THE STORY OF
THE JONES COUNTY CALF CASE

TOLD BY

CHARLES E. WHEELER

AT THE

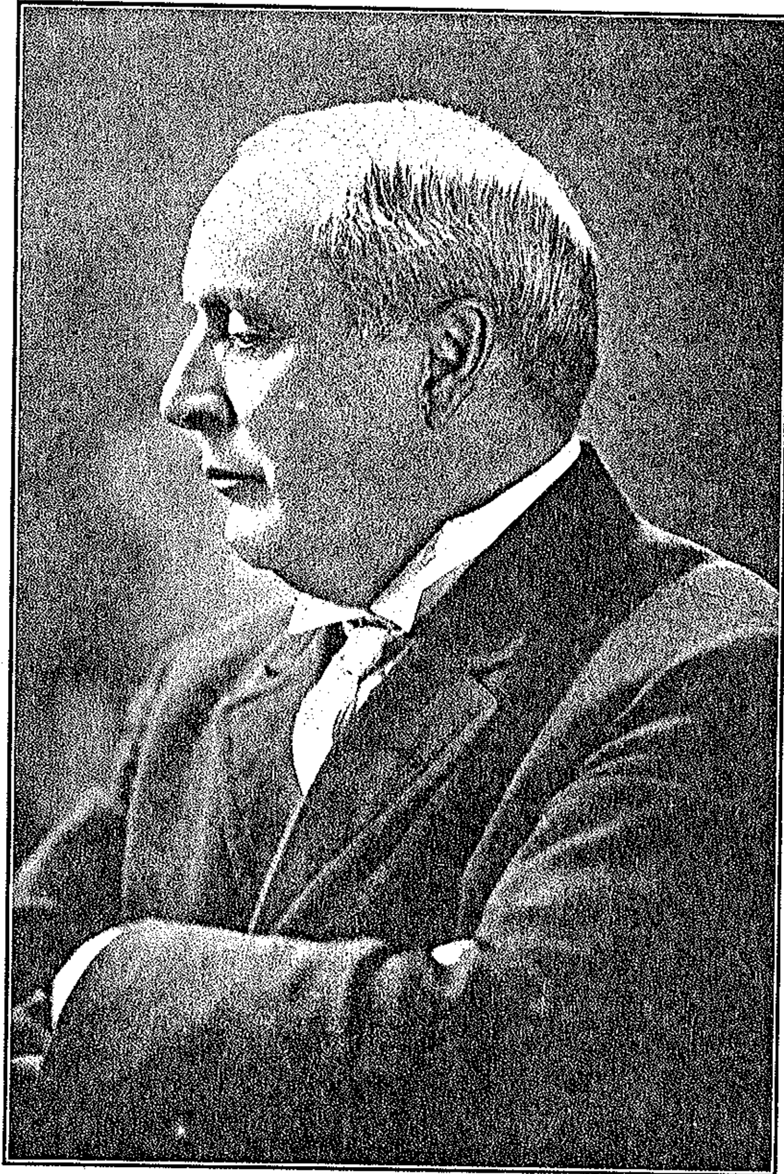
TWENTY-SIXTH ANNUAL MEETING

OF THE

IOWA STATE BAR ASSOCIATION

CEDAR RAPIDS, IOWA

JUNE 24, 1920



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The Toastmaster, Mr. Emmet Tinley of Council Bluffs: I think one of the greatest pleasures of many members of the Iowa State Bar in coming to Cedar Rapids is the knowledge we would see and hear Charley Wheeler. On the program it is "Mr. Chas. E. Wheeler". But to his friends who love him, he is "Charley Wheeler",—one of the greatest lawyers Iowa ever produced, who has had as large a part in the building of history as any man in Iowa. I want him to tell you the story of "The Jones County Calf Case".

THE JONES COUNTY CALF CASE

Mr. Toastmaster, Ladies and Gentlemen, and Members of the Iowa Bar: When I divided it up in that way I did not mean to be invidious. For nearly half a century I have been addressing audiences that were sworn to remain until I got through,—I am a little nervous about you gentlemen. There is the judge that must remain. Whatever sufferings he goes through, he must remain. Generally he is a large man with a protruding front, and a bald head, and speaks in a deep sepulchral voice. Then there is the bailiff, always a small man, and old, who is not supposed to know anything. Of course, the jury thinks that the judge knows more than the Creator of the Universe. The members of the bar know better. The bailiff is a silent man, ordinarily, with watery blue eyes, and he has for forty-five years gone to sleep promptly when I started to talk, and protected himself in that manner. The other twelve of my audience of fourteen is the jury,—God bless them! The long suffering men,—composed of all kinds. They have availed themselves of the opportunity of going to sleep, and particularly after the noon adjournment. I have taken a great deal of pleasure when I noticed a front row juryman asleep when I was addressing them, in going around and slapping him on the knees, and poking his ribs.

The judge ordinarily turns his back. He sits in a swivel

chair and pretends to read a newspaper, but goes to sleep, and when he is suddenly and rudely awakened he pretends he has not been asleep at all.

Now, gentlemen, the Jones County Calf Case has probably attained more notoriety than any other case ever tried in this State, because of the small amount involved, and because of the long litigation, and the great amount of costs, and all that sort of thing. Of course, the supposed English case of Jarndyce *vs.* Jarndyce never did occur except in the mind of the great Charles Dickens, who made it immortal.

This story that I am about to tell you deals largely with a red-headed hero by the name of Bob Johnson. Bob, of course, was my client or he would not be a hero. It is always spoken of in the singular—*the* Jones County Calf Case, whereas, there were in truth and in fact three separate law suits growing out of the same facts.

The first one that occurred was what we call the Note Case. It was on a note for twenty-four dollars that Bob gave—I called him Bob—that Bob gave when he was made to believe that he had handled the stolen calves. That note was for twenty-four dollars, and it was litigated about every full of the moon for several years, the note bought by an innocent purchaser, a bank. You know, the innocent purchaser bank. Now, Bob had found out after giving the note that it was a mistake to have given it, that he had not handled the stolen calves at all, so Bob refused to pay the note, and litigated it and was finally beaten, and I think that the note cost Bob something like $1400.00.

The next case was upon an indictment in which Bob was charged with stealing the Foreman calves. That was begun in Jones County where all of the parties lived, and where the calves lived; and there was an indictment found against Bob charging him with stealing the Foreman calves, and he hired Colonel Preston, then a very distinguished advocate at this bar, and we went to the mat.

First we moved to quash the indictment because of an error in drawing and impaneling the grand jury. While that motion

was pending, Bob's house was burned. Spontaneous combustion! And later, and during the pendency of the indictment, and the pendency of the motion, Bob went out one morning and found on his horse block a rope with a hangman's knot in it, and attached to the rope, which was in itself somewhat suggestive, he found a little note which read something like this: "You better withdraw your motion, and try this case here in Jones County, or take this." And this note was attached to the rope.

Now, by the way, along in here Bob had a barn burned. Another case of spontaneous combustion! And Bob concluded that he did not want to try his case in that particular county. I might say here that at that time there had been recently organized in that county an organization known as "The Iowa Branch of the North Missouri Anti-Horse Thief Association." And Bob was not a member. Now that organization wanted to try its machinery on something, and they fed Bob into it. They never used that machinery afterwards. It was ruined. Bob broke the cogs, and they never used it again.

Well, finally, we were granted a change of venue, and we went down to Cedar County to try the criminal case. The first indictment I should say had been quashed, but the court had ordered the case resubmitted to another grand jury, and there had been a second indictment returned against Bob. To make a long story short, because it is a long story, gentlemen, and the mists of forty years have obscured it largely from my memory, we tried Bob, Colonel Preston defending him with consummate ability, and Bob and I hustling the testimony and doing chore work only. We tried it down there, and the jury stood eleven to one for acquittal, and hung. We tried it again and Bob was acquitted.

Then Bob began the third case of the series; it is entitled Robert Johnson *vs.* E. V. Miller *et al.*, in which Bob was the plaintiff and seven of his neighbors were defendants who had been most active in his prosecution. Bob sued them for damages. Now that is the case, that malicious prosecution damage case is the case you hear referred to ordinarily as the Jones

County Calf Case. That case lasted, together with the other two cases, approximately a quarter of a century. It was tried all over eastern Iowa pretty nearly. Changes of venue were taken, and this and that, and it was the real case of the three.

Before I go into the story proper of the loss of the veal, I want to say a word to you about the plaintiff, and the seven defendants. They all lived in the same neighborhood in southern Jones County, and were all farmers, well-to-do for prairie farmers, and all reputable men. All of the defandants but one lived there. One of the defendants, by the name of Potter, lived then in Greene County. He had lived in Jones County. They are all dead, gentlemen. I used to think, of course, that the defendants were the most wicked men that ever lived; that they were scoundrels and outlaws and that they ought to be hung. And I believed it so thoroughly, it was so soaked into me, that I believed it until after they were all dead. Looking backward, I know now that, with perhaps just one single exception, the defendants were all reputable men, and probably believed Bob Johnson had stolen the calves.

Now, going to the real case, the last one, the case for damages, the story in outline is something like this:

Bob Johnson and one of the defendants by the name of Potter had been raised together in the State of Ohio and were friends. They came west about the same time and settled in the same neighborhood. Later Potter moved out to Greene County. In 1874, (this month, in June, 1874) Potter came down from Greene County to buy some calves to take them west to his place in Greene County, and he stopped over night with his friend Bob Johnson. He told Bob what his mission was down there, and said, "Now, I am going on down to Big Rock (a little ways east of there) to pick up some calves; and, Bob, if you can find any calves up here that are all right, you buy them for me and when I come back on my way home, I will take the calves that you have bought for me." Potter went on down east, down towards Big Rock.

The next day Bob and his brother, Newt Johnson, went up to their little neighborhood town of Olin, in Jones County, to pur-

chase some hardware. Bob was going to build a house. They went into the store kept by Coppes & Derr, merchants, and talked about hardware in there, and finally Bob said to Coppes & Derr that Potter had been down at his house the night before and wanted him (Bob) to buy some calves for him, and asked Coppes if he knew of any one that had calves for sale, and Coppes said, no, he did not. Whereupon a stranger who was sitting in the store came forward and said to Bob, "I have got four calves down here on the commons, down on the river bottom, that I would be glad to sell you." And Bob said, "All right. I have got to go down to Stanwood and price hardware, anyway, and that is on the road and we will go down and see your calves." And he said, "By the way, what is your name?" and the stranger said, "My name is John Smith." He picked an unfortunate name. And he said, "I am Clem Lane's son-in-law." "All right," Bob said, and he and Newt went out and got on their horses, and Smith got on his horse there in front of Coppes & Derr's store, and they started down to see Smith's calves. They got down into the neighborhood on the river where the Smith calves were supposed to be running out on the common. In those days we all let our cows run out and even the lawyers wore boots. They hunted them up and they found three of the calves that Smith said were his, but they could not find the fourth one. There were a good many cattle on the river bottom, but Smith said that the fourth one was just as good as the other three. "Well," Bob said, "You find him and bring them and put them up in the Hines pasture, and then come over to my house and I will pay you." The Hines pasture was up towards Bob's house. "Well, now," Smith says, "I will tell you, Mr. Johnson; I would not sell you these calves as cheap as I have priced them to you if it was not for the fact that I have got to have some money tomorrow morning. I am sued." Bob said, "I haven't got money enough with me to pay you." His brother, Newt, however, said that he had, and so Bob borrowed some money from Newt and put it with his money and paid Smith, and Bob and Newt went on to Stanwood.

The next day after that Bob got word from Potter that he was

coming back with a little herd of calves. Potter had been down near Big Rock and picked up some calves, and was coming back, and he sent word to Bob that he would meet him on a certain hill on the highway, a hill called Porter's hill, and if he had any calves to bring them down. So Bob went down to the Hines pasture and he saw three of the Smith calves—there were other cattle in the Hines pasture, but Bob saw three of the Smith calves, and he found a fourth calf running with them that answered the description Smith had given him—and so he took the four calves and drove them down to Porter's hill and delivered them to Potter When Bob got down to the Porter hill with the Smith calves—and remember, gentlemen, that the Smith calves were *dark colored,* all of them *dark*—(you know the identity of a calf makes more trouble than the question of whether the soul is immortal or not)—and so, when Bob got down there to the Porter hill where Potter was with his herd of calves, he found a man by the name of Pete Onstott there with Potter. He had lost some calves and was hunting them, and he came to Potter's herd before Bob got there with his calves, and Pete testified for a quarter of a century, more or less, that when he got to Potter's herd before Bob got there with his *dark* colored calves, that he noticed four *light* colored calves in Potter's herd, pretty good ones. Pete Onstott asked Potter where the got those four *light* calves, and Potter said that he got them from So-and-So (the name has now escaped me). Peter remained there talking with Potter until Bob came. Bob delivered his four Smith calves, *dark* colored calves, to Potter there in Pete's presence. Potter went on west to Greene County with his herd of calves.

About this same time a man by the name of John Foreman lost four *light* colored calves—*light colored* now mind you— and he looked the neighborhood over and he could not find them. And finally he heard that Potter had been down there and picked up a herd of calves, and so Mr. Foreman who had lost the four *light* colored calves went out to Greene County and found his four light colored calves in the Potter herd which Potter had brought back from Jones County. He asked Potter where he got those four light colored calves, and Potter said that he bought them of Bob Johnson.

Potter and Foreman came back from Greene County to see Bob Johnson, and Bob happened to be in Mechanicsville. I had then (in 1874) just exposed my professional sign to the weather in Mechanicsville, and there was standing room in my office. None of the neighbors seemed to know what great opportunities they were missing in not coming to my office. But Bob Johnson, and Potter and Foreman did break into my office through the crowd, and this was what happened: Bob said, "Charley, (nobody ever thought of calling me anything but Charley) John Foreman here lost four calves, and he has gone out to Greene County and found them in Potter's herd, and Potter says he got them of me. I got them of Clem Lane's son-in-law, named Smith. Now, what am I going to do about it?" "Well," I said, "Bob, (of course I thought awhile first, and looked wise) if you have handled the Foreman calves, why, you have got to pay for them, and then you go and jump on Clem Lane's son-in-law, Smith." "All right," Bob said, "but I ain't got the money. I tell you, Foreman and Potter, I bought these calves of a man who approached me to sell them to me up in Coppes & Derr's store in Olin, and you come and go over there with me and they will tell you all about it, just as I told you, that I got them of Smith, and then I will give you my note for the calves." They went over there with Bob and Coppes & Derr told them that Bob's story was true, but said that Smith was a stranger to them; they didn't know who he was, and Bob gave his note for twenty-four dollars, six dollars apiece for the four calves, and they went across the street and had a drink, the three men—(it makes me thirsty to think of it now). Then went across the street and had a drink and shook hands, and all parties went home except Bob.

Bob went across the street to a justice of the peace and filed an information against John Smith and got a warrant and got a constable and started out to arrest Smith. They went down into Clem Lane's neighborhood and tackled Clem Lane, and told him that Smith said he was his son-in-law, and Clem Lane said, "I never had a son-in-law named Smith," and from that day to this Smith has never been found. Although Bob John-

son tracked him, or tracked all the Smiths by the name of John, and they were all named John, he tracked him high and low over this State and other states, he never could find the John that was Clem Lane's son-in-law, or the man from whom he bought the four dark colored calves.

Now, this Iowa Branch of the North Missouri United Horse Thief Association saw a chance to put something into their machine that was brand new. They had never tried it. All Bob's neighbors substantially were members of this anti-horse thief association. Bob was not. So they went to Foreman (the man that lost the calves and found them in Greene County) and they suggested to Foreman that he must join their North Missouri Anti-Horse Thief Association, the Iowa branch of it, and help prosecute his neighbor, Bob Johnson; and Foreman joined.

Then they wrote to Potter (the man that had the four light colored calves)—Foreman's were *light colored*, all of them—they wrote to Potter and they told him that he better had come back to Jones County and become a member of that select organization, and Potter was awfully slow in coming back. Finally, they wrote to him that if he didn't come back they would prosecute him (Potter) for stealing Foreman's calves, and under the encouraging suction of that threat Potter came back, joined the organization, and they went before the grand jury and had Bob indicted.

Up to this time Bob had believed that he had handled the Foreman calves and had given his note, as I have told you, for them. After he was indicted he heard that the Foreman calves that Foreman found in Greene County in Potter's herd were *light colored* calves. So Bob and his brother, Newt, who was with him when he bought the *dark colored* calves of Smith, took the train and went out to Greene County and into Potter's herd, and Bob said, "Potter, where are those four Foreman calves?" And Potter pointed them out — four *light colored* calves. Bob said, "Why, Potter, I never sold you any light colored calves." "Well," Potter says, "you did." And then Bob used language that,—well, it was more forcible than elegant—and jumped off his horse to whip Potter, and Newt

stopped the fight, and they came back. Then it was that Bob found out that he had not handled the Foreman calves at all, the *light colored* calves, and then it was that he refused to pay his twenty-four dollar note. And I have told you what became of that case. The innocent purchaser business worked and Bob was beaten, and, as I have said, it cost him about fourteen hundred dollars; and fourteen hundred dollars, gentlemen, in those days was an enormous amount of money.

The criminal cases, I have told you what became of those. They were tried in Cedar County, and Bob was acquitted.

During these proceedings everybody had got so "het up" in that county that they carried guns for one another. The malicious prosecution case at one time, I remember, had one hundred and thirty witnesses. I have forgotten where we tried that case the first time. I tried to get Bob to quit. I told him that he had been acquitted in the criminal case, but he always insisted, as he said, *"I want my character back!"* And I always said, "You got it back when you were acquitted." And Bob said, "No. They claim that they had reasonable and probable cause for having me indicted, and," he says, "I will try it with them until I will convince everybody in this country that they had no cause whatever." And so we kept on in the malicious prosecution case.

We tried that malicious prosecution case, or at least other lawyers tried it for Bob, and he and I hustled the testimony as long as Bob was anything but a bankrupt. He became a bankrupt, I might say, very early in the game, and after he got to where he could not hire distinguished counsel, why, then, and then only, I helped Bob try it, and we went on trying it for about eighteen or twenty years after that. It went to the supreme court, as you see, gentlemen, four times. The case, as I have said, was entitled Robert Johnson *vs.* E. V. Miller, *et al.*, and is, I think, one of the leading cases on the subject of malicious prosecution. These four cases are reported in 63 Iowa 529, 69 Iowa 562, 82 Iowa 693, and 93 Iowa 165.

Now, during the time that the last indictment was pending, and that was during the lifetime of Colonel Preston, it was the

same day, I think, that the court set aside the first indictment and ordered it resubmitted and it was resubmitted and a second indictment was found, Colonel Preston, who, as it seemed to me, used to have some misgivings as to whether Bob was guilty or innocent, said to me, in substance: "How big is Bob's bond?" And I told him it was fifteen hundred dollars. He said, "Who is on it?" And I told him old George Fall, Bob's father-in-law. "Well," he says, "now, Charley, of course Bob is innocent, but I guess you better tell him that he better jump his bond and leave the country." It was a terrible shock to me. I was filled with vinegar in place of knowledge, and I believed just as religiously then as I believe now that Bob was innocent, and for a great lawyer like Colonel Preston to tell me I better tell Bob to jump his bond, was somewhat of a shock to me. But I was under orders, and so that night I took Bob out for a walk. It was in Anamosa, and we walked down into the woods where the penitentiary now stands. It was not there then. And after going around by Robin Hood's barn, I finally told Bob that the Colonel and I, (and I put the emphasis on "we"), that *we* thought that he had better under all of the circumstances, (while he was perfectly innocent, you understand, perfectly innocent) that under all the circumstances, he better jump his bond and leave the country.

I shall never forget it, gentlemen, as long as my head is hot, what old Bob said and did, and how he looked when I told him. We were walking side by side. Bob stopped, and I stopped. He took me by the shoulder, and turned me facing him. He looked to me as high as the second joint of a liberty pole. He looked like an infuriated lion, and he says, "Boy, I never stole the John Foreman calves, and, by God, I will go to the penitentiary off my door step before I will ever jump my bond!" And from that day, during all the years that followed, and up to this day, I have never doubted that he told me the truth.

We would try this malicious prosecution case, and we would always get a verdict from the jury, but the trial courts would—you know what. Bob was a bankrupt, and had been then for many years. He would go home and work like a nigger

to get ready to try his Jones County Calf Case again. He would raise a little money, and we would be on hand when the bell rang and try it over again, and then the enemy would take it to the supreme court, and the supreme court would pick it to pieces, and reverse it; but not so but what there was enough left of the case to try again. There were always a few little remnants around somewhere, and Bob and myself could piece them together and have a new suit of clothes when the next term of court came.

Finally, after the lapse of a quarter of a century from the time that John Foreman lost his calves, we got a verdict up here at Waterloo, (I have forgotten how much it was) but we tried it three times up at Waterloo, and we got another verdict and they appealed it to the supreme court, and it was affirmed.

Bob was an old man. He was a middle aged man before John Foreman lost his four calves—*light colored calves*—and when we were through the weight of a quarter of a century had bowed him. He was so many times bankrupt that I lost count. By the time we got through his indebtedness was barred by the statute of limitations. He came home to Jones County, where he was first indicted, where his enemies—the defendants—lived, and went to work and paid every dollar that he owed. He would go to a man that he owed, and say, "I came to pay you." No, he would not say "came", he would say "come". "I come to pay you." "Why," the man would say, perhaps, "why, I don't remember, Mr. Johnson, that you owe me anything." "Yes," Bob would say, "I owe you two dollars. I borrowed it when I was trying my Jones County Calf Case, and I have never paid it, and I want to pay it and I want to pay the interest on it." Well, the man would say, "Why, it is outlawed." "Yes, that is the reason that I am particularly anxious to pay it." And the man would not charge him any interest, and old Bob would pay.

He was then selling real estate up at Anamosa. That is a business that the impecunious can indulge in. It doesn't take any cash capital to begin with. Bob was doing well. Finally,

after his assets were depleted, he came down to see me. In the meantime, and during the Calf Case, he would borrow forty cents of me, or one dollar, or five dollars; maybe twenty-five when we were away trying his Calf Case, and of course I was just as much interested as Bob was, and so it had run along until Bob said he owed me about fifteen hundred dollars for borrowed money, and he had been earning money and paying his other creditors, and we sat down on the floor as all thieves do to divide the loaves and fishes, and Bob didn't have any loaves and fishes except a spavined stallion—a cheap horse, and spavined— and one hundred and thirty dollars. So he handed them over to me and said that he would pay me the balance as he got it. And I said, "Bob, I have been a thousand times repaid. I didn't have any clients; I didn't have anything to do when you came to me twenty-five years ago, and I have made an acquaintanceship, and that has done me good, and you don't owe me another dollar." And so we shook hands and looked the other way, and Bob went back to Anamosa.

After Bob got through house cleaning and paying up his debts, he was elected mayor of Anamosa, the town where he had been indicted forty years before for grand larceny, in the county where it was claimed that he had stolen the Foreman calves. He became mayor and, I believe, served two or three terms with credit. He worked hard; he saved his money; and when he died, sitting quietly in his chair an old, old man in his own little home, with his wife and son present, he had paid for his home and had some property besides that, I don't know how much.

Now, there were a number of incidents that happened during that long litigation that were illustrative of Bob. He was a queer man. He gave up all that he had, including twenty-five years of the best part of his life to, as he always said, "Get my character back." He always called country "kintry", and he always said, I did so and so "in my weakness".

Gentlemen, it is said that the minds of old people dwell in the past. Mine does. And after forty-six years I want to describe Bob Johnson to you as he looked to me when I first saw him.

He was as tall and straight as a lance. He had long tawny hair. (People wore their hair long in those days.) He had a full tawny beard. He had smiling grey eyes. His hair and his beard made Bob look like a lion, and that is what he was. He was one of those rare men whose courage mounts and grows, and mounts with adversity, and during all those years that the trial judges were setting aside our verdicts, and the supreme court was setting aside our judgments, during all of those years old Bob was just the same. He never weakened, never gave up. As I have said, he would say, "That's all right, Charley; that's all right, *I am going to have my character back,*" and he got it. And now, after nearly half a century, when I look backward and see a lot of shadowy forms that were once my clients, towering head and shoulders above the shadowy forms stands one. His name is Bob Johnson. Bob Johnson, whose own lawyers could not make him jump his bond and run away. I see him now as I saw him when I was a boy. He was one of my very first clients. I believe in him now as I believed in him then.

You are all lawyers. There is some mystery connected with the Jones County Calf Case. Let me ask you some questions, and you chew it over when you are at leisure. Who was the man, Smith? The other side always claimed there wasn't any Smith; that he was a mythical Smith, and that Bob lied when he said he bought the four dark colored calves of Smith. They claimed that Lane never had any such son-in-law, and that it was a put-up job by Bob after he got into trouble to claim that he got the calves of Smith, and they always referred to him as "the shadowy Smith". And before I leave that question I want to say to you that the evidence disclosed, beyond a reasonable doubt, that there was a Smith; that he was unquestionably present in Coppes & Derr's store that day that he sold these calves to Bob Johnson. Bob searched the earth for him, but he could not find him, and so our enemies always referred to him as "the mythical Smith".

Another question, gentlemen: It is sure John Foreman's calves, light colored calves, were stolen. That is sure. We admitted that. Who stole them? Not Bob Johnson. Not Smith.

Because Foreman's calves were light colored that he lost and found out in Greene County. The Smith calves were dark colored. Who stole John Foreman's light calves?

Now, gentlemen, I am not near so rank in my opinions as I used to be. I am not nearly so sure that I am right. There does not seem to me to be as many liars and perjurers in the country as I used to think there were. Who stole the Foreman calves? Not Bob. Not Smith. Who? Was it Potter? Potter, the man that came down from Greene County; Potter, the man that bought the Smith calves of Johnson, who had the four light colored calves, the Foreman calves, in his herd before Johnson came with his calves? Was it Potter? Bob always claimed it was. I make no claim. He is dead.

Now those questions have never been answered in a satisfactory way to unprejudiced people, although forty-six years have passed. The parties are all dead. The lawyers pretty nearly all dead. And, in thinking the matter over the other day, gentlemen, I want to call attention to some of the lawyers who took part in the Jones County Calf Case for one side or the other. Some of you older gentlemen will remember them. There are a number, I should say, who took part in the different counties where we tried the last case, eminent gentlemen, whose names I have forgotten. There was the Honorable W. A. Foster, of Chicago, formerly of Davenport, a very distinguished advocate in those days; there was Colonel Preston. You gentlemen of the old school will remember that Colonel I. M. Preston was the kind we referred to when we talked about advocates —a real cracker-jack. Ex-Governor Boies tried the case for the defendants in season and out of season for many years. I had a letter from him the other day, ninety-three years old, back from California visiting his son, the Judge, up in Waterloo. And I want to say to you gentlemen who never heard ex-Governor Boies try a law suit to twelve jurymen, that in my judgment he was the greatest of advocates. I never have seen his like to a jury. Honorable N. M. Hubbard—you all know, and have heard your fathers speak of Judge Hubbard, who died my partner. I thought in those years, and I still think, that Judge

Hubbard was the greatest combination of lawyer and advocate that I have ever had the pleasure of listening to. Colonel Charles A. Clark, Judge Hubbard's partner at one time, a most eminent lawyer, a sure enough lawyer. He had been vaccinated for a lawyer, and so had all his brothers, five of them, and every time the vaccination worked. They were, every man-chick of them, lawyers. Some of them were freaks, too, but not Colonel Charles A., a most eminent and agreeable lawyer. A. R. McCoy, of the Clinton bar, a real lawyer. Louis Boies, ex-Governor Boies' son, who died a number of years ago. There are gentlemen here who knew Louis Boies and heard him try law suits, and those of you who never heard young Louis Boies try a law suit,—your lives lack one stave of being round. That old man Boies bred true, especially when he got both of those boys, Louis, now dead, and the Judge now upon the bench. They were most agreeable men. Honorable M. P. Smith. We call him on account of his initials, Member of Parliament Smith—M. P. I saw him night before last. He is either eighty-five years old, or a hundred and eighty-five, I don't know which it is, but I am here to tell you, gentlemen, that when that old critter gets onto the bench and pulls that lock of hair down so that he looks like an infuriated buffalo, he can do a great deal of hooking. O. C. Miller, of the Waterloo bar, once a leading lawyer up there. Judge Crouch, of the Waterloo bar, once a leading lawyer up there also.

Another little story I want to tell you—because this is nothing but a story—and that is what Bob said when the defendants began to die. Bob was the last one of the parties, of the eight parties, to die. I met him on the street here in Cedar Rapids one day, and I said, "Bob, I understand So-and-So (one of the defendants) is dead." "Yes," Bob said. Just to have fun with Bob I said, "Where do you suppose he has gone to?" "Oh," Bob says, "I think he is in hell." "Well," I said, "Bob, that is too bad." "But," he says, "I think he's there." After awhile another one died, and I had the same conversation with Bob and he expressed the same opinion as to where he had gone to. But after all of the defendants were dead I met the

old lion on the street, then a humped over old man. "Well," he said, "Boy,"—he used to call me boy; I was a boy when he and I began sleeping together. He says, "Well, Boy, the last one of them is dead." I said, "Yes, I heard so. Where do you think he has gone, Bob?" "Well," he says, "I will tell you; I have changed my mind about that." I said, "How is that?" "Well," he says, "I don't think any of them is in hell." "Well," I said, "I am glad of that, Bob. What has changed your mind?" "Well," he says, "There wasn't no necessity for sending them to hell. *Look what I done to them!*"

And so Bob "got his character back". At the last trial up in Waterloo, the Honorable Horace Boies was just closing, and I was just about to begin. Old Horace had made an argument that made me cold. He just chilled me with the force of his argument the whole length of my spine. Bob sat right next to me. He saw that Horace was going to sit down, and he leaned over to me, and he said, "Charley, tell them I don't care whether they give me a cent or a million dollars. *What I want is my character back!*"

And so, after his debts were all paid, and he had served in that town twice as mayor, and so far as I know every one respected the old lion, the lion of the Calf Case, he walked down home one day and sat down in the kitchen with his old wife, Mary Ann, who had attended every trial and sat by that old man through thick and thin, he sat down in the kitchen with her, and she happened to be looking at him, and he dropped his head, the first time he ever dropped his head in his life when he was in battle, and she went to him—he was dead.

Old Bob, the lion of the Jones County Calf Case, peace to his ashes!

THE TOASTMASTER: You have just listened, my friends to the richest story in the legal history of Iowa. Throughout that story runs a richer story, the story of the sweetest character at the Iowa bar, Charles E. Wheeler. Charley, I know the bar of Iowa thank you for your splendid effort making it possible to place in printed form that story that our successors may read it.

DEAN W. R. VANCE of Minneapolis: In expressing to you my very great enjoyment from the day that I have spent in Cedar Rapids in attendance upon this Bar Association, I cannot refrain from saying that the long and rather tiresome trip from Minneapolis, taken at a time when I was particularly busy, is one hundred times repaid by the privilege of hearing—I should say seeing—before me the heroic figure of Bob Johnson. I am glad to indulge the hope that the report of this meeting will put in indelible print that rare recital, one of the most vivid word pictures that I have ever been privileged in my life to hear.

It was not only instinct with life and beauty, but with feeling; and as I looked at that wonderful portrait of a real hero I could see behind it, with my own eyes, the portrait of another hero, the figure of the lawyer who stood by his client through thick and thin; a lawyer who through adversity and ill success, without hope of reward, stuck fast by his client, and when finally at the end of the long litigation he came out victorious for his client, he generously said that he owed him nothing.

When I place beside the portrait of this hero lawyer of the generation that is passing off the stage, the picture of some of the miserable creatures that I know of in Minneapolis, who comb the country over for unhappy victims that have lost legs or arms, and try the cases to a jury, taking one-half of the pitiful blood money, leaving the other half to the fellow that furnished the arm or leg, I am a little afraid that the lawyer of today, at least in some places, is not measuring up to the lofty figure of those great old lawyers that, I am sorry to say, seem to be passing from off the stage.

I say to you: All glory to such a lawyer as Charles E. Wheeler. I am proud to have heard him. I am proud to have sat in the same room with him. And when I get a printed report of the story, I am going to read it to my boy, and if he grows up to be a lawyer, I want him to know something of the man who lived for his client.

(63 Iowa, 529)

JOHNSON v. MILLER and others.

Filed October 16, 1883.

It is error to give an instruction when there is no evidence to support it.

Admissions of an alleged conspirator are not admissible as evidence against his co-conspirators, unless the conspiracy has been established or the admissions tend to prove it, and were made during the existence of the conspiracy, and in aid of the common design.

In an action against several defendants for malicious prosecution, evidence that an association of which they were members caused the suit to be instituted, and that defendants contributed money for that purpose, is admissible, but to render them liable it must be shown that they either voted in favor of the action of the association, or intentionally aided or contributed money in furtherance of the unlawful act.

Where the object of an association is stated in its constitution and by-laws, which are introduced in evidence, it is for the court to determine, as a matter of law, whether such association was organized for an unlawful purpose or not, and it is error to submit that question to the jury.

What constitutes probable cause for instituting a criminal prosecution is a mixed question of law and fact, and in an action for malicious prosecution the court should group the facts together in the instructions which the evidence tends to prove, and then instruct the jury if they find such facts have been established they must find there was or was not probable cause.

Where parties are instrumental in causing a criminal action to be commenced without probable cause, they must be held liable for its continuance.

Possession of stolen property, after a larceny thereof, when unexplained, is evidence of the guilt of the party in whose possession it is found.

Where a party is tried on a criminal charge, that the jury failed to agree and were discharged, is evidence of probable cause for the institution of the action.

Appeal from Black Hawk district court.

Action for malicious prosecution. It is stated in the petition the defendants caused the plaintiff to be indicted for the crime of grand larceny, and that in so doing they acted maliciously, and without probable cause, and that they conspired together for the purpose aforesaid; that said plaintiff has been acquitted of said charge. The defendants pleaded a general denial. Trial by jury and judgment for the plaintiff, and defendants appeal.

Horace Boies and *Hubbard, Clark & Deacon*, for appellants. *C. E. Wheeler* and *Piatt & Carr*, for appellee.

SEEVERS, J. 1. The burden was on the plaintiff to establish the conspiracy charged, and that the criminal proceeding was commenced without probable cause. The plaintiff offered evidence showing his barn and contents were burned shortly after he was acquitted of the criminal charge. This evidence was objected to as immaterial, but the objection was overruled and the evidence admitted. There were two indictments against the plaintiff. The first one was quashed, and it was generally known a motion to quash would be made. A few days prior to the convening of court, there was found, early in the morning, near the plaintiff's residence, a letter addressed to him, with which was a rope. The contents of the letter, as testified to by the plaintiff, were as follows:

"In view of the present indictment we understand that you are under, we understand that you calculated to have the indictment set aside. We advise you to appear and be tried under the indictment, with the defect, if any exists, or take the lamented Greeley's advice and 'go west,' or take this.

"WE, THE COMMITTEE."

The plaintiff offered evidence of the finding and contents of the letter. To this the defendants objected on the grounds of incompetency, and it was not shown any of the defendants were connected with the letter. The objections were overruled. We have examined the large abstract with care, and have failed to find any evidence tending to show that the barn was not accidentally burned, or, if not, that any of the defendants had connection with or are in any respect responsible therefor. We have also been unable to find any evidence tending to show the letter was written by the defendants, or any of them, or that they even had knowledge of its existence. This being so, we think the foregoing evidence should have been excluded, and we can readily see and understand the defendants were greatly prejudiced by its introduction.

The defendants were members of an "anti-horse-thief association," and it is claimed the association directed or caused the criminal proceeding to be commenced against the plaintiff, and that the defendants advised and directly sanctioned what the association did by, among other things, contributing money to aid the prosecution. Conceding this to be so, there is no evidence

tending to show the association had anything to do with burning the barn or writing the letter.

The defendants asked the court to instruct the jury to disregard the foregoing evidence. This was refused, and the jury instructed they should disregard it, "unless you find there is testimony which connects [the defendants] in some way with such acts. Mere suspicion or supposition is not sufficient." It is insisted by counsel for the appellee that the error in the admission of the evidence aforesaid was cured by the instruction given the jury. But it is error to give an instruction when there is no evidence to support it. This has been repeatedly ruled, and we do not understand counsel to claim otherwise.

Benjamin Yont testified that, at the term the indictment was found, one of the defendants, but which one he was unable to state, said "that if they could not get rid of him [plaintiff] no other way they would burn him out." It is said this evidence warranted the court in giving the instruction above stated.

The evidence is indefinite and uncertain, and we think if the defendants were on trial for burning the barn, the evidence would have been inadmissible against any one of them, because it failed to identify the defendant who spoke the alleged words, and it would not have been admissible as evidence against all of the defendants unless a conspiracy to burn the barn had been established; and the rule must be the same in this case. There is no evidence tending to show a conspiracy to burn the barn.

John Hines testified he heard David Fall, one of the defendants, say, at the term the indictment was found: "We will convict Johnson sure; or if we do not convict him we will drive him out of the country." Who Fall included when he said "we" the witness was unable to state. It is exceedingly doubtful whether what Fall said is binding on any one but himself; but concede the defendants are bound thereby, we do not think the presumption should be indulged the plaintiff was to be driven out of the country by the perpetration of two serious criminal acts. It cannot be presumed that Fall intended to accomplish the desired end by unlawful acts. The evidence, therefore, was insufficient to connect the defendants with either the burning or writing the letter. The court, therefore, erred in the admission of the evidence, and in instructing the jury as above stated.

2. John Foreman is one of the defendants, and the plaintiff, when on the stand as a witness, testified this case was twice tried in Benton county, and that said Foreman testified on said trials, or one of them, "that they had met this organization, had met these defendants and the balance of them, and they had determined to prosecute whether anybody told them or not." That is, as we understand, whether or not the district attorney advised the commencement of the criminal proceeding. This evidence was objected to by all of the defendants except Foreman, but the objection was overruled. The evidence was admissible against Foreman as an admission. It stands upon the same footing as an admission out of court. But it was not binding on the defendants unless the conspiracy had been established or the admission tended to so prove. The admission was made by Foreman long after the criminal proceeding was at an end. The conviction of the plaintiff of the criminal charge was the object of the conspiracy. This had failed, and the conspiracy had ceased to exist when the object intended to be accomplished had failed. Concede that Foreman and the defendants were conspirators, we understand the admission of one, to be binding on the others, must be made during the existence of the conspiracy and in aid of the common design.

In 3 Greenl. Ev. § 94, it is said: "The evidence of what was said and done by the other conspirators must be limited to their acts and declarations made and done while the conspiracy was pending, and in furtherance of the design; what was said or done by them before or afterwards not being within the principle of admissibility." See, also, *State* v. *Westfall*, 49 Iowa, 328. We think the court erred in the admission of the evidence aforesaid.

3. William Harrison, who is not a defendant, was called as a witness for the defendants, and in cross-examination was permitted to testify, against their objection, that he was a member of the association, but became such after the indictment was found, and that he had contributed money as dues to the association during the pendency of the indictment. This evidence was not elicited in reply to, or in explanation of, the evidence of the witness in chief, and was inadmissible because the witness was not charged with conspiracy; and the fact that he was a member of the association and contributed money in furtherance of the objects of the organization, should not prejudice the defendants. What the witness did bound no one but himself.

4. G. W. Miller, one of the defendants, was called as a witness by the plaintiff, and testified he was present at the meeting of the association, and he thereupon was asked and answered the following questions: "Do you recollect of a vote being taken in a meeting of that organization to prosecute Mr. Johnson for selling Mr. Foreman's calves?" "Yes; I think I do." "Do you know of money being voted for that purpose and the members assessed to raise the money?" "Yes, sir." This evidence was objected to "because the action of the organization is not that of the defendants," but the objection was overruled.

The association was not incorporated, but it may be said to be recognized by, or formed in accordance with, a statute, (Code, § 1091.) It cannot, therefore, be regarded as unlawful unless organized for such a purpose. But, if lawfully organized, its powers may have been used for an unlawful purpose. The association is not a party to this action, but certain members are, and the question is, to what extent are the latter bound by the acts of the association? As it was not incorporated, the association must be regarded as a partnership or association of persons for the accomplishment of a common purpose, which, for the purpose of the argument, must be conceded to be the prosecution of the plaintiff on the criminal charge. Now, if the defendants aided and abetted in the prosecution by the contribution of money for that special purpose, or otherwise, then we think they are responsible for the consequences. If the prosecution was unlawful, they are liable. But the defendants insist the evidence fails to show they, or any of them, contributed money in aid of such prosecution. They say the evidence only shows they contributed money to the objects of the association as dues provided for in the by-laws, and that it does not appear they directed the money so contributed should be used to prosecute the plaintiff. We have examined the whole evidence of Miller with care, and think, when taken all together, it is shown the portion objected to as above was admissible, because it had some tendency to show the defendants contributed money for the purpose of the prosecution of the plaintiff. But the defendants are not liable, in our opinion, for what the association did, merely because they were members and contributed money to effectuate the common purpose. It must be presumed, in the absence of any showing to the contrary, such contributions were made for lawful and not for unlawful purposes. It must be shown they either voted in favor of the action of the association, or intentionally aided or contributed money in furtherance of the unlawful act. Each member of the association is liable only for the torts and wrongs he did, or aided in doing, as above stated. Now the mere fact the defendants contributed money to the association, and it was expended in the prosecution of the plaintiff, is not sufficient unless they participated in the action of the association in making such expenditure.

In view of a retrial, we have deemed it not improper to say this much, but we deem it unnecessary, and possibly improper, to say whether there is sufficient evidence that the defendants participated in the action of the association, so as to be bound thereby, because the evidence may not be the same on such retrial. For the same reason we decline to say whether, in our opinion,

a conspiracy has been established, or whether evidence has been introduced which so tends.

5. The court instructed the jury that, "on the contrary, if you find the association was organized for an unlawful purpose of taking the law into their own hands outside of the civil authorities, their acts and organization are unlawful," etc. The objects of the association are stated in what is called a constitution and by-laws, which were introduced in evidence. As there was not, and cannot be, any controversy what facts were established by the constitution and by-laws, it was for the court to therefrom determine whether the association was organized for an unlawful purpose. The court, therefore, erred in submitting this question to the jury.

6. Although the association may have been organized for a lawful purpose, the members thereof, including the defendants, may have acted unlawfully, and therefore rendered themselves liable in this action. This depends largely on the question whether there was probable cause for the criminal prosecution. It is urged the evidence does not sustain the finding of the jury in this respect, but we are not prepared to say we can, under the established rule, set aside the verdict. The court referred certain instructions asked by the defendants as to what facts constituted probable cause, and in so doing it is claimed the court erred. In these instructions were grouped facts which the defendants claim the evidence tended to establish; and if the jury so found, then it is insisted the plaintiff failed to establish, there was not probable cause. We incline to think the instructions asked and refused were warranted by the evidence. The court correctly gave a general instruction which would be applicable in any case for malicious prosecution, and also, in another instruction, grouped together some of the facts stated in the instructions refused, but omitted therefrom at least one material fact. The criminal charge against the plaintiff was the stealing of certain calves, the property of Foreman There was evidence tending to show that the plaintiff paid or gave his note to Foreman for the value of the calves prior to the finding of the indictment. In grouping the facts this circumstance was omitted.

Without determining whether there should be a reversal because of the refusal, under the circumstances, to give the instructions asked, we deem it proper, in view of a retrial, to say that, in actions of malicious prosecution, where the evidence is conflicting and where the facts it tends to prove are numerous, it is exceedingly important the instructions in relation to what constitutes probable cause should be clear, definite, and certain. It is true, we apprehend that what constitutes probable cause is a mixed question of law and fact. When the facts are admitted or have been found by the jury, the law declares whether there was probable cause or not. We think it is important and the better way for the court to group the facts together in the instructions which the evidence tends to prove, and then instruct the jury, if they find such facts have been established, they must find there was or was not probable cause. *Owen* v. *Owen*, 22 Iowa, 271; *Shaul* v. *Brown*, 28 Iowa, 37.

7. The first indictment was, as has been said, quashed, and the cause was resubmitted to the grand jury and another indictment found. As it does not appear the defendants, or any of them, had anything to do with such resubmission, it may be it should be presumed it was done by the court, and this the defendants claim is the fact. It is said the defendants should not be held responsible for the continuance of the prosecution, because they could not dismiss it. Instructions asked embodying this view were refused, as we think correctly. Conceding the defendants were instrumental in causing the criminal action to be commenced, we think they are liable for its continuance. *Bacon* v. *Towne*, 4 Cush. 217.

It may be true the prosecuting officer declined to dismiss such proceeding, under the belief the plaintiff was guilty. But such belief was, in all probability, engendered by information derived from the defendants, and the jury

have found specially they did not state to such officer all the facts within their knowledge. This being so, it is fair to presume the criminal action was not dismissed because the defendants had failed to do that which it was their duty to do; that is, to state to the prosecuting attorney all the facts within their knowledge. It is urged, the special finding above mentioned is against the evidence, and we are asked to set it aside. This we are not prepared to do.

8. There was evidence tending to show the plaintiff had possession of the property shortly after the alleged larceny, and the defendants asked the court to instruct the jury that such possession, unexplained, was evidence of guilt. This instruction was refused. It should have been given. It has been so ruled by this court in several cases.

9. As has been said, the plaintiff was twice tried on the criminal charge. On the first trial the jury were unable to agree on a verdict, and were discharged. The defendants sought to introduce in evidence the record of such trial, which showed that the jury retired to consider as to their verdict on the fifth day of May, and, being unable to agree, they were discharged the next day. Upon the objection of the plaintiff this evidence was excluded. It is insisted by counsel for the defendants the evidence sought to be introduced was evidence of probable cause, and therefore the court erred in excluding it.

It has been held that a conviction before a justice of the peace on a criminal charge, and upon appeal there was an acquittal, is conclusive evidence of probable cause. *Whitney* v. *Peckham*, 15 Mass. 243; *Witham* v. *Gowen*, 14 Me. 362. In *Bacon* v. *Towne*, 4 Cush. 217, it is said the authority of the first case has been doubted in *Burt* v. *Place*, 4 Wend. 591, and that if the conviction before the justice is regarded "as evidence of probable cause, we think it is *prima facie* only and not conclusive." And such is the rule in this state. *Moffatt* v. *Fisher*, 47 Iowa, 473. In *Garrard* v. *Willet*, 4 J. J. Marsh. 628, it was held "that the finding by the grand jury [of an indictment] is *prima facie* evidence of probable cause." In *Smith* v. *McDonald*, 3 Esp. 7, it is said if the evidence on the trial of the criminal charge is such as to cause the jury to hesitate as to an acquittal, it was evidence of probable cause. In the case at bar the jury were unable to agree as to the innocence or guilt of the defendant. It follows, of course, that the jury, or some of them, must have believed the plaintiff to be guilty. The fact that he was acquitted by another jury cannot affect the result which must necessarily follow, because the first jury failed to acquit. We think the evidence offered was admissible, because it tended to show probable cause. It was not conclusive, and, like any other *prima facie* evidence, was subject to be explained. The question is not whether the plaintiff was guilty, but whether the defendants had reasonable cause to so believe. If the finding of an indictment is evidence of probable cause, or the evidence on the trial of the criminal charge is such as to cause the jury to hesitate is evidence of probable cause, it seems to us the inability of the jury to agree must have the same effect. The evidence offered was, therefore, admissible.

The errors not considered are rather of a minor character, which will not in all probability affect the result if another trial is had. Reversed.

(61 Iowa, 693)

SWAILS *v.* CISSNA.

Filed October 17, 1883.

Where a verdict is for a gross sum, and does not show on its face whether or not interest was allowed in fixing the amount of the verdict, an affidavit of one of the jurors that no interest was allowed is admissible.

This court will look into the record for the purpose of determining whether questions certified by a trial judge for opinion of the court fairly arise in the case, to the end that real controversies, and not mere abstract questions, may be determined.

([illegible] Iowa, 562)

JOHNSON *v.* MILLER and others.

(*Supreme Court of Iowa.* October 15, 1886.)

1. MALICIOUS PROSECUTION—PROBABLE CAUSE—QUESTION FOR JURY.

   In an action for malicious prosecution, the question of probable cause is a mixed question of law and fact, and, in a case when the defendants had caused the plaintiff to be indicted for the larceny of certain calves, which they knew had been stolen, and which the plaintiff admitted to them that he had had in his possession the day after the theft, the question whether or not they should have believed his explanation of his possession of the calves was properly submitted to the jury.[1]

2. LARCENY—POSSESSION OF THING STOLEN.

   The possession by a person of stolen property the day after it was taken is *prima facie* evidence that he stole it, unless he gives a reasonable explanation of how it came into his hands.[2]

[1] See note at end of case, part 1.

[2] See note at end of case, part 2.

3. MALICIOUS PROSECUTION—PROSECUTION BY AN ASSOCIATION—MALICE.
Where a voluntary association, the object of which is to assist in bringing thieves to justice, has caused a prosecution to be instituted against a man for stealing calves, the individual members of the association are not liable in an action for malicious prosecution brought by the man so indicted, although they voted for the prosecution, and contributed money, unless, in doing so, they acted with malice, and without probable cause.[1]

4. SAME—PROSECUTION ON ADVICE OF DISTRICT ATTORNEY.
One who, in instituting a criminal prosecution, has acted on the advice of the prosecuting attorney, given upon a full and fair statement of all the material facts which he knew, or which he had reasonable ground to believe, existed at the time, is not liable in an action for malicious prosecution.[1]

5. SAME—EVIDENCE—MALICE—WITNESS EXPLAINING WHAT HE UNDERSTOOD A STATEMENT TO MEAN.
A witness, in an action for malicious prosecution, cannot explain what he understood one of the defendants to mean when the defendant said to him, during the prosecution, "If we had our way, we would make short work of him, as they did with Hi Roberts."

6. SAME—SUBMISSION TO JURY OF QUESTION OF FACT PROVED AS TO ONE OF SEVERAL DEFENDANTS.
It is reversible error to submit to the jury in an action for malicious prosecution against several defendants, a material question of fact as to probable cause, of which there is evidence as to one of the defendants only.

Appeal from Black Hawk district court.

This is an action for the recovery of damages for an alleged malicious prosecution. The case has once before been in this court. See 63 Iowa, 529; 17 N. W. Rep. 34. On that appeal the judgment in favor of plaintiff was reversed, and the cause was remanded. A second trial resulted in a verdict and judgment for plaintiff. Defendants appealed.

Boies, Husted & Boies and *Hubbard, Clark & Dawley*, for appellants.

The court cannot assume a fact in its instructions. *Ruter* v. *Foy*, 46 Iowa, 132; *Walters* v. *Chicago, R. I. & P. Ry.*, 41 Iowa, 76; *York* v. *Wallace*, 48 Iowa, 307; *Case* v. *Burrows*, 52 Iowa, 146; S. C. 2 N. W. Rep. 1045; *Perigo* v. *Chicago, R. I. & P. Ry.*, 55 Iowa, 327; S. C. 7 N. W. Rep. 627; *State* v. *Bailey*, 54 Iowa, 414; S. C. 6 N. W. Rep. 589.

Where instructions are so contradictory that it is impossible to tell which the jury followed, a new trial will be allowed. *Hawes* v. *Burlington, C. R. & N. Ry. Co.*, 64 Iowa, 319; S. C. 20 N. W. Rep. 717; citing *Hoben* v. *Burlington & M. R. Ry. Co.*, 20 Iowa, 562; *State* v. *Hartzell*, 58 Iowa, 520; S. C. 12 N. W. Rep. 557.

The question of probable cause rests *only* on those facts and circumstances which were *known* to the prosecutor at the time the prosecution was begun, and not upon any which afterwards came to his knowledge. *Swaim* v. *Stafford*, 3 Ired. 289; *Munns* v. *Dupont*, 1 Amer. Lead. Cas. 213; *Galloway* v. *Stewart*, 49 Ind. 156.

W. A. Foster and *C. E. Wheeler*, for appellee.

It is not necessary that the defendant, in an action for malicious prosecution, should be the originator of the prosecution. It is enough to render him liable for damages that he voluntarily participated in the prosecution, and that it was carried on with his countenance and approbation, if the jury find the other facts necessary to fix his liability. See *Stansbury* v. *Fogle*, 37 Md. 369; *Clements* v. *Ohrly*, 2 Cockb. & R. 686; *Green* v. *Cochran*, 43 Iowa, 544; *Weston* v. *Beeman*, 27 Law J. Exch. 57; *Churchill* v. *Siggers*, 3 El. & Bl. 937; *McWilliams* v. *Hoban*, 42 Md. 56.

The question of probable cause is one of law, when there is no dispute as to the facts. *Center* v. *Spring*, 2 Iowa, 393; *Shaul* v. *Brown*, 28 Iowa, 37; *Burns* v. *Erben*, 40 N. Y. 463; *Thaule* v. *Krekekler*, 81 N. Y. 428; *Stone* v.

[1] See note at end of case, part 1.

Crocker, 24 Pick. 81; *Burton* v. *St. Paul, M. & M. Ry. Co.*, 22 N. W. Rep. 300; *Baldwin* v. *Weed*, 17 Wend. 224; *Kidder* v. *Parkhurst*, 3 Allen, 393.

In order to make the advice of counsel available as a defense, the defendant must show that he communicated to him all the facts which he knew, or by reasonable diligence could have known, bearing upon the guilt or innocence of the accused, even though the defendants supposed that some of the facts were not material. 1 Hil. Torts, 503; *Wicker* v. *Hotchkiss*, 62 Ill. 107; *Burris* v. *North*, 64 Mo. 426; *Ames* v. *Rathbun*, 55 Barb. 194; *Fisher* v. *Forrester*, 33 Pa. St. 501; *Hill* v. *Palm*, 38 Mo. 13; *Sharpe* v. *Johnston*, 59 Mo. 557; *Thompson* v. *Lumley*, 50 How. 105; *Fagnan* v. *Knox*, 66 N. Y. 525; *Bell* v. *Pearcy*, 5 Ired. 83; *Munns* v. *Dupont*, 1 Amer. Lead. Cas. 214; Cooley, Torts, 183; *Turner* v. *Ambler*, 10 Q. B. 252; *Galloway* v. *Stewart*, 49 Ind. 156.

REED, J. The plaintiff and all the defendants except S. D. Potter reside in Jones county. Potter is a resident of Greene county. In June, 1874, Potter purchased about 50 head of calves in Jones county, which he drove to his farm in Greene county. The defendant Foreman claimed that four of the number belonged to him, and that they had been stolen from him, and he instituted a suit for their recovery before a justice of the peace in Greene county, and, on the trial, he established his right to them. Potter claimed that he had purchased said calves from plaintiff, and an indictment was subsequently returned by the grand jury, in which he was accused of the larceny of the property; but, upon the trial of the indictment, he was acquitted. He then instituted this suit, alleging that the defendants had conspired together to institute said prosecution, and that it was commenced maliciously, and without probable cause.

1. The first point urged by counsel in argument in this court is that, upon the undisputed facts of the transaction, as shown by the evidence given upon the trial, there was probable cause for the institution of the prosecution, and that the verdict is therefore without support. The question whether there was probable cause for the commencement of the prosecution is what is denominated a mixed question of law and fact. If there are no facts in dispute, the question is for the court; but, if there is a controversy as to the facts, it should be submitted to the jury. Cooley, Torts, 181; *Center* v. *Spring*, 2 Iowa, 393.

Plaintiff has always admitted that he sold and delivered to Potter seven of the calves, which the latter drove to Greene county. In October, 1874, Foreman visited Potter's place, and, on his return to Jones county, he informed plaintiff that he had found four calves which had been stolen from him in Potter's possession, and that the latter claimed that he had purchased them from plaintiff, and he demanded payment for them. In a few days afterwards he again called upon him, accompanied by Potter, and the latter stated to plaintiff that the four calves which Foreman claimed (and which he had then recovered in the proceeding before the justice) were of the number of those sold him by plaintiff. In neither of these interviews did plaintiff make any question as to the identity of the calves claimed by Foreman with those sold by him to Potter, and in the last interview he settled with the parties, and gave Potter his note for their value. He, in effect, and perhaps in express terms, admitted that he had in possession, and had sold to Potter, the calves which had been stolen from Foreman; but this admission was based on the representations of Potter as to their identity. In both of the interviews he claimed to have purchased them from a man who was a stranger to him, and who stated that his name was Smith. He stated to them that on the day before he sold the calves to Potter he was in the store of Coppecs & Derr, in Olive, and that while there he inquired of the proprietors of the store whether they knew of any cattle for sale, and that the man Smith was

in the store at the time, and asked him what kind of cattle he desired to buy, and that he replied that he wanted young cattle; and that Smith then stated that he had five calves that he wanted to sell, and that they were on the commons some distance from the town; and that he then went with Smith, accompanied by his brother, Nelson Johnson, who had gone to the store with him, to where the calves were, and there contracted with Smith for their purchase, and paid him for them; and that Smith agreed to deliver them at a certain pasture, and that he found them in that pasture the next morning, and drove them from there to where he delivered them to Potter. He also stated to them that, when he learned that Foreman was claiming the calves, he went into the neighborhood in which Smith had represented he lived, and inquired for him, but that he had been unable to find him. At his request, Foreman went with him to the store of Coppees & Derr, and these parties stated to them that plaintiff had a conversation with a stranger in the store about the purchase of cattle, and they detailed the transaction substantially as plaintiff had stated, but were unable to fix the time when the transaction occurred. In subsequent conversations, with other of the defendants, plaintiff made the same statement to them, and he informed some of them that, when he drove the calves from the pasture the next morning after the purchase from Smith, Foreman was working in the highway adjoining the pasture, in plain sight of the calves, and not more than 30 or 40 rods from them. In some of these conversations he stated that on the same day on which he made the purchase from Smith he went to the town of Stanwood, and had certain business transactions with parties whose names he gave. On subsequent inquiry, however, the defendant learned that those parties claimed that the transactions which plaintiff claimed were had on the day before he sold the calves to Potter did not take place until nearly two months after that. Other facts incident to the transaction were known to defendants when the prosecution was instituted, but they all bear on the question of the reasonableness of the account given by plaintiff as to how he came into possession of the property, and need not be stated.

When the prosecution was commenced, then, the defendants knew (1) that the property had been stolen by some person; (2) that by the plaintiff's own admission he had the stolen property in his possession soon after the larceny; and (3) that he claimed to have acquired the possession of it by purchase from the man Smith.

That the first two facts, standing alone, would have afforded probable cause for instituting the prosecution, cannot be denied; but it is equally apparent that, if plaintiff's story in explanation of his possession of the property is true, no ground for the prosecution existed. The question, then, whether there was probable cause depends upon whether the facts and circumstances of the transaction, as they were known and understood by the defendants, would have warranted an ordinarily prudent and cautious man in the belief that plaintiff's story as to how he acquired the possession was false.

The answer to the question depends, then, upon the conclusion or deduction which should be drawn from the numerous facts and circumstances of the case, and we think it was the province of the jury to draw that conclusion. The court could not say, as a matter of law, that the story was so unreasonable or improbable as to be unworthy of belief. It was properly left to the jury, and we cannot interfere with their finding.

2. As stated above, plaintiff, in effect, admitted, when he made the settlement with Foreman and Potter, that he had sold to Potter four calves which belonged to Foreman. After the indictment was returned, however, he, in company with his brother, who he claims was present when he made the purchase from Smith, went to Potter's place, and Potter pointed out to them the four calves that Foreman had claimed; and on the trial both he and his brother testified that those were not the calves he had sold to Potter.

The district court gave the following instruction to the jury: "If the jury find that the defendants learned before the prosecution complained of was commenced, by statements which they might reasonably and prudently rely upon and believe, and did rely upon and believe, that Foreman's calves were stolen, and that, within a *day* or two thereafter, the plaintiff, Johnson, sold and delivered them to Potter, and that, when they were found by Foreman in Potter's herd, Johnson gave his note for their value, and attempted to account for his sale of them to Potter by stating that he bought them from a stranger, who could not be found, and if defendants in like manner found and believed that his statements and details of the purchase claimed to have been made of such stranger were unreasonable, improbable, and contradictory, in material matters, *and they had no knowledge of any mistake on plaintiff's part in making such admissions or explanations*, then, as a matter of law, this created a probable cause for a criminal prosecution."

This instruction, except the italicised clause, was given at defendant's request, that clause being added as a modification of the instruction as asked. As modified, the instruction submits to the jury for their determination the question whether defendants had knowledge when the prosecution was commenced that, when plaintiff made the admission that four of the calves which he sold to Potter belonged to Foreman, he was laboring under a mistake as to that fact. If the calves claimed by Foreman were not purchased by Potter from plaintiff, Potter may have known at the time that plaintiff made the admission by mistake, and it would have been entirely proper to submit that question, as to him, to the jury. But plaintiff did not claim that he was laboring under a mistake when he made the admission until after the prosecution was instituted, and there is no evidence tending to show that any of the defendants except Potter had any knowledge or information on the subject until he made the claim. As to them, therefore, the instruction submits to the jury a question on which there was no evidence whatever, and, as there was evidence from which the jury might have found that plaintiff was mistaken when he made the admission, they may have been prejudiced by it. We have so often held that it is reversible error to submit to the jury a material question of fact for their determination of which there is no evidence, that it cannot now be necessary to cite the cases in which the holding has been made.

3. The defendants asked the following instructions, which the court refused to give:

"(6) In cases of larceny, the naked fact that recently stolen property is found in possession of an accused person raises a legal presumption of guilt, and casts upon him the burden of explaining his possession in a satisfactory manner. Until satisfactorily explained, the naked fact of possession of recently stolen property is of itself probable cause for the prosecution of the person possessed thereof.

"(7) By a reasonable explanation is meant a statement of alleged facts which are consistent, rational, and likely to occur in transactions similar to that attempted to be explained.

"(8) An explanation of the possession of recently stolen property which is improbable and unlikely to be true, in the ordinary transactions of men, whereby the possession of personal property is changed from one to another, is not, in law, a reasonable explanation, and no person is bound to accept such explanation, and desist from a prosecution of one who is found to have been in possession of stolen property immediately after the larceny thereof."

The court, however, on its own motion, gave the following instructions:

"(6) To constitute probable cause for criminal prosecution, there must be such reasonable grounds of suspicion, supported by circumstances sufficiently strong in themselves, to warrant an ordinarily cautious man in the belief that the person accused is guilty of the offense charged. The law does not

require a certainty that an accused person is guilty before another may proceed against him. It is enough that a felony has been committed, and the circumstances are such as to lead a reasonably prudent and cautious man to believe honestly, and without prejudice, that the accused is guilty thereof."

"(19) In determining the question of probable cause for the prosecution of Johnson, the following principles of criminal law must be considered by the jury, namely: The possession of personal property which has been recently stolen is *prima facie* evidence that the person in whose possession it is so found or traced stole the property, unless he satisfactorily explains his possession, and shows how he came by the property. If such person attempts to explain his possession of property recently stolen by statements that he bought it of an unknown person, who cannot be found, and the details of the purchase, as he gives them, are unnatural, unreasonable, or improbable, that tends to strengthen, rather than weaken, the presumption of guilt. If his statements as to such purchase from an unknown person are, in material matters, contradictory and inconsistent,—that is, not favorable to innocence; and if, after admitting the possession of property recently stolen, and attempting to account for it by purchase from an unknown person, who cannot be found, he then denies such possession altogether,—this does not tend to establish his innocence."

Conceding that the instructions asked by the defendants correctly express the law, we are clearly of the opinion that they were not prejudiced by the refusal of the court to give them. As applicable to this case, the propositions embodied in them are—*First*, that the possession of the stolen property by plaintiff afforded probable cause for the commencement of the prosecution, unless he had given a reasonable explanation of such possession, and, *second*, if the facts stated by him in explanation of his possession of the property were not consistent, or such as might reasonably be expected to occur in such a transaction, the explanation was not reasonable, within the meaning of the law, and defendants were not bound to accept it, or desist from the prosecution. It may be conceded that neither of these propositions is stated, in express terms, in the instructions given, but, in substance, both are given. In the sixth instruction given, the jury were told in effect that the prosecution was not without probable cause, if the circumstances were such as to warrant a prudent and cautious man in the belief that plaintiff was guilty; and in the nineteenth they were told that his possession of the property was *prima facie* evidence that he was guilty, unless he had given a reasonable explanation of such possession. The jury could hardly have failed to understand from this that defendants were not bound to desist from the prosecution, unless the explanation given was reasonable, and they were left to determine that question from the circumstances proven.

4. It was shown that the defendants were members of a voluntary association, the object of which was to assist in the prosecution and bringing to justice of thieves, and other violators of the law; and there was evidence tending to prove that the association, at a meeting at which all of the defendants were present, resolved to institute a prosecution against plaintiff for the larceny of said property, and that each voted in favor of the proposition; and that a committee was appointed by the association to look up the evidence against plaintiff, and bring the case to the attention of the district attorney; and that the defendants contributed money to aid in the prosecution. It was also proven that E. V. Miller, one of the defendants, and another person, who was a member of the association, laid the case before the district attorney, and made a statement to him of what they claimed were the facts of the transaction, and this was done in obedience to the direction which had been given by the association. The district attorney then brought the case before the grand jury, and the defendants appeared before that body in obedience to subpœnas served on them, and gave testimony. There was no evidence,

however, that any of the defendants except E. V. Miller had anything to do with bringing the charge to the attention of the district attorney or grand jury, except that which tends to show that they participated in the action of the association; and that is the only evidence which tends to prove that there was a common design or purpose by all of the defendants to institute the prosecution. The court gave the following instructions:

"(23) The association not being incorporated, its members are individually liable for its unlawful acts, if any, if they took part therein; and, though the association was organized legally, its powers could have been used for an unlawful purpose.

"(24) You are instructed that if you find from the evidence that the association undertook or aided to prosecute plaintiff upon the charge of stealing the calves of defendant Foreman, and that said prosecution was without probable cause, and with malice, that the defendants in this action are liable for the said acts of said association only so far as they participated therein for that purpose; and before you can hold the defendants, or any of them, liable for the acts or proceedings of said association, in relation to the prosecution of plaintiff, you must find that they, either by vote or by voluntary contribution of money, or other means, participated in the prosecution of Johnson; that is, each defendant is liable, if at all, for the part said association took in said prosecution, only for what he did, or intentionally aided in doing, in furtherance of the prosecution of Johnson by said association."

These instructions hold that, if the prosecution was instituted by the association, the individual defendants could be held liable for its action in instituting it only in case they participated in or aided the action. In that respect they are undoubtedly correct. We held this on the former appeal. But malice in the institution of the prosecution is an essential element of the cause of action. To render the individual members of the association liable for the action of the body, they must not only have consented to or aided in it, but, in doing so, they must have acted with malice; that is, they must have become parties consciously to the wrongful act which was being done. If the proceeding was instituted without probable cause, and any of the defendants knew that it was instituted by the malice of their associates, or if they were themselves moved by unlawful or evil motives in consenting to or aiding it, they were joint wrong-doers with all the others who were moved by like motives. But some of them may have been influenced only by an honest desire to see the law enforced against one whom they believed to be guilty of a crime, while others may have been moved by malicious motives. If so, the latter are liable, while the others are not. Under the instruction, however, they might be held liable, for they do not make the motive of the individual defendant the test of his liability. In this respect they are erroneous.

5. The court admitted, over the objection of the defendants, evidence of certain statements and declarations said to have been made by individual defendants during the progress of the prosecution. It was urged in argument that the court erred in admitting this evidence against any of the defendants, except those who are alleged to have made the statements. Without now inquiring whether a *prima facie* case of conspiracy had been established so as to make the declarations and acts of each conspirator admissible against the others, we deem it sufficient to say that no such question was raised by the objections made in the court below. The objection, in every case, was that the evidence was incompetent and immaterial; but, in so far as it tended to show the motives or feelings that actuated the person making the statement, it was both competent and material. In admitting the evidence, therefore, the court did not hold that the statements were admissible as against any of the defendants except those who made them.

6. A witness testified that one of the defendants on one occasion, when speaking of plaintiff and the prosecution, made this statement: "If we had

our way, we would make short work of him, as they did of Hi Roberts." He was then asked what he understood the defendant to mean by his reference to Hi Roberts. The question was objected to, but the witness was permitted to answer it, and he stated that he supposed him to mean that they would hang him by the neck. The objection to the question should have been sustained. The opinion of the witness as to what was meant by the reference was incompetent. It was understood in the community that Roberts, the person referred to, had been hanged in a certain grove. When the jurors were informed of that fact, they were quite as competent to put a construction on the language as was the witness. It is ordinarily the province of the jury to determine what deduction or conclusion should be drawn from a given state of facts. There are some exceptions to that rule, but this case is not within any of the exceptions.

7. One of the defenses relied on was that, in doing what they did about the institution of the prosecution, the defendants acted on the advice of the district attorney, to whom they had made a full and fair statement of the facts of the transaction as they had ascertained them, and of the evidence which could be produced to substantiate the charge against the plaintiff, and who had advised them that the facts and evidence afforded ground for the institution of the prosecution. The district court gave the following instruction:

"(26) Whether or not the defendants, or some of them, did, before instituting the proceedings, make a full, fair, and honest statement to the district attorney, of all the material facts bearing upon the guilt of plaintiff, of which they had knowledge, and which they could have ascertained by reasonable diligence, and whether, in commencing such prosecution, the defendants acted in good faith, upon the advice of said district attorney, are questions of fact to be determined by you from all of the evidence and circumstances in the case. If you believe from the evidence that none of the defendants made a full, fair, and truthful statement of such facts to the district attorney, or that they instituted the criminal proceedings from a fixed determination of their own, rather than from the advice of said district attorney, the advice of the prosecuting attorney would not be a defense in this action."

In our opinion, this instruction is erroneous. One who seeks the advice of counsel with reference to the commencement of a criminal prosecution is bound to act in good faith in the matter. Unless he does this, he will not be protected from liability on the ground that he acted upon the advice given him. He is required to make to the counsel a full and fair statement of all of the material facts known to him. If he has reasonable ground for believing that facts exist which would tend to exculpate the accused from the charge, good faith requires that he shall either make further inquiry with reference to those facts, and communicate the information obtained to the counsel, or that he shall inform him of his belief of their existence, in order that he may investigate with reference to them, and take into account, in forming his opinion, the information attained with reference to them. But he is not required to do more than this. He is not required to institute a blind inquiry to ascertain whether facts exist which would tend to the exculpation of the party accused. But if he honestly believes that he is in possession of all of the material facts, and makes a full and fair statement of those facts to the counsel, and acts in good faith on the advice given him, he ought to be protected. This, it seems to us, should be the rule when the advice of private counsel is relied on. But there are more cogent reasons for applying it where the communication is made to the public prosecutor. In criminal cases, that officer is the representative of the state. He is required, not only to prosecute indictments which are found, but it is his duty to assist in the investigation of charges against individuals which are brought to the attention of the grand jury. He is by law made the legal adviser of the grand jury. When complaint is made to him that a public offense has been com-

mitted, it is his duty to investigate the charge, and, if he deems it a matter of sufficient importance, to demand the attention of the grand jury. It is also his duty to have the witnesses subpœnaed and brought before that body, and he has the right to appear also, and assist in their examination. Neither he nor the grand jury are confined in their investigations to the witnesses named by the complainant, but they have the power to send for and examine any witnesses whom they have reason to believe can give any material evidence bearing on the question of the guilt of the accused. We will not, of course, be understood as holding that a party who maliciously makes a groundless charge to the district attorney, and thereby procures the finding of an indictment, is not answerable to the one injured by the proceeding. It would, however, be a very harsh rule, and one calculated to discourage entirely the making of complaints by private individuals, to hold that one who has acted on the advice of the district attorney, given upon a full and fair statement of all the material facts which he knew, or which he had reasonable ground to believe, existed at the time, was not protected by the advice of the attorney, simply because he did not, before making the complaint, learn of other material facts of the existence of which he might have learned by reasonable inquiry; yet that is the doctrine of the instruction. The instruction seems to have the support of Hilliard in his work on Torts, (see volume 1, p. 506,) and Waite in his work on Actions and Defenses, (see volume 4, p. 335.) The doctrine of the text is supported, however, by but few of the cases cited in the notes in support of it, and we do not believe it is sound.

The judgment of the district court will be reversed, and the cause remanded.

NOTE.

1. Malicious Prosecution—Probable Cause. The existence of probable cause is a mixed question of law and fact. It is for the jury to determine what facts are proved, and for the court to say whether or not they amount to probable cause, Burton v. St. Paul, M. & M. R. Co., (Minn.) 22 N. W. Rep. 300; Johnson v. Miller, (Iowa,) 17 N. W. Rep. 34; S. C. 19 N. W. Rep. 310; Ross v. Langworthy, (Neb.) 14 N. W. Rep. 515; Castro v. De Uriarte, 16 Fed. Rep. 93; Gee v. Culver, (Or.) 6 Pac. Rep. 775; Sartwell v. Parker, (Mass.) 5 N. E. Rep. 807; but when the facts are undisputed, the court should instruct the jury that there was or was not probable cause, Brewer v. Jacobs, 22 Fed. Rep. 217; Castro v. De Uriarte, 16 Fed. Rep. 93; Fulton v. Onesti, (Cal.) 6 Pac. Rep. 491; Parli v. Reed, (Kan.) 2 Pac. Rep. 635; Sartwell v. Parker, (Mass.) 5 N. E. Rep. 807.

As to how far a party will be protected by the advice of counsel, and what is essential to secure such protection, see Johnson v. Miller, (Iowa,) 19 N. W. Rep. 310; S. C. 17 N. W. Rep. 34; Porter v. Knight, (Iowa,) 19 N. W. Rep. 282; Witmore v. Mellinger, (Iowa,) 18 N. W. Rep. 870; S. C. 14 N. W. Rep. 722; Smith v. Austin, (Mich.) 13 N. W. Rep. 593; Logan v. Maytag, (Iowa,) 10 N. W. Rep. 311; Sherburne v. Rodman, (Wis.) 8 N. W. Rep. 414; Emerson v. Cochran, (Pa.) 4 Atl. Rep. 498, and note. See, also, Walker v. Camp, (Iowa,) 27 N. W. Rep. 801, and note; S. C. 19 N. W. Rep. 802.

For a full discussion of the questions of malicious prosecution and probable cause, Magmer v. Renk, (Wis.) 27 N. W. Rep. 26, and note, 29; Emerson v. Cochran, (Pa.) 4 Atl. Rep. 498, and note, 500; Taylor v. Rice, 27 Fed. Rep. 264, and note, 267; Heap v. Parish, (Ind.) 3 N. E. Rep. 549, and note, 552; Krulevitz v. Eastern R. Co., (Mass.) 5 N. E. Rep. 500; Gonzales v. Cobliner, (Cal.) 8 Pac. Rep. 697, and note, 700.

2. As to the presumption of guilt created by the unexplained possession of personal property, see State v. Pennyman, (Iowa,) 26 N. W. Rep. 82; State v. Johnson, (Minn.) 21 N. W. Rep. 843; State v. Hopkins, (Iowa,) 21 N. W Rep. 585; State v. Hollett, (Iowa,) 19 N. W. Rep. 206; State v. Tilton, (Iowa,) 18 N. W. Rep. 716; Johnson v. Miller, (Iowa,) 17 N. W. Rep. 34; S. C. 19 N. W. Rep. 310; State v. Richart, (Iowa,) 10 N. W. Rep. 657; Ingalls v. State, (Wis.) 4 N. W. Rep. 785; Towle v. State, (Wis.) 2 N. W. Rep. 1133; State v. Snell, (Wis.) 1 N. W. Rep. 225; Wagner v. State, (Ind.) 7 N. E. Rep. 896; Hoge v. People, (Ill.) 6 N. E. Rep. 796.

sire to make special mention of but one objection. The twenty-second paragraph of the charge is as follows: "The killing of an assailant is justifiable on the grounds of self-defense only when it reasonably appears to be the only means of saving the life of the party assaulted, or preventing some great injury to his person. If it is apparent that the danger which seemed to threaten him can be avoided or prevented by any other means in his power, he is not justified in taking the life of his assailant. In determining whether the defendant in this case was justified in using a dangerous weapon in self-defense, the inquiry is not whether danger to him existed in fact, but whether, from all the attendant and surrounding circumstances at the time of the conflict, it reasonably appeared to the defendant, as a reasonable, prudent, courageous, and cautious man, that he was about to suffer death or great bodily harm at the hands of the said Louis Miars, and if it so appeared to him, and if it further appeared to him to be the only means of saving his life, or preventing great bodily harm, he would be justified; otherwise, he would not be justified." The use of the word "courageous" is claimed to be erroneous. It is not to be denied that a strict construction of the language employed is inaccurate. If the court had used the words "reasonably" instead of "reasonable" in connection with the words "prudent, courageous, and cautious," it would be within the rule of responsibility prescribed by this court in numerous decisions. In view of the fact that the rule applicable to self-defense is correctly stated in several other paragraphs of the charge, we think the court surely intended to qualify the word "courageous" by the word "reasonably," and we think the failure to do so cannot be said to be erroneous. The instructions are not necessarily repugnant to each other. A careful examination of the whole record has led us to the conclusion that the judgment should be affirmed.

(82 Iowa, 693)

JOHNSON v. MILLER *et al.*

(*Supreme Court of Iowa.* Jan. 26, 1891.)

GENERAL AND SPECIAL VERDICT—MALICIOUS PROSECUTION — ADVICE OF COUNSEL — ARREST OF JUDGMENT.

1. Where, in an action for malicious prosecution, special findings were made, and it was not specially found that defendant commenced the criminal prosecution complained of, but there was a verdict for the plaintiff, it will be considered that such a finding, being necessary to be made, is covered by the general verdict.

2. It is no defense to an action for malicious prosecution by one who did not believe defendant guilty of the crime charged that he made the complaint upon the advice of counsel, after a full and fair statement of all the facts within his knowledge.

3. Where there is no direct finding as to whether there was probable cause for the prosecution, it will be inferred from a general verdict for plaintiff that the jury found a want of probable cause, and, although the facts found are such as to warrant suspicion, yet, if they do not necessarily lead to a belief of plaintiff's guilt, a general verdict for plaintiff is not so manifestly inconsistent with the special findings as to justify judgment for defendant on the special findings, notwithstanding the verdict.

4. A motion in arrest of judgment in a civil case can only be made when the facts stated in the petition do not entitle plaintiff to any relief whatever.

Appeal from district court, Blackhawk county; J. D. LENEHAN, Judge.

Action for malicious prosecution. Trial by jury, verdict for plaintiff, and special findings returned. Defendants' motion for judgment on the special findings, and in arrest of judgment, overruled, and judgment for plaintiff on the general verdict. Defendants appeal. For report of former trial, see 63 Iowa, 538, 17 N. W. Rep. 34.

Wheeler & Moffett and *Woolf & Hanley*, for appellants. *Boies, Husted & Boies*, for appellee.

GIVEN, J. 1. The questions presented by this appeal arise upon defendants' motion for judgment, and their motion in arrest of judgment. Twenty-eight special interrogatories were submitted to and answered by the jury, 2 of which were at the request of plaintiff, and 26 at the request of defendants. Defendants' motion for judgment on the special findings is upon three grounds, namely: "(1) Because it is established thereby that defendants did not institute or commence the criminal prosecution complained of by plaintiff. (2) Upon the facts found, they are protected by the advice of counsel. (3) Upon the facts found, there was probable cause for prosecution." The interrogatories are not only numerous, but somewhat lengthy, and it is unnecessary to an understanding of the questions discussed that we more than state their substance in connection with the questions under consideration.

2. There is no direct finding as to whether the defendants did commence the criminal prosecution complained of. In the absence of a special finding to the contrary, we must presume from the general verdict that the jury found that the defendants did commence the criminal prosecution. Such a finding was necessary to be made before they could find a verdict for plaintiff, and all questions arising in the case, not covered by the special findings, are to be considered as having been found in favor of, and covered by, the general verdict. Cook v. Howe, 77 Ind. 442; Rice v. Manford, (Ind.) 11 N. E. Rep. 284; Lassiter v. Jackman, 88 Ind. 118; Acton v. Coffman, 74 Iowa, 17, 36 N. W. Rep. 774. It is fairly inferable, from the findings hereafter noticed, that the jury did fully understand this issue, and find that the defendants not only commenced the prosecution, but did have something more to do with prosecuting a second indictment than merely to state facts within their knowledge to the district attorney.

3. In response to the second interrogatory submitted by the plaintiff, the jury found that the defendants, in the prosecution of plaintiff, did not "act in good faith, upon the advice of counsel, believing the plaintiff guilty of such charge." The following questions submitted at the request of defendants were answered in the affirmative: "If you have answered

plaintiff's second interrogatory that defendants did not act in good faith, upon the advice of counsel, believing plaintiff to be guilty, will you now answer whether defendants fully and fairly stated to the prosecuting attorney all of the material facts for and against the theory of plaintiff's guilt, which had come to their knowledge before the first indictment? Answer. Yes. Did the district attorney, after such statement, advise defendants that there was probable cause to believe the plaintiff guilty, and advise defendants that his case should be submitted to the grand jury? A. Yes. Did defendants go before such grand jury by reason of his advice, and in obedience to a subpœna, legally served upon them, and give their evidence, and the only evidence which they gave on that occasion? A. Yes." It will be seen from these findings that, while the jury found that the defendants fully and fairly stated to the prosecuting attorney all of the material facts for and against the plaintiff, which had come to their knowedge, they did not believe the plaintiff guilty of the larceny. The contention is whether advice of counsel is a protection to one who commences a prosecution against another who is not guilty, and whom he does not believe to be guilty. It is good faith that excuses from wrongfully commencing or continuing the criminal prosecution. Certainly one cannot be said to act in good faith who causes the prosecution of another on a charge of which he does not believe him guilty. In Center v. Spring, 2 Iowa, 393, it is said, as the general expression of the rule, that if "the defendant misrepresents the facts to such counsel, if he does not act in good faith under the advice received, if he does not himself believe that there is cause for the prosecution or action, he will not be protected."

In Acton v. Coffman, 74 Iowa, 17, 36 N. W. Rep. 774, the court instructed that, if the defendant acted in good faith upon the opinion given by the attorney "that he believed himself that there was cause for the prosecution, then he is not liable." In that case, the jury found specially that the defendant did seek the advice of counsel; that the attorney, with a full knowledge of the facts, advised that a suit was maintainable, and that the defendant acted on that advice in commencing the prosecution. In that case, as in this, the question was whether the facts thus found conclusively show that the general verdict is so inconsistent therewith that it must be set aside. The court says: "It must be assumed that the jury followed the instructions above set out. Therefore they must have found that, although plaintiff stated the facts to counsel, and acted on the advice of counsel in commencing the criminal action, yet, in doing so, he did not act in good faith, or that he himself did not believe there was probable cause for prosecution." In that case as in this, the instruction was not excepted to, and constituted the law of the case. It is contended that the finding that the defendants did not act in good faith, upon the advice of counsel, believing the plaintiff guilty of the charge, is the finding of a mere inference or conclusion, and is overcome by the other findings. If it be the finding of a mere conclusion, it is sustained by the general verdict, and there is nothing in the other findings to negative it, as it is nowhere found, even by inference, that the defendants believed the plaintiff guilty.

4. Probable cause is defined to be "a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense with which he is charged." It is a mixed question of fact and law. The sufficiency of the circumstances to constitute probable cause is a question of law for the court, and the evidence of the circumstances is for the determination of the jury. Center v. Spring, supra, and authorities therein cited. The facts found by the jury are, in substance, these: Four calves were stolen from the defendant Foreman on the night of June 3, 1874, in Jones county. In October following, Foreman found the calves in the possession of the defendant Potter, in Greene county. Potter claimed to have purchased the calves of the plaintiff, in Jones county, on June 4, 1874. Foreman soon after communicated these facts to plaintiff, who conceded that he did sell the calves to Potter on or about June 4, 1874, and claimed that he had purchased them, while running on a common six or seven miles from Foreman's place, of a stranger, who said his name was Smith, about 11 o'clock, on or about June 4th, to be delivered in a pasture six or seven miles away, where he afterwards found the calves, but did not find the stranger; that the plaintiff thereafter settled with Potter for the calves, and gave his note for the value thereof; and that plaintiff never gave any other explanation of his possession of the calves to the defendants prior to the commencement of the criminal prosecution. The further findings show that these facts were known to the defendants Foreman, Potter, and Fall at the time of the commencement of the prosecution, but were not known to the other defendants. There is a further finding that neither of the defendants had been informed of any mistake in the admission of plaintiff that he had had the stolen calves in his possession, and sold them to Potter, until after the commencement of the criminal proceedings, and that, at the time the proceedings were commenced, the defendants did believe the admission of plaintiff, that he did have the stolen calves in his possession, to be true. In instructing upon the question whether the defendants had probable cause for believing the plaintiff guilty, the court, following the suggestion made on the former appeal, (63 Iowa, 538, 17 N. W. Rep. 34,) grouped together in an instruction the facts which the evidence tended to prove, and directed the jury that, if the defendants discovered and believed that the statements of the plaintiff, as to the details of the purchase as claimed by him, were unreasonable, contradictory, and improbable, then such facts coming to their knowledge, and believed by them, would, in law, constitute probable cause for a criminal prosecution. There is no direct finding as to whether there was

findings. If it be the conclusion, it is sus- l verdict, and there is r findings to negative found, even by infer- endants believed the

is defined to be "a rea- suspicion, supported sufficiently strong in nt a cautious man in rson accused is guilty which he is charged." n of fact and law. The umstances to consti- is a question of law he evidence of the cir- determination of the g, supra, and author- The facts found by the e, these: Four calves defendant Foreman 3, 1874, in Jones coun- wing, Foreman found session of the defend- ene county. Potter rchased the calves of s county, on June 4, after communicated ff, who conceded that es to Potter on or and claimed that he while running on a en miles from Fore- ranger, who said his out 11 o'clock, on or e de[illegible] red in a past- aw where he after- ves, but did not find e plaintiff thereafter for the calves, and e value thereof; and ave any other expla- n of the calves to the he commencement of ution. The further ese facts were known oreman, Potter, and he commencement of t were not known ts. There is a further of the defendants had mistake in the ad- at he had had the possession, and sold after the commence- al proceedings, and e proceedings were dants did believe the ff, that he did have is possession, to be upon the question ants had probable e plaintiff guilty, the uggestion made on 3 Iowa, 538, 17 N. W. ether in an instruc- e evidence tended to the jury that, if the and believed that plaintiff, as to the e as claimed by him, contradictory, and h facts coming to believed by them, ute [illegible]bable cause uti[illegible] There is no whether there was

probable cause or not, and the facts found, though such as to warrant suspicion, do not necessarily lead to a belief of guilty. The inference from the general verdict is that the jury found that there was a want of probable cause, and this they might do upon the conclusion that the defendants, though believing plaintiff's explanation of his possession to be suspicious, did not believe him guilty. It is only when the special findings of fact are manifestly inconsistent with the general verdict that the special findings should control. Hardin v. Branner, 25 Iowa, 364; Clark v. Warner, 32 Iowa, 219; Mershon v. Insurance Co., 34 Iowa, 87; Conners v. Railway Co., 71 Iowa, 490, 32 N. W. Rep. 465. There is no manifest inconsistency between these findings and the verdict. They are reconcilable upon the theory that the defendants did not believe the plaintiff guilty. As it follows from these conclusions that appellants' motion for judgment on the special findings was rightly overruled, it is unnecessary that we notice the discussion as to the defendants' liability for the finding of the second indictment.

5. A motion in arrest of judgment is only available "if the facts stated by the petition do not entitle the plaintiff to any relief whatever." Code, § 2650. The ground of defendants' motion is that the court having instructed the jury to find for the defendants, on the charge of conspiracy, there were no allegations upon which a joint judgment could be rendered against the defendants. It is a sufficient answer to say that the facts stated in the petition did entitle the plaintiff to some relief, and therefore the questions discussed could not be raised by a motion in arrest of judgment. A careful consideration of the whole record leads us to the conclusion that the judgment of the district court should be affirmed.

(82 Iowa, 89)

Clifton Heights Land Co. v. Randell.

(*Supreme Court of Iowa.* Feb. 2, 1891.)

Deed to Unincorporated Company—Tax-Title—Adverse Possession.

1. A conveyance to an unincorporated company which goes into possession under the deed passes a title which vests in the company subsequently incorporated.

2. A conveyance describing the land by lots, blocks, or government subdivisions, and adding at the end of the description "also together with all other lands that may not have been heretofore described belonging to said" grantor, passes title to a lot not expressly mentioned.

3. Where a lot is by mistake taxed in the name of a person who has no interest in it, but who owns the adjoining lot, and notice to redeem is served on him, and also on the person in possession, the tax-deed executed to the purchaser is valid in the absence of any proof of fraud.

4. Plaintiff owned the lot in controversy, but it was assessed to defendant, who had no interest in it, and sold for taxes. Defendant acquired the tax-title, but did not go in possession. The lot when sold was in possession of plaintiff's tenant. When defendant acquired title, he went to the tenant of the lot, who was then paying rent to plaintiff, and told him that he owned the lot and would lease it. The tenant said "All right" to defendant's offer to lease the lot, in consideration of the tenant's looking after the fences. He continued to pay rent to plaintiff, however. This possession of the tenant continued for five years after the statute had commenced to run against the tax-deed. *Held*, that the tenant was plaintiff's tenant, and that his five years' possession barred defendant's tax-title.

Appeal from district court, Polk county; W. F. Conrad, Judge.

Action to quiet the title to lot 22, South Park addition to Des Moines, Iowa. Plaintiff claims to be the owner of said lot by patent-title, and defendant claims to own it under a tax-sale thereof for the taxes of 1877, and a deed issued thereon. Each party denies the other's title. Decree was entered for the plaintiff; defendant appeals.

Kauffman & Guernsey, for appellant. *C. C. & C. L. Nourse*, for appellee.

Given, J. 1. B. F. Allen was the owner of the patent-title to a tract of land including the lot in question. He conveyed the tract by deed, dated February 15, and recorded March 3, 1870, to the South Park company, plaintiff's grantor, by which it was, with other land, platted into lots, etc. April 22, 1870, articles of incorporation of the South Park Company were filed for record. Appellant contends that as the South Park Company was not incorporated when the deed was executed there was no grantee, and, therefore, the deed did not pass title to any one. It does not appear that the South Park Company either received or made conveyance of this lot as a corporation. Surely a company may be so organized as to do both without being incorporated. Assume, however, as is probably the fact, that the South Park Company did receive and convey title as a corporate body, we think the title from Allen vested in it as against one not holding by a superior title, not only because of the conveyance but because of possession taken under it.

2. The South Park Company conveyed to plaintiff by deed, wherein the description of the property is given by lots, blocks, or government subdivisions, covering over two pages of legal cap, followed with these words: "Also together with all other lands that may not have been heretofore described belonging to said South Park Co." Appellant contends that as certain lots are expressly mentioned, that excludes all others, and as lot 22 is not mentioned it did not pass by the deed. Such a construction of this deed would be against the manifest intent of the grantor. The evident purpose was to convey all the land owned by the grantor. The lots were numerous, the description lengthy, and omissions possible. To cover any omissions and express the purpose of the parties the recital quoted was added as descriptive of what further was conveyed. We are in no doubt but that plaintiff is the owner of lot 22, unless defendant's tax-title divested it or its grantor of ownership.

3. The lot in controversy was sold October 21, 1878, for the taxes of 1877, to W. O. Curtis, who assigned the certificate to E. J. Adams, to whom a tax-deed was executed July 18, 1888, in pursuance of notice to redeem, served by Adams on the defendant Randell, in whose name the lot was then taxed on August 19, 1881, and on John

was made by the court. The report was not changed, but the court simply modified the referee's report to the extent indicated, and rendered judgment for the balance as recommended by him. Appellant's exceptions were filed prior to the time she filed her supplemental report. These facts had no effect upon the neglect of appellant to file her exceptions in time. Hence appellant has no exceptions to the findings of the referee, and the court did not err in striking them. With the record in this condition, appellant cannot be heard upon this appeal upon the merits of the case. Affirmed.

(93 Iowa, 165)

JOHNSON v. MILLER et al.

(Supreme Court of Iowa. Dec. 20, 1894.)

JUDGMENT FOR COSTS—JOINT DEFENDANTS.

Code, § 2934, providing that where there are several defendants the cost shall be apportioned according to the several judgments rendered, does not apply, in case several persons are sued in tort and they defend jointly, and judgment is rendered in favor of plaintiff against all but one defendant, so as to prevent judgment from being rendered against the other defendants for all the costs.

Appeal from district court, Blackhawk county; D. J. Lenahan, Judge.

Boies, Couch & Boies, for appellants. Wheeler & Moffit and Wolf & Hanley, for appellee.

KINNE, J. 1. This case is commonly known as the "Jones County Calf Case." It was an action for malicious prosecution, begun in Jones county, Iowa, on May 23, 1878, against E. V. Miller, David Fall, George W. Miller, Abe Miller, John Foreman, S. D. Porter, and Herman Kellar. For the purposes of this opinion we need not state the issues between the parties further than to say that the action was against all of the defendants jointly, and on every trial, except as otherwise stated, judgment was jointly rendered against all of the defendants, and the defense upon all the trials was jointly made by all of the defendants. The case was first tried in Benton county, and resulted in a disagreement of the jury. On the second trial, in the same county, the verdict was for plaintiff and against all of the defendants. This verdict having been set aside, the third trial was had in Clinton county, resulting in a verdict for plaintiff and against all of the defendants. This verdict was set aside, and a fourth trial had in the district court of Blackhawk county, wherein a verdict was rendered for plaintiff and against all of the defendants. On appeal to this court the case was reversed. 17 N. W. 34. Thereafter the cause was tried the fifth time, and in the circuit court of Blackhawk county, and resulted in a verdict for plaintiff and against all of the defendants. On appeal to this court the judgment was reversed, and the sixth trial of the case was had in the district court of Blackhawk county. 29 N. W. 743. Upon this trial the jury were directed to find for the defendant Herman Kellar. They returned a verdict for plaintiff and against all of the defendants except Herman Kellar for $1,000, and found for the defendant Kellar. The defendants other than Kellar filed a motion in arrest of judgment and for judgment against the plaintiff on the ground that the special findings were in conflict with the general verdict. Both motions were overruled, and judgment rendered against all of the defendants except Kellar for the full amount of the verdict. Thereafter all of the defendants except Kellar appealed to this court, and the judgment below was affirmed. 47 N. W. 903. No appeal or exception was taken by plaintiff to the instruction of the court directing a verdict for Kellar. Thereafter the widow and heirs at law of Kellar made a showing of his death, that no administrator of his estate had been appointed, and asked to be substituted in his place as parties, and that judgment be rendered in their favor against plaintiff on the general verdict dismissing the action, and for costs of said Kellar. Thereafter all of the other defendants filed a motion asking the court to apportion the costs so that they should only be liable for six-sevenths of all costs which plaintiff would have been entitled to recover had he recovered a judgment against all of the defendants in the action. Plaintiff made a showing in resistance of said motion that defendants answered jointly, with the same attorneys, and jointly assumed the burden and expense of the defense, and that plaintiff was successful in the action. Attached thereto was an affidavit of plaintiff to the effect that the only evidence applicable alone to defendant Kellar, and not necessary in the trial of the case as against the other defendants, was the testimony of one Parsons, who had been a witness upon all of the trials except the last, when he was subpoenaed, but for some cause unknown to plaintiff failed to attend, being absent from home; that the only costs made solely on account of Kellar were costs of service of the original notice upon him, and service of the subpoena on Parsons, and his fees and mileage as a witness; that Kellar had no witnesses, except himself, whose testimony was applicable alone to his defense; that Kellar died six months after the last trial. The court overruled the motion, to which defendants excepted. Thereafter judgment was entered in favor of plaintiff and against the six defendants other than Kellar for the full amount of the costs in said action, being $2,886.84, to which action of the court said six defendants excepted, and now appeal.

2. The only question involved in this appeal is the ruling of the court below on the motion to apportion the costs. The appellants rely

upon the following section of the statute: "In actions where there are several plaintiffs or several defendants the costs shall be apportioned according to the several judgments rendered, and when there are several causes of action embraced in the same petition, or several issues, the plaintiff shall recover costs upon the issues determined in his favor, and the defendant shall recover costs upon the issues determined in his favor." Code, § 2934. The contention is that under the first clause of this section it was mandatory upon the district court to apportion the costs as asked. This particular provision of the statute has never been construed. Suppose plaintiff had recovered against one only of the seven alleged wrongdoers, on appellant's construction of the statute he would only be entitled to a judgment for one-seventh of the costs as against him, although plaintiff had been successful in his action. Surely no construction should be placed upon the statute which would work such an inequitable result, unless its wording requires it, or such was the manifest intent of the legislature in its enactment. We see no reason for so construing it. These seven parties were charged with having committed a wrong against the plaintiff. The jury found that as to six of them the charge was established, but the seventh man was not liable. Why should the latter fact operate to relieve the other six from the payment of one-seventh of the costs incurred in the action brought against them all for one cause, and to which all of the seven made a joint defense? The six are in no way prejudiced by the fact that as against a seventh defendant there was no recovery had, except possibly by being required to pay costs which were made only in prosecuting the case as against the seventh man. What portion of the costs were thus made, if any, does not appear. This was not a case coming within this provision of the statute. It was not a case of separate judgments in favor of the plaintiff and against all of the defendants. It was simply a case where several were sued, and a recovery had as to all but one of them,—a joint verdict and judgment as against all as to whom plaintiff recovered at all. If separate judgments had been recovered against the parties in different amounts, there might be some reason for claiming that the costs should be apportioned in a proper case. We do not think the statute bears the construction contended for. The motion was properly overruled, and the judgment below is affirmed.

(92 Iowa, 714)

CALKINS v. CHICAGO, M. & ST. P. RY. CO.

(Supreme Court of Iowa. Dec. 15, 1894.)

APPEAL—ASSIGNMENT OF ERRORS—DIRECTING VERDICT.

1. Where plaintiff, who was injured in coupling cars, was asked if he would have pulled the pin and put it in the engine, and replied, "No, sir; I would not, for there was no link in the engine," the latter clause of the reply was properly stricken out as irresponsive.

2. The ruling out of an explanatory answer to a question was not prejudicial, where an explanation had been previously given.

3. Under Code, § 3207, requiring an assignment of error to point out the very error objected to, where it is impossible to know what particular error is relied upon, except by resort to the argument, the assignment is not sufficient.

4. Where the petition charged negligence in that after plaintiff had gone between the tender and the car, and taken hold of the link to make a coupling, the engine brakes were released, causing the engine to back down violently and injure plaintiff, and plaintiff testified that he could not tell whether, between the time he took hold of the link and the accident, the engineer applied or released the brake,—such being the only evidence on the question,—a verdict was properly directed for defendant.

Appeal from district court, Linn county; J. H. Preston, Judge.

Action for damages for a personal injury. Verdict and judgment for defendant. Plaintiff appeals. Affirmed.

Thompson & Stuart, for appellant. Mills & Keeler, for appellee.

KINNE, J. 1. The petition charges that while plaintiff entered between the tender of the locomotive and a freight car to couple them together, and while he was in the act of making said coupling, and without any negligence on his part, "the engineer in charge of said engine, carelessly and recklessly, and without any warning to plaintiff, suffered the brakes of said engine to become suddenly detached from the wheels, and in consequence thereof said engine and tender were permitted to back down with great force and violence, by reason of which plaintiff was caught by the right hand between the draught irons of said tender and car, and three of his fingers on said hand mashed" so that they had to be and were amputated. Defendant admitted that plaintiff was in its employ as a brakeman, as claimed, and that he received certain injuries to his right hand, and denied all other allegations of the petition. At the close of the evidence, and on motion of defendant, the court directed the jury to find a verdict for the defendant, which was done, and a judgment was entered thereon.

2. It appears that on the night of April 22, 1892, plaintiff was the head brakeman upon a freight train on defendant's road which was going up a steep grade called "Haysville Hill," just south of the station of that name. When the train stopped, plaintiff went back, cut off eight cars, and the engine pulled them into Haysville. After setting these cars out, the conductor remained at the switch, while plaintiff went back, with the engine, to get the remainder of the train. In backing down, steam was shut off when the engine got upon the grade, and it moved by its own momentum, checked occasionally by the air brakes, and came to a full stop about 10 feet away from the cars standing upon the grade.