalb County was the defendant in the suit for a piece of land, and his lawyer, ex-Judge Jones, had been making a strong fight for it. When the plaintiff's attorney began his argument he said:

"May it please the court, I take the ground—"

The old farmer jumped up and sang out: "What's that? What's that?"

The judge called him down.

"May it please the court," began the attorney, not noticing the interruption, "I take the ground—"

"No, I'll be d—d if you do either," shouted the old farmer; "anyhow not till the jury decides the case." Ohio Legal News.

An Indiana judge in instructing a jury said: "Gentlemen, you have heard the evidence. The indictment charges the prisoner with stealing a jackass. This offense seems to be becoming a common one. The time has come when it must be stopped; otherwise, gentlemen, none of you will be safe."—Ex.

THE MINNESOTA LAW JOURNAL.

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

DISTRICT COURT.

Supreme Court.

In the Matter of the Application of Henry Benedict to set aside a sale of a judgment on execution to Edward Feldhauser.

(Not reported in the official reports.)

Sec. 5465, Statutes, 1894, forbidding the sale of things in action on execution without an order of court, applies to executions issued out of the Supreme Court.

Ambrose Tighe for Henry Benedict, judgment debtor, Lewis E. Jones for Harry Habighorst, judgment creditor, J. H. Foote for Edward Feldhauser.

Henry Habighorst having obtained a judgment for costs of $146.40 against Henry Benedict in the Supreme Court, on the 15th of August, 1895, caused an execution to issue out thereon under which the sheriff of Ramsey county levied on a certain judgment which appeared docketed in Ramsey county in Benedict's favor against certain parties for $9358.11. On the 28th of August, 1895, after personal notice to the parties who owed the $9358.11 judgmen but without any notice to Benedict who was a non-resident and after posting the statutory notice of sale of personal property on execution but without an order of court authorizing the sale, the sheriff sold the $9358.11 judgment belonging to Benedict under the execution to Edward Feldhauser for $75. Nov. 5th, 1895, Benedict secured an order to show cause why the execution sale should not be set aside.

Attorneys for Habighorst and Feldhauser argued that sec. 5465 did not apply to executions out of the Supreme Court. Attorney for Benedict argued that either sec. 5465 did apply or else that the common law rule would apply under which a thing in action could not be levied on under execution. Nov. 7, 1895, the Supreme Court made its order as follows:

It is ordered that the sale of said judgment in the above cause, having been made without an order of the court, be and it is hereby set aside and vacated.

Stockholders Liability Action---Return and Paper Book.

Pioneer Fuel Co. & W. R. Merriam, Respondents, vs. St. Peter St. Improvement Co., et al., defendants, A. J. McA. Stark, appellant.

(Not reported in the official reports.)

(Appeal from District Court, Ramsey County, Kelly, J.

In a stockholders' liability suit under Genl. Statutes, Ch. 76, a defendant demurring to the plaintiff's complaint, on an appeal from an order overruling his demurrer, will not be required to include the complaints of intervening creditors filed after the interposition of his demurrer, in his return to the Supreme Court.

Davis, Kellogg & Severance and T. R. Palmer, for respondents; Ambrose Tighe, for appellant.

Respondent Pioneer Fuel Co. having obtained a judgment against St. Peter St. Improvement Company, which was unpaid, began an action March 2, 1894, against the company and three of its stockholders, not including the appellant, to enforce their statutory liability as such, on the judgment. Respondent Merriam having obtained a judgment against the same company began an action March 1, 1894, against all its stockholders including appellant, under General Statutes, Chap. 76. To the complaint in this last action appellant demurred. A notice to creditors had been published in the Pioneer Fuel Co. action and a large number intervened and filed claims. On April 18th, 1894, after the service of the appellant's demurrer, the district court made an order consolidating the two actions. Subsequently the appellant's demurrer was argued and overruled and he appealed. On his appeal he returned to the supreme court the complaint in the Merriam suit, his demurrer and the order overruling the same. The respondents

secured an order to show cause why he should not be required to make an amended return and serve an amended paper book which should include the complaint of the creditors who had intervened. In support of their application, they presented a certificate of the trial judge that he had considered these intervening complaints as well as the complaint specifically demurred to in passing on the appellant's demurrer. In opposition, the appellant argued that the order of consolidation had no standing as such because the parties in the two actions sought to be consolidated were not identical, that if it had any effect it was simply that of an order allowing the Pioneer Fuel Co. and other creditors to intervene in the Merriam suit, and that under the decision in Howard v. Carroll, et al., 64 N. W. Rep., 145, the intervention having been made subsequent to the service of the appellant's demurrer, the complaints of the intervenors could not be considered in passing on the merits of the original complaint. January 6th, 1896, the court made its order as follows:

It is ordered that the clerk of the district court of the County of Ramsey upon the presentation to him of a copy of this order and tender of his fees by the *respondents* make and return to this court an amended return in this case so as to include all the pleadings and papers in the action hereinbefore referred to. Ordered that other than as herein stated the respondent's mo tion be and it is hereby denied.

The State of Minnesota, ex rel., William B. Stine relator, vs. Charles E. Weld, Ole Open, William O'Neill and Peter Keegan, as the Canvassing Board of Murray County, Minnesota, defendants.

(District Court, Murray County.)

The duties of a county canvassing board are purely ministerial, and if it fails to canvass the votes cast for candidates for a county office at a regular election, on the ground that no vacancy existed in such office, it will be compelled to by a writ of mandamus. But the question of who is entitled to the office cannot be determined in such mandamus proceedings.

H. C. Grass and B. H. Whitney for the relator; P. P. Smith and F. L. Janes for the defendants.

It was agreed by counsel that the cause should be decided by the judges of the Eighth and Thirteenth Judicial Districts of said State.

CALDWELL and P. E. BROWN, J. J., made the following findings of fact and conclusions of law:

I. That William B. Stine, the relator, is and has for several years past been a resident, freeholder, and tax payer and legal voter in and of said county. That said county is a legally organized county in this state.

II. That on the 4th day of November 1890, said William B. Stine was duly elected to the office of clerk of the District Court in and for said county, that on the first Monday of January, 1892, he duly qualified as such clerk of the District Court of said county, and duly entered up the discharge of his duties as such clerk of the District Court; that said term of office will expire on the first Monday in January, 1896.

III. That there was an election held in all the various election precincts of said county on November 6th, 1894, for the election of state and county officers.

IV. That after said election and within the time prescribed by law there were returned by the judges of election of the several election districts of said county for said William B. Stine, for the office of clerk of the District Court of said county 502 votes, and for J. A. Maxwell 85, L. A. Foster 403, W. H. Dawson, 66, Robert Hyslop 1, H. Pfeifer 1, to the county auditor of said county, which returns were in due form.

V. That Charles E. Weld was on November 6, 1894, and ever since has been the duly elected and qualified County Auditor of said county, and that on said date the defendant Ole Open was the duly elected and qualified Chairman of the Board of County Commissioners of said county, and that the defendants, William O'Neill and Peter Keegan were at said date, duly elected and qualified justices of the peace in and for said county and were duly selected and appointed by said County Auditor to constitute the members of the county canvassing board to canvass the returns of said election held on November 6th,

1894, and that said Weld, Open, Keegan and O'Neill constituted the canvassing board of said county to canvass the returns of said election.

VI. That within the time allowed by law the said county canvassing board proceeded to and did openly and publicly canvas the returns made to the County Auditor's office of all state and county officers voted for at said last mentioned election in said county, except the returns for the office of the Clerk of the District Court of said county. That said county canvassing board board did prepare, sign, certify and deposit in the office of said County Auditor separate statements containing the whole number of votes in said county for all state and county officers voted for at said last mentioned election, and the votes were given, except for the office of Clerk of the District Court, or the names of the persons for whom such names of the persons from whom such votes were given. That said canvassing board neglected, omitted and failed to canvas the said returns made to the county auditor's office of the votes for Clerk of the District Court of said county, or make the statement of said vote as required by law, or to declare the person having the highest number of votes for the said office of Clerk of the District Court duly elected. That said county canvassing has closed and completed its labors as such canvassing board, except canvassing the vote for Clerk of the District Court as aforesaid and has adjourned.

VII. That the said relator was not the nominee of any political party in and for said Murray County for the office of the Clerk of the District Court for said county in the year 1894, neither was said relator the certified nominee for said office of any political party participating in said election; nor was the relator the certified nominee as a candidate for the office of said clerk of the District Court selected otherwise than by a convention of delegates; neither was the relator the candidate for such office by a petition of the voters of said Murray County, nor was any certificate of a nomination or selection of any kind of the relator as candidate for Clerk of said Court filed or attempted to be filed in the office of the County Auditor in the year 1894.

VIII. That the Secretary of State did not certify, in his certificate of the the office to be elected in said county at the general election in 1894, to the County Auditor of said county that a clerk of the court in and for said county was to be elected at said election, nor did the said County Auditor, in the notices sent to the different election precincts in said county, certify that there was to be elected, at said election, a clerk of said court in and for said county, but each and all of said notices made no reference whatever to said office.

IX. The said relator did not file or cause to be filed any certificate or statement in any form of his nomination, name or selection as candidate, for the office of Clerk of the District Court, in the office of the County Auditor of said county, at any time in the year 1894, nor did he in any manner demand of or request the said county auditor to place, print, or put the name of the relator as candidate for clerk of the court on the official ballots in said county in the year 1894, nor did the said relator in any manner procure any order or decree from any court requiring that relator's name as said candidate be placed, printed or put on said election ticket; nor did the relator pay or tender the payment of the fee of ten dollars to the auditor of said county at any time in the year 1894.

X. That the name of said relator as candidate for the office of clerk of said court was not printed upon any of the official tickets used at the general election aforesaid in said county in the year 1894.

Conclusions of Law.

I. The plaintiff is entitled to judgment in this action for his costs and disbursements.

II. The plaintiff is also entitled to judgment adjudging that a per-emptory writ of mandamus forthwith issue, di-

rected to the defendants, commanding them to forthwith re-convene and canvass the returns in the office of the County Auditor of said county of the votes cast for the office of Clerk of the District Court of said county at the election held in said county on November 6th, 1894, and make a statement of such vote as required by law, and declare the person having the highest number of votes for said office duly elected.

Let judgment be entered accordingly.

Dated December 24th, 1895.

FRANCIS CALDWELL,
Judge Eighth Judicial District of said State.

P. E. BROWN,
Judge of Thirteenth Judicial District of said State.

* * *

We are of opinion. 1. That a clerk of the District Court for said County, should have been elected by the electors of said county at the last general election.

2. It was the duty of the County Canvassing Board to canvass the votes for this office. That the duties of said board are purely ministerial, and the board cannot go behind the returns.

3. The County Canvassing Board, having failed to perform its duty in this respect must re-convene and finish its labors. To hold otherwise, i . e., that they cannot be compelled to so do in effect decides that such board can by simply declining to act and adjourning, defeat the will of the people expressed at any election. The question of the regularly of the election, who is entitled to this office and kindred questions cannot be tried in this action.

Rea, Hubachek and Healy have removed to the Phoenix building, Minneapolis.

Cobb & Wheelwright have taken nice quarters in the N. Y. Life Building, Minneapolis.

Col. W. E. Dodge, attorney for the G. N. R. R., in Minneapolis, has removed his office to 331 Hennepin over the Minneapolis Trust Co.

Municipal Corporation---Negligence---Ice and Snow.

Oscar Sanders vs. City of St. Paul.

(District Court, Ramsey County.)

1. Where a municipal corporation permits coasting on the sidewalk, thus rendering the snow covered surface more slippery than it would have been by ordinary use, the city is liable to one who falls on the sidewalk and is injured, by reason of such slippery condition.

2. The fact that the plaintiff in such case did not wear rubber overshoes does not make him guilty of contributory negligence.

Briggs & Countryman for plaintiff; Herman Oppenheim for defendant.

The complaint in this action alleged that the plaintiff fell on the sidewalk on Farrington avenue in the City of St. Paul and broke his arm, and that his fall was caused by a slippery condition of the walk resulting from its being used for sliding and coasting; also that although such use had been brought to the knowledge of the city authorities, no attempt had been made to stop the practice of coasting on the sidewalk.

A demurrer to the complaint, on the ground that the city is not responsible for a condition of its sidewalks caused by ice or snow or the operation of the elements, had been overruled at a previous term by Brill, J.

At the trial it appeared that the sidewalk where plaintiff fell was on a rather steep incline, and that the street at that point was a favorite coasting ground for the boys of the neighborhood. That for several months previous to the night of the accident they had been in the habit of coasting down this street and upon the sidewalk where plaintiff fell, the consequence of which was that the snow which covered the sidewalk was rendered extremely smooth and slippery. The policeman whose beat included the premises in question had seen the boys sliding there and some complaints had been made to him by persons living in the vicinity, but no action had been taken by the city, so far as appeared to put a stop to the practice. The plaintiff had a verdict for $300.

In his charge to the jury it was among other things said by—

KERR, J.:—

"The city is clothed with the power, (which carries with it the duty) of maintaining the sidewalks of the city in a reasonably safe condition for travel by pedestrians. The city is not the insurer of its citizens who use its streets and sidewalks. It is not obliged to have them in the best possible condition. It is obliged to use reasonable and ordinary care, and by that I mean such care as men of ordinary prudence and common sense and intelligence use in and about their own affairs.

The city is not responsible for accidents which may happen from the fact that the sidewalks are generally slippery in winter. As our Supreme Court says, that would practically bankrupt any city, in this climate, to hold it responsible for slipperiness merely in the sidewalks, whether the slipperiness is caused by ice or snow, or whether it is produced by purely natural causes, or by some artificial cause, such as water running off a house, or something of that kind. It is not responsible for care to that extent and degree."

* *

"The burden of proof is on the plaintiff to satisfy you by a fair preponderance of proof, that the fact that boys were accustomed to slide or coast over this part of the sidewalk was the proximate, or one of the proximate causes of this injury to the plaintiff; that without that as one of the causes, the injury would not have occurred. If you are satisfied from the evidence that this is the fact, and satisfied by a fair preponderance of proof, then that would be evidence tending to show negligence on the part of the city, provided the city knew, or in the exercise of ordinary care ought to have known, that the sidewalk was put to that use by the boys, and you find that that was an improper use of the sidewalk, calculated to enhance the danger of the citizen walking over the sidewalk, on account of the slipperiness."

* *

"You must find, in order that the plaintiff may recover, that this accident was caused by the boys making this sidewalk more slippery than it otherwise would have been, by coasting over it, and the city either had knowledge of that fact in time to have remedied it before the injury, or, in the exercise of ordinary care and diligence, might and should have such knowledge."

At the conclusion of the court's charge the defendant's attorney requested that the court should also instruct the jury that if the plaintiff was guilty of negligence which contributed to the accident, he could not recover and in that connection the jury might consider the fact he was walking without rubber overshoes.

To this it was said by the court:

"Well, gentlemen of the jury, I do not know of any law which compels a citizen of this city to wear rubber overshoes."

Right of Way---Procession---Electric Car.

Sarah Johnson vs. St. Paul City Railway Co.

(District Court, Ramsey County, File No. 62023.)

The ordinance of the City of St. Paul, approved October 7, 1869, forbidding the driving of any horse or carriage or vehicle of any kind through any funeral, military or civic procession, does not apply to an electric street railway train.

Daniel W. Doty for plaintiff; Munn, Boyesen & Thygeson for defendant.

The plaintiff brought suit for damages on account of a personal injury sustained as the result of a collision between an electric train operated by the defendant and a carriage in which she was riding as part of a funeral procession. A new trial was granted after a verdict in her favor and the court filed the following memorandum:

BRILL, J.: After further consideration of the question, I am of the opinion that Sec. 6 of the ordinance of 1869, which ordinance is entitled "Fast Riding and Driving of Horses in the Streets," does not apply to the operation of street cars. At the time the ordinance was passed street cars were not in use in the city and the ordinance was intended to apply to such vehicles as are driven about the streets and may be moved from place to place at the will of the driver. The person in

charge of an electric car does not "drive" the car in the ordinary acceptance of the word. Processions upon the street sometimes are of great length and occupy a considerable period of time in passing a given point, ten, thirty, forty minutes, or an hour or more. An ordinary loose vehicle can turn aside and proceed upon another street without much inconvenience. A street car is a public conveyance for the transportation of passengers. It proceeds upon a fixed track and could do nothing but wait, whatever the time might be, and such a rule would greatly inconvenience the public. The interruption to a procession by the passage of a car would at most, be slight, and frequently there are breaks in a procession through which the car might pass without interrupting the progress of the procession at all.

Of course, without an ordinance, the street car has no greater right of passage than the person in a procession. The company is liable for negligence the same as in any other case; but these cases were tried and submitted to the jury on the theory that the ordinance gave the procession the right of way, and that to run the car through the procession was negligence *per se* and hence there must be a new trial without regard to whether aside from the ordinance there was sufficient evidence to sustain the finding of negligence upon the part of the defendant.

Garnishment.

William J. Stewart, Plaintiff, vs. Edwin T. Root, Defendant, and Bronson & Folsom, Garnishees.

(District Court, Washington County.)

Sec. 5412 Statutes 1894 permitting judgment to be entered against such defendants sued jointly as are proved liable, even if all the joint defendants are not proved liable, is applicable to proceedings against joint garnishees.

E. C. Teitsworth for plaintiff; J. C. Nethaway for defendant.

Plaintiff recovered a judgment against the defendant some years ago. A short time ago he garnished Bronson & Folsom. In the affidavit and garnishee summons Bronson & Folsom are described thus: David Bronson, E. A. Folsom and Geo. O. Haskell as copartners as Bronson & Folsom. The matter was referred to a referee to take and report the disclosure. Upon disclosure it appeared that Bronson & Folsom were of a mixed nature. The firm composed of the persons named above were engaged in the mercantile business. Under the same firm name Mr. Bronson and Mr. Folsom were engaged in the lumber and steam tow boat business. Haskell had nothing to do with the first end of the concern, but was employed by this latter named part of the concern as a pilot on a steamboat. It also appeared that the tow boat in question was employed on the Mississippi river. Defendant moved to dismiss on the grounds: 1st. That the garnishees, as shown by the disclosure, were not at the time of the service of process, indebted to the defendant. 2nd. That the amount due defendant was exempt by the statutes of the United States. The motions were denied, and judgment ordered in favor of plaintiff.

WILLISTON, J.: The first ground urged by defendant in support of his motion is covered by Sec. 5412, Chap. 66, Gen. Stat. 1894. As to the second ground it does not affirmatively appear from the disclosures that the indebtedness of the garnishees to the defendant, was in any manner connected with his services rendered for them as pilot. What was said by the Supreme Court of this state in Milliken v. Mannheimer, 49 Minn., 521, and in Fletcher vs. Staples, 64 N. W. Rep., 1150, is applicable to the case at bar.

Appeal From Justice Court.

A. Mills, Plaintiff, vs. John Wilson, Defendant.

(District Court, Lac qui Parle County.)

An appellant from Justice Court cannot dismiss his appeal in District Court against the objection of respondent.

C. A. Fosness for plaintiff; Bensel & Smith for defendant.

This was an action in forcible entry brought originally in justice court. On the trial in the justice court judgment

was rendered for the plaintiff for $25.00 as fine only, no judgment being entered for possession. The defendant appealed to the district court. When the case came up in the district court for trial the defendant moved for a dismissal of his appeal. The plaintiff objected to a dismissal of the appeal. No questions were raised as to jurisdiction.

The object of the defendant in moving for a dismissal was that by having the appeal dismissed the only judgment the respondent would have would be an affirmance of the judgment of the lower court, thus keeping the respondent out of possession of the property.

The court denied the motion.

POWERS, J.: "In an appeal from justice court to the district court the appealing party cannot dismiss his appeal against the objection of the respondent, where no questions as to the jurisdiction of the court are raised, but can only dismiss the action or allow judgment to be entered against him as in cases originally brought in district court."

Taxation of Costs---Witness Fees.

Christian Schneider vs. A. S. Weymouth, et al.

(District Court, Ramsey County.)

Where a trial is postponed because one of the attorneys is engaged in another court, the party represented by this attorney cannot tax fees for the attendance of witnesses during the time the trial has been thus delayed.

Michael & Peebles, Attorneys for Plaintiff; Lloyd Peabody, for Defendant.

KERR, J.: A question of practice being involved in this case, which is likely frequently to arise, the same was submitted to a meeting of judges, who are of the opinion that it would not be just in a case like this, where the trial is postponed from day to day solely on account of the fact that one of the attorneys is engaged in another court, to permit the party represented by such attorney to tax fees for the attendance of witnesses during the time the trial has been so delayed.

A party whose witnesses are kept waiting solely on account of the business engagements of his attorney must himself bear the expense incurred in that behalf.

Here is a legal problem which is bothering the lawyers of Iowa.

George E. Metcalf was arrested some time ago on the charge of having robbed the American Express company of several hundred dollars while acting as its agent at Thayer, a small town near Creston, Iowa. On motion of his attorney the prisoner was granted a continuance to go to Kentucky in search of evidence establishing an alibi. J. G. Bull went on his bond for $1,000 and the date for the final preliminary examination was fixed at June 27. While in Lexington, Ky., however, Metcalf was again arrested on another charge similar to the first one, and, being unable to furnish a bond on this occasion, failed to return to Creston in time. Upon this the county attorney demanded forfeiture of the bond. This the justice of the peace before whom the trial took place not only refused, but upon the failure of the prosecution to make good its case against Metcalf, ordered the prisoner discharged, notwithstanding his absence. The state has accordingly brought suit against Bull, Metcalf's bondsman, to recover the amount of the bond, and against the justice of the peace to compel him to show cause why he did not exceed his authority in ordering Metcalf's discharge during his absence. It is not maintained that there was sufficient evidence to justify the commitment of the prisoner, but it is claimed that no order of any kind in a criminal case can be valid unless the defendant is present in the court room at the time it is made. None of these questions have ever been passed on in Iowa and much interest is felt in the outcome of the litigation.

The St. Paul Dispatch of Dec. 20, 1895, says:

Today is the thirteenth day of the taking of evidence in this city before Special Examiner in Chancery in the case of Dale v. Hitchcock, Monsons et al., in the United States circuit court, involving the title to a large tract of property in West St. Paul.

Among other testimony given by

Warren H. Mead on the stand was that, about 1885, Frederick S. Dale came to St. Paul, and that he hired a carriage and took him up unto the highest point on Dayton's bluff, in the Suburban Hill's district. From that point Mr. Dale looked across the river and beheld, with hungry eyes, the rich prospect before him.

Attorney Hawthorne suggested that Mr. Dale was like Moses. He was looking across the river to something he would never obtain possession of.

Col. Ripley, of Minneapolis, who is better posted on the Bible than a person would suppose from his appearance or place of residence, quickly retorted that Mr. Mead's taking of Mr. Dale unto the hill reminded him of another instance in the Bible in which Christ had been taken unto a mountain and shown all the kingdom of the world by a being whom Mr. Mead forcibly reminded him of.

But Col. Ripley took back this allusion in a very abject way this morning in court, when Judge Kerr had been sworn on behalf of the defendants, and testified that he was the man, instead of Mr. Mead, who had accompanied Mr. Dale.

Our Portrait.

Hon. W. C. Williston, whose portrait the Journal publishes as this month's frontispiece, is a South Carolinian by birth but was reared and educated in Ohio. He was a farmer's son and studied law in the intervals of other pursuits, being admitted to the bar in 1855. In 1857 he moved to Minnesota, and located at Red Wing, where he has since resided, practicing law until his elevation to the bench except for an interval while he was fighting his country's battles as captain in the 7th Minnesota Infantry Volunteers. From 1858 to 1871, Judge Williston was associated as a partner with Hon. E. T. Wilder and from 1871 to 1881 with Hon. O. M. Hall, recently a member of congress from the 3rd District. His constituents showed their appreciation of his ability and character by sending him to the House of Representatives in 1873 and 1874, to the Senate in 1876 and 1877, by selecting him as city attorney for several terms and by making him a member of the Red Wing Board of Education for seventeen years. In 1889 he was appointed on the state Board of Corrections and Charities and when Judge McCluer of Stillwater died, Governor Merriam named him as his successor on the District Bench of the 1st Judicial District. The people of the district ratified this appointment at the 1892 election, selecting him for the full term beginning January 1st, 1893.

Judge Williston is a handsome, interesting and able man, who, by his judicial work, contributes much to the reputation our bench enjoys for probity, fearlessness and intelligence.

Literary Notes.

An unprinted diary of Hawthorne opens the January issue of the Atlantic for the new year. It gives a charming glimpse of the great romancer's early life in Boston while weigher and gauger of that port. One of the most important contributions is a paper by John R. Proctor, Chairman of the United States Civil Service Commission, upon The Fourth Class Postoffice under Civil Service. It will be read with interest by every believer in civil service reform.

The remarkable new constitution which is just going into operation in South Carolina is reviewed in detail by Albert Shaw in the January Review of Reviews.

Funk & Wagnalls, the publishers of the new Standard Dictionary, have issued a circular defending their book against the criticisms its rivals have made on it for giving the definitions of certain indelicate words. The criticism is directed against eighteen words only and from a lawyer's standpoint the publishers make out an unanswerable case for themselves, on the score of reason and authority.

M. Gustavus A. Wald, in his address at the dinner of the Harvard Law School Association last June, remarks that "On Feb. 14, 1882, Sir Frederick Pollock wrote me: 'Will you believe that our Benchers of Lincoln's Inn actually refused to buy for the library O.W. Holmes' Common Law, and Langdell's Summary of Contracts, when I not only recommended the books, but handed them to the librarian for the committee's inspection? Probably you will not. But it is true.'

A glimpse into the past, however, of twenty years before, reveals a somewhat different spirit.

Mr. Henry Crabb Robinson, a London barrister, who died at the venerable age of 92, in 1867, remarks, in his diary of 1862, of a colleague in the administration of the London University, Henry Busk: "There is an old sinecure office of which I had never heard, given to Busk by Quayle, when treasurer. Referees sit on certain days to decide controversies in the Temple. Anybody may, but no one does come; and 20 pounds per annum has been held by Busk. Busk however, did not choose as others do, to put the money in his pocket, but he bought good American law books, and thus aplied 600 pounds to augment the Temple Library."

Review of the Law Reviews.

The Yale Law Journal for December contains a valuable and exhaustive article on property subject to government regulation as based on the decision in Munn v. Illinois, 94 U. S. 113, and the subsequent decisions of the United States Supreme Court.

The Medico Legal Journal gives in full the papers received before the recent Medico legal congress in New York.

The recent numbers of the Albany Law Journal give the new rules of court promulgated by the courts of New York on their reorganization under the new constitution adopted by that state.

The Central Law Journal in the first number of its new volume discusses the Assignability of a cause of action for a statutory penalty, a subject of interest to Minnesota lawyers in view of the provisions of our new fire insurance law.

The American Law Register & Review contains an elaborate article defending the power of courts to declare legislation unconstitutional, against the criticisms the Income Tax decision has excited.

Lawyer and Credit Man for December gives an interesting series of papers from practical men on the methods they have found effective in the collection business.

Book Reviews.

General Digest, Vol. X. year ending September, 1895. Lawyer's Co-operative Publishing Company, Rochester, N. Y.. $6.00.

To review a work of the character of this before us is a very difficult, if not an impossible task. We have examined the work thoroughly, but no examination, however thorough, would reveal the real merits or demerits of such a work. These can be ascertained only by use of the book in actual practice. Our present opinion of this volume, therefore, is necessarily based upon the nine preceeding volumes which we have used. With these, we apprehend, our readers are as familiar as we, and comment on the series is needless. The publishers say in the preface, that this annual carries forward the work of the series without material change.

This volume is larger and apparently more complete than any of its predecessors, containing, including table of cases digested, 2750 pages of closely, but clearly, printed matter. There is also a table of cases which during the past year have been overruled, criticized or limited, containing, as we estimate, about 1200 cases. The criticism of, or the refusal to follow or recognize the previous case as authority, is cited, whether the criticising court be that in which the previous case was decided or another. This we consider an invaluable adjunct to an annual digest, as

it enables the practitioner to ascertain very quickly and easily whether an authority upon which he may rely has been repudiated by the court which rendered it or by other courts. This table, as the whole digest, includes not only the decisions of American courts, but those of England and Canada as well, and includes cases unofficially reported.

The '95 Annual, as those preceding, contains full cross references, so that after an examination of it one is safe in assuming that he knows what, if any, adjudications have been made by any court upon the question during the preceding year. Such a digest is a necessity to a practicing lawyer. Our great wonder is that such a work can be sold at the price asked. To the uninitiated it would seem that the mechanical work and material would cost a large part of that amount.

Commentaries on the Constitution of the United States by Roger Foster. To be complete in three volumes. Vol. I. Octavo. 713 pages. Published by Boston Book Co., $5 per Vol. In law sheep; $4.50 in cloth.

The author of this noteworthy book is Roger Foster of the New York bar, author of a treatise on Federal Practice and lecturer on Federal Jurisprudence in the Yale Law School. Mr. Foster is a young man, under forty and comes of a distinguished loyal family. His father was Dwight Foster, one of the United States' representatives on the Halifax commission and his mother is a sister of Simeon E. Baldwin, Professor in the Yale Law School and one of the justices of the Connecticut Supreme Court. Mr. Foster himself is a scholar of the profoundest attainments in his department of tireless industry and gifted with a literary style at once precise and entertaining.

His work on the Constitution is an ambitious undertaking. He aims to treat the subject exhaustively from both an historical and a juridical standpoint. His method is, starting with the preamble, to take each section, in the order in which it appears in our Great Charter, trace its origin, give a summary of the comments which have been made on it either by constitutional writers or in judicial decisions and detail the events in our national history in which it has been applied or interpreted. For example, Chapter XI is devoted to Section 3, of Article I of the Constitution which contains the provisions concerning the senate. Here are presented a discussion of the origin of the Senate, going back to the earliest times, with descriptions of parallel bodies under other systems, a summary of the debates in the Federal Convention on this section, ten pages on the methods of electing senators, two pages on the classification of Senators, six pages on the method of filling vacancies in the senate which occur during a recess of the legislatures and finally a series of general observations including the questions of senatorial courtesy, of the right of legislatures to instruct senators and of the influence of the senate on national legislation.

The dangers of this method of treatment are obviously that the work may present a scrappy, disjointed and staccato effect, repulsive to the consecutive reader and disheartening to the student. But it is evidentiary of Mr. Foster's ability as a writer that such is not the result. On the contrary the book is one of exceptional interest and carries whoever takes it up, along with unflagging spirit to the end. The whole world of authority from the obscurest books and judicial decisions to contemporary newspapers and the personal testimony of living men has been drawn on and each statement of fact is fortified by the fullest references to its source, and sometimes by a verbatim quotation from the witness relied on. A vast mass of hitherto inaccessible information is collected and all sides of every point debated are set forth with more than judicial fairness. The limits of the Journal do not permit it to compare the book with others on the same subject, to discuss the author's conclusions on controverted questions or to refer in greater detail to the works many merits. But it looks forward with interest to the remaining volumes and

predicts for them a generous welcome.

By way of criticism and as against a new edition of the present volume, the Journal calls the attention of the publishers to the fact that curiously enough the Constitution in its entirety is nowhere printed in the book and that there is no index to the volume. The intention is probably to reserve the index for the last volume when it will be given for the entire work but there is no justification for such a method. There should be in each volume of a law book an index as well as a general index in the last volume.

Lost and Found Books.

The Librarian of the Law Library in Temple Court, Minneapolis, writes the Journal:

"Mr. Jaggard's suggestion, in your issue of November, that you establish a 'Lost Book List,' is an admirable one. So long as men are careless enough to omit putting their names in their books, such lists will be necessary. As a contribution to your "Exchange" Department, I note the following losses:

Vol. 2, Kay & Johnson.
Vol 2. Brevard.
Vol. 80, N. C.

And the following unlawful gains:

One Vol. of A. & E. Enc. of Law.
One Vol. of Iowa Rep.
One Vol. of Minn. Rep.

Their owners I should be glad to find."

Frank I. Mason of 82 Loan & Trust Building, Minneapolis, writes:

"While out of my office about 30 minutes today between 12 and 1 o'clock some thief stole my "Greenleaf On Evidence," three volumes comparatively new. They are of the latest edition. My name was written in back hand on the bottom of the back of each one, only the initials being used; name was written in ink with a pen. Will any attorney to whom they are offered for sale have would-be-vendor arrested and notify me?"

And Mr. Jaggard, himself, says:

"There are missing from my office the following reports, borrowed and not returned: 54 Vol. of Minnesota, 4 Pacific Reporter, 19 New York Supplement. Also some one borrowed and failed to return 'Innis on Torts.'"

The Journal is afraid Mr. Jaggard will never recover his "Innis on Torts." The man who borrowed it has probably used it for kindling wood, assuming that it has no value now that Mr. Jaggard's own work on the subject is completed and on the market.

Personals.

D. H. Twomey of Duluth has removed to Salt Lake City, Utah.

Hon. S. D. Allen, a bright attorney of Duluth, has been nominated by the republicans for mayor. If push wins he will be elected.

Shearer and Childs have removed from the Boston Block, Minneapolis, to the New Guaranty Loan Association building.

F. W. Murphy, a well known and rising young lawyer of Wheaton, Minn., and Miss Estella M. Gray of Stillwater, were married Dec. 11.

D. F. Morgan of the firm of Hale, Morgan & Montgomery, Minneapolis, and Mrs. Lizette Davis were married on Dec. 9.

Mr. Henry Conlin has severed his connection with the legal department of the Omaha Ry. Co. at St. Paul and has been admitted to the firm of Welsn & Hayne, Minneapolis. Mr. T. A. Polleys, of Madison, Wis., will succed Mr. Conlin.

The epidemic of typhoid fever now raging in Duluth has done as well with the legal profession as with others more wicked and hardened. The Journal regrets to learn that Mr. Schmidt of the firm of Schmidt, Reynolds & Mitchell has been in the hospital for some time.

Mr. Frank Crosby, son of Judge F. M. Crosby, of Hastings, is also sick.

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EXECUTION.

The statutory provision forbidding sale of choses in action under execution, without an order of court, applies to executions issued out of the Supreme Court. In re Application of Benedict, (Not officially reported), 272.

NEW TRIAL.

Where there are several material issues tried and a general verdict rendered, a new trial must be granted if there was an erroneous instruction upon any one of the issues. Funk v. St. Paul City Ry. Co., 129.

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Where language of an act is obscure or doubtful, court will look to history of time when it was enacted for the mischief aimed at. Funk v. St. Paul City Ry. Co., 129.

STREET RAILROADS.

Ch. 13, Laws of 1887, the "fellow servant" act, is not applicable to a street railroad operated by cable. Funk v. St. Paul City Ry. Co., 129.

DECISIONS OF DISTRICT COURTS.

ACTIONS.

Handing summons to sheriff to serve is not the commencement of an action, within the meaning of the statute, where the defendant did not usually or last reside in the county. Hoke v. Swift, 20.

Action for injury to real estate must be brought in the state where it is situated. Little v. Chic., St. P. M. & O. Ry. Co., 214.

APPEAL.

An appeal not perfected by service of notice on the clerk, or service of bond, does not stay proceedings. Pioneer Press Co. v. Hutchinson, 68.

It is no defense to an action on an appeal bond, where the principal became insolvent pending the appeal, that if the judgment appealed from had been enforced the principal would have made an assignment and his estate would not have paid more than twenty cents on the dollar. Such a defense is too conjectural. Estes v. Roberts, 64.

ARBITRATION.

The claim of any person to an estate in fee or for life, what is not. In re arbitration between Alexander and Nelson, 136.

ASSIGNMENT.

A cause of action for trespass to land is not assignable. Hoten v. Munch, 181.

BANKS AND BANKING.

A bank which makes collections from time to time, and at stated periods remits the proceeds, is a mere debtor of the owner of the funds, and not a trustee. In re Assignment of Kingsland, 156.

A check on funds in bank operates as an equitable assignment, and payment to a holder for value cannot be stopped by the drawer's assignee in insolvency. Columbia Market Co. v. Union National Bank, 94.

In an action by a depositor against a bank for refusal to honor a check, the complaint must allege that the check was drawn by a person authorized by the depositor to sign it, and that this fact was known to the bank. Jaynes v. Second National Bank, 51.

COMMON CARRIERS.

Where stock shipped is received in bad condition, and consignees refuse to accept same, and it is sold by the carrier, and plaintiffs fail to prove negligence on the part of the carrier, or that the sale was not honestly and fairly made, the measure of damages is the amount realized from such sale. Thuett Bros. v. Chic., Ct. P., M. & O. Ry. Co., 215.

CORPORATIONS.

Stockholders in annuity, safe deposit and trust companies, organized under act March 5, 1883, have no double liability. International Trust Co. v. American Loan & Trust Co., 23.

Receiver of insolvent corporation must not be a stockholder or officer. Nat. Ger. Am. Bank v. St. Anthony Park North Real Estate Imp. Co., 30.

Members of a corporation, who conduct business not authorized by the articles, under name closely resembling corporate names, are liable as partners in that business, to persons who have no notice of the corporate management. Longfellow v. Central W. C. T. U. Coffee House, 24.

COSTS.

Costs allowed as condition of amending pleading are not payable if party does not amend. Glencoe Produce Co. v. Whitcomb, 214.

On appeal from justice court, if judgment be reduced one-half, defendant is entitled to costs and disbursements, though he neither appeared nor answered in justice court. Thorne v. Reedy, 234.

Where a case is continued because one of the attorneys is otherwise engaged, his client cannot tax witness fees for attendance during the time the trial was thus delayed. Schneider v. Weymouth, 278.

DEPOSITIONS.

Where depositions are taken on due notice, and other side does not appear or submit cross-examination, the right to cross examine such witness is waived and lost. Merchants Nat. Bank v. West Duluth Light & Water Co., 164.

DIVORCE.

Decree of divorce a mensa et thoro not annulled by resumption of matrimonial relations, requires further action of competent court. Ristow v. Ristow, 47.

In action by wife for divorce, persons to whom husband conveyed lands to defraud her may be joined on motion as defendants. Gardner v. Gardner, 141.

EJECTMENT.

Pending second trial in ejectment, defendant's removal of crops cannot be enjoined or receiver appointed. Larocke v. Knack, 256.

ELECTIONS.

The duties of a county canvassing board are purely ministerial, and if it fails to canvass the votes cast for candidates for an office, on the ground that no vacancy existed in such office, mandamus will lie to compel such canvass. But the question of who is entitled to the office cannot be determined in such proceedings. State ex rel Stine v. Weld, 273.

EVIDENCE.

Physician may testify as to physical condition of patient from knowledge based in part upon personal examination and in part upon statements of patient made at time of examination as to symptoms and suffering, but not where his knowledge is based in part upon statements made to him by another physician. Miller v. St. Paul City Ry. Co., 68.

EXECUTORS AND ADMINISTRATORS.

Administrator's sale held void on account of insufficient description. Pugsley v. Casey, 23.

Where executors have made unauthorized investments, they must bear all losses, however good their intentions, or however mistaken they were as to their powers and duties. In re estate of Scheffer, 44.

Probate Court ought not to approve of investment by executors in stocks

EXECUTORS AND ADMINISTRATORS—(Continued.)

or bonds of new and untried banks, loan or insurance companies. In re estate of Scheffer, 44.

A special administrator is only empowered to collect and preserve the assets for the executor or administrator who may afterwards be appointed, and he is entitled to reasonable compensation for services performed. Attorney employed to represent an heir cannot receive compensation for acting for special administrator. In re Estate of Hayward, 237.

Sureties on administrator's official bond are liable to his successor for money received by him on sale of real estate in excess of debts, though he had given a special sale bond. Fryberger v. Reed, 141.

A claim of a legatee against the estate of a residuary legatee who had given bond and taken all the assets, must be presented within eighteen months after notice to creditors, or it is barred, notwithstanding the legacy was not made payable for several years after the residuary legatee died. In re Estate of Whiting, 93.

EXEMPTIONS.

The exemption law of another state cannot be given effect in an action against a non-resident here. Caulkins v. Spring, 17.

Sewing machine used by dressmaker is exempt. Mere intention to remove from state, until followed by actual removal therefrom, does not destroy exemption. Badgley v. Rheinberger, 163.

Damages for attachment of exempt property in good faith, without malice or oppression, limited to value of use of same during detention, and depreciation, if any. In absence of such proof, measure of damages is interest on value. Badgley v. Rheinberger, 163.

FRADULENT CONVEYANCES.

Allegations of fraud on information and belief held sufficient. First National Bank v. Merritt, 19.

In action to set aside fraudulent conveyances, allegation that the grantor "conveyed" the premises to the grantees is sufficient with alleging delivery and acceptance. First National Bank v. Merritt, 19.

In action to set aside conveyances as fraudulent, jurisdiction of non-resident defendants may be obtained by publication of summons. Osborne v. Fraser, 50.

A certain transfer held not to have been made with intent to defraud creditors. Leque v. Stoppel, 43.

GARNISHMENT.

Money due a non-resident may be garnished in this state, where it does not appear that the money was by agreement to be paid at any particular place. Caulkins v. Spring, 17.

Sec. 5412, Stat. 1894, permitting judgment to be entered against such defendants sued jointly as are proved liable, even if all the joint defendants are not liable, applies to proceedings against joint garnishees. Stewart v. Root, 277.

HOMESTEAD.

The selection of a homestead cannot be made in an arbitrary manner to the great and unnecessary injury of the remainder of the tract. Nat. Bank of Wahpeton v. First Nat. Bank of Breckenridge, 160.

Wife need not acknowledge husband's mortgage of homestead. Her signature thereto is sufficient, even though she did not actually know it was a mortgage. Van Etten v. Ger. Am. Nat. Bank, 234.

HUSBAND AND WIFE.

Husband liable for slander uttered by wife. Editorial comment on decision, 2.

There is no such privity between husband and wife that a judgment against one of them is conclusive as an estoppel against the other. Simpson v. St. Paul City Ry. Co., 98.

INJUNCTION.

Interesting case where district court of Washington county granted an injunction temporarily restraining further proceedings in a pending suit in district court of Hennepin county. Turnbull v. Crick, 49.

INSANITY.

Contracts of insane persons under guardianship are voidable, not void. Letters of guardianship prima facie evidence of insanity. Thorpe v. Hanscom, 39.

Where it is sought to rescind a contract on the ground of insanity, other party may show that he was ignorant of the incapacity, that he acted in good faith, and took no inequitable advantage; thereupon he must be placed in statu quo as condition of recission. Thorpe v. Hanscom, 39.

INSOLVENCY.

It is the duty of an insolvent debtor to make an assignment before judgment has been obtained against him in pending actions, and the judgment creditor thereby obtain a preference. Merriam v. Underwood, 72.

Where actions have been commenced against an insolvent, and he does not answer or make an assignment, the court on application of other creditors will enjoin the entry of judgment and appoint a receiver. Non-resident suing creditors may be brought in by order to show cause served on their attorneys of record.

INSOLVENCY.—(Continued.)

Merriam v. Underwood, 72.

Where a creditor of an insolvent bank cannot show that the assignee has the identical money which the bank collected on his account, he can only share in the assets equally with other creditors. In re Assignment of Kingsland, 156.

The assignment of one member of a partnership does not entitle his assignee to possession of any part of the firm assets as against the solvent partners, until the partnership has been wound up. In re Assignment of Lofgren, 66.

JUDGMENT.

An oral order for judgment, announced by a judge in open court, does not alone warrant the clerk in entering judgment. But it seems that if the order is entered by the clerk in the minutes as the order of the court, it then becomes effectual. Pioneer Press Co. v. Hutchinson, 68.

The mere general statement, in application to open a default, that defendant has a good defense, is overcome by particular facts set up in his moving papers showing that he has not. Merchants Nat. Bank v. West Duluth Light & Water Co., 164.

Supplementary proceedings cannot be had by creditor who has assigned his judgment as collateral security. Sabin v. Gorman, 25.

JURISDICTION.

Where a non-resident's funds have been garnished in the hands of a resident, an intervenor by appearing generally and setting up a claim of exemption under the laws of another state gives the court jurisdiction to determine to whom the fund garnished belongs. Cox v. Ridpath, 71.

JURY.

Laws 1895, Ch. 328, providing for struck juries, construed and held constitutional. Homme v. Minneapolis Gas Light Co., 182.

JUSTICE OF THE PEACE.

Justice is liable for damages caused by his negligence to a party litigant in his court. Larson v. Kelly, 181.

The amendment, at the trial, of a general denial, is not an absolute right, but vests in the discretion of the justice. Menzell v. Ferch, 160.

A motion in the district court to set aside a judgment by default rendered by a justice, must be accompanied by an affidavit of merits. Rogers v. Amos, 159.

Appellant from justice court cannot dismiss his appeal in district court if respondent objects. Mills v. Wilson, 277.

LEGAL NEWSPAPER.

Failure of the publisher's affidavit filed with auditor to state that the paper is "printed" as well as published at a certain place, or to give the day of the week of its publication, does not invalidate an otherwise sufficient affidavit. O'Connor v. Allen, 177.

LIBEL AND SLANDER.

The words " dangerous, able and seditious agitator" are libelous. Wilkes v. Shields, 256.

In Minnesota, husband is liable for slander uttered by wife though not in his presence. (Affirmed by Supreme Court, 64 N. W. Rep., p. 912). Pett Morgan v. Kennedy, 13.

It is actionable to accuse a person of having been on a prolonged "drunk," since Scheffer law makes drunkenness an indictable offense. Pett Morgan v. Kennedy, 13.

LUMBERMAN'S LIEN.

The statute allowing lumbermen a lien on logs cut or banked, gives a lien to any person whose labor is actually used in and is necessary in the performance of the lumberman's labor on the logs, and includes cooks in camps and blacksmiths employed in process of logging. Breault v. Archambault, 154.

MORTGAGES.

Affidavit of costs and disbursements need not be filed until within ten days after foreclosure has been completed by making and filing sheriff's certificate of sale. La Rocque v. Chapel, 185.

Endorser of mortgage note is a proper party to action for foreclosure and deficiency judgment. Reed v. Hallowell, 92.

Simulated mortgages, taken by a mortgagor after foreclosure, for the purpose of enabling him to extend time of redemption by filing large number of notices of intention to redeem, will be cancelled as a cloud upon the title of the purchaser at foreclosure sale. New England Mut. Life Ins. Co. v. Capehart, 91.

Where purchaser at foreclosure sale causes certificate to be made in name of his creditor as collateral security, the relation between purchaser and such creditor is that of mortgagor and mortgagee. Carroll v. Minnesota Savings Bank, 70.

MUNICIPAL CORPORATIONS.

Common council of a city has only such powers as are expressly or by necessary implication granted to it. Rundlett v. City of St. Paul, 186.

Ch. 1 Sp. Laws 1874, Sec. 5 of Sub. Ch. 4, providing for election of a president of the common council of St. Paul, is not repealed by Ch. 6 Spec.

MUNICIPAL CORPORATIONS.

(Continued.)

Laws 1891. State ex rel v. Ehrmanntraut, 63.

Mandamus is not the remedy to obtain satisfaction of a judgment against a city when the charter provides a method. State ex rel Dahm v. Hospes, 257.

Notice of claim for damages caused by defective street, required under St. Paul charter. Should state the place of the accident with reasonable certainty. Lemieux v. City of St. Paul, 258.

Requirement of Stillwater charter that written notice shall be given of injuries sustained from defects in any bridge, street, sidewalk, sewer, gutter or thoroughfare, and that action for such injury shall be brought within one year, does not apply to action for damage caused by surface water. Wennerberg v. City of Stillwater, 139.

A charter provision that an abstract of title shall be furnished the city by the claimant showing himself entitled to the compensation claimed for property taken for public improvements is valid, and compliance with such provision must be alleged in the complaint. Coles v. City of Stillwater, 67.

City is liable for injuries received by falling on sidewalk made slippery by boys sliding on it, where city is negligent. It is not contributory negligence to walk on the sidewalk in winter without rubber overshoes. Sanders v. City of St. Paul, 275.

St. Paul ordinance forbidding the driving of any horse or carriage or vehicle of any kind through any funeral, military or civic procession, does not apply to an electric street railway train. Johnson v. City of St. Paul, 276.

A proceeding to enforce the payment of an assessment for local improvements, under the charter of the city of St. Paul is a proceeding in rem, and the name of the owner need not appear in any of the proceedings. Warner v. City of St. Paul, 73.

Where property owner has been guilty of negligence in not inquiring as to existence of assessments, court will not set aside judgment for such assessments. In re Delinquent Assessments, 22.

NEGOTIABLE INSTRUMENTS.

Waiver of notice of protest is not a waiver of presentment and demand for payment, but merely waives notice of non-payment. Reed v. Hallowell, 92.

The entry of judgment by default against one or more of several joint makers of a note exhausts the remedy, and the plaintiff cannot thereafter proceed in the action against another joint maker who had answered. Blackman v. Dakota Land & Live Stock Company, 66.

NUISANCE.

The charter of a gas and electric light company does not protect it in the commission of a private nuisance arising from the emission of smoke, gasses, etc. Mathews v. Stillwater Gas & Elec. Light Co., 118.

A prescriptive right must be pleaded as a defense to action for nuisance. Mathews v. Stillwater Gas & Elec. Light Co., 118.

Right to maintain a nuisance by adverse use must be proved for the same length of time as is required to acquire adverse title to real estate. Such use must have been continuous, uninterrupted, adverse and notorious, with the knowledge and acquiescence of the owner. Mathews v. Stillwater Gas & Elec. Light Co., 118.

Town cannot recover special damages in action to abate an obstruction in highway. Town of Pine City v. Munch, 114.

Where the maintenance of a dam is authorized by the legislature, the same cannot be abated as a nuisance at the suit of a town. Town of Pine City v. Munch, 114.

PARTIES.

Where a title is taken in the name of a third person, he is a necessary party in an action to redeem or to recover the land. Carroll v. Minnesota Savings Bank, 70.

PARTNERSHIP.

Members of a corporation are liable as partners in a business ultra vires, carried on in name closely resembling corporate name. Longfellow v. Central W. C. T. U. Coffee House, 24.

Upon the assignment of an insolvent member of a partnership, the solvent partner is entitled to possession of the firm assets, for the purpose of paying partnership debts and winding up the business. In re Assignment of Lofgren, 66.

PLEADING.

It is not necessary to allege that a defendant city is a corporation. Coles v. City of Stillwater, 67.

Allegation in answer of a former action pending and settlement by payment must be denied positively. Denial on information and belief bad on demurrer. Silverstein v. Johnston, 165.

PRACTICE.

Laws 1895, Ch. 320, gives the court discretion to order judgment notwithstanding verdict, but is not mandatory. Walter A. Wood Mowing & Reaping Co. v. Burrill, 184.

Proper method of trying title to in-

PRACTICE.—(Continued.)

solvent's assets, as between receiver appointed by Federal Court and receiver appointed by State Court, is by action, and not by order to show cause why Federal Court receiver should not turn over property to State Court. In re Receivership Great Western Mfg. Co., 18.

RAILROAD COMPANIES.

The ticket seller at the Minneapolis Union depot is the "acting ticket agent" of each of the companies whose tickets are so sold. Helary v. Great Northern Ry. Co., 96.

RECEIVER.

Conflicting property rights of receivers appointed by different courts must be determined by action, not by motion. In re Receivership Great Western Mfg. Co., 18.

A stockholder and officer of a corporation is incompetent, by reason of interest, to act as receiver in insolvency proceedings against the corporation. Nat. Ger. Am. Bank v. St. Anthony Park North Real Estate Imp. Co., 36.

REFEREE.

A referee appointed to try and determine a cause, cannot order a stay of proceedings after filing his report. Leasor v. Colyer, 159.

STATUTE OF FRAUDS.

A grantee's assumption to pay a mortgage debt which is not due for more than one year from the date of the deed assuming it, is void under the statute of frauds, according to New York theory. Washington Life Ins. Co. v. Marshall, 138.

SUMMONS.

See also actions, 20.

Proof of service of summons may be filed after judgment, nunc pro tunc.. Hayes v. Douglas, 118.

Summons is issued, within meaning of the statute, when placed in the hands of a competent person for service, and immediately followed by bona fide effort to obtain service. Hawkins v. Beadle, 94.

Publication of summons is proper as against non-resident defendants in action to set aside fraudulent conveyance. Osborne v. Fraser, 50.

SUPPLEMENTARY PROCEEDINGS.

Judgment creditors cannot have supplementary proceedings after assigning the judgment as collateral security. Sabin v. O'Gorman, 25.

TAXATION.

Parole evidence is admissible to show that clerk's file-mark of date of filing resolution designating official newspaper, was erroneous. State v. Crossly Land Co., 140.

Where holder of tax title has the land assessed in his name, and notice of expiration of time to redeem served on himself, such service does not deprive the owner of the legal title of his right to redeem. Statute means that notice shall be served on person in whose name properly assessed. Mitchell v. Chisholm, 134.

Notice of expiration of period of redemption from tax sale must give notice that the time to redeem will expire sixty days after the service and filing proof of service of the notice. State ex rel v. Haldin, 52.

Where land is assessed in the name of "unknown" the time for redemption can be terminated by publication of notice, etc., the same as if assessed in the name of an individual. Hoyt v. Clark, 52.

TRIAL.

General verdict showing on its face disregard of instructions will be set aside. Graves v. Village of Fairmont, 238.

Non-suit will be granted only where the court would set aside verdict without argument. Lemieux v. City of St. Paul, 258.

USURY.

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