purtenant property." Under the terms of this grant, the only ground upon which the plaintiff can claim a joint interest in the shop grounds, or any other parcel of land, is that it is "appurtenant" to the thing or things specifically granted. But the rule of the contract, and which is a rule of law independently of the contract, by which appurtenant property passes, applies as well to the property excepted from the grant as to that granted; and the question comes to this: Are the shop grounds "appurtenant" to the shops, or to something else? It is clear that shop grounds at Burnham, used for shop purposes, and not intended for any other use, are "appurtenant" to "the shops at Burnham," and not to the "tracks, buildings, sidings, and switches" granted to the Colorado Company. No piece of property could be more "appurtenant" to another than the shop grounds are to the shops, and to detach the shop grounds from the shops, and declare them an "appurtenance" to the track, or some building, siding, or switch, in connection with which they were never designed to be used, and to the proper use of which they are not essential, would be extremely unreasonable, and contrary to the plain meaning of the contract. It seems that a subordinate agent of the defendant in listing the property for taxation distinguished between shops and yards, and that the plaintiff has been charged with and paid one-half of the taxes on some portion of the shop grounds. The listing was done in conformity, or supposed conformity, to the revenue laws of Colorado, and had no reference to the rights of the parties under the contract, of which the agent, who attended to the taxes, had no knowledge. No estoppel arises from anything that took place about the taxes. The defendant, from the beginning, has claimed that the shop grounds were excluded from the contract.

A great deal of testimony has been taken in the case, very little of which is competent, and it has not been referred to for that reason. If competent, it would tend to support the conclusion of the court.

WALDRON v. WALDRON.

(Circuit Court, N. D. Illinois. February 17, 1890.)

1. HUSBAND AND WIFE—ACTION FOR ALIENATION OF AFFECTION.
In an action by a wife against another woman for alienating her husband's affections, and causing him to abandon her, plaintiff cannot recover unless it appears by a preponderance of evidence that the alienation of affection and abandonment was caused by defendant knowingly, and by direct and active interference.

2. SAME—PREVIOUS DIVORCE—EVIDENCE.
In such action, the complaint and evidence, in a suit for divorce previously obtained by plaintiff against her husband, are inadmissible.

3. SAME—DAMAGES.
The measure of damages in such action is based on the actual injury to plaintiff by the loss of her husband's affection and support, and on the pecuniary circumstances of defendant; and, if the injury was inflicted wantonly and maliciously, exemplary damages may be awarded.

At Law.

Chas. H. Aldrich and *Wirt Dexter*, for plaintiff.

Edwin Walker and *A. & C. B. McCoy*, for defendant.

BUNN, J., (*charging jury.*) This action is brought by the plaintiff, Mary Waldron, a citizen of the state of Indiana, residing at La Fayette, in said state, against Josephine P. Waldron, a citizen of Illinois, residing at Chicago, to recover damages for the alleged wrongful act of the defendant in alienating the affections of the plaintiff's husband, Edward H. Waldron, from the plaintiff, and depriving her of the comfort, fellowship, society, and assistance of her said husband. There are in the plaintiff's declaration two distinct statements of the charge which the plaintiff makes and relies upon as a cause of action against the defendant. The first is:

"For that whereas, the said defendant, contriving and wrongfully, wickedly and unjustly, intending to injure the said plaintiff, and to deprive her of the comfort, fellowship, society, aid, and assistance of Edward H. Waldron, the then husband of the said plaintiff, and to alienate and destroy his affection for the said plaintiff, on, to-wit, the 6th day of June, 1886, and on divers other days and times between the said 6th day of June, 1886, and the 21st day of June, 1887, wrongly, wickedly, and unjustly debauched and carnally knew the said Edward H. Waldron, then and there still being the husband of the plaintiff, and thereby the affection of the said Edward H. Waldron for the said plaintiff was then and there alienated and destroyed; and also by reason of the premises the said plaintiff from thence hitherto wholly lost and was deprived of the comfort, fellowship, society, and assistance of the said Edward H. Waldron, her said husband, in her domestic affairs, which the said plaintiff during all that time ought to have had, and otherwise might and would have had."

The second statement of the plaintiff's cause of action is:

"That whereas, the said defendant, contriving and wrongfully, wickedly and injuriously, intending to injure the said plaintiff, and to deprive her of the comfort, fellowship, society, aid, and assistance of Edward H. Waldron, the then husband of the plaintiff, and to alienate and destroy his affection for the said plaintiff, on the 6th day of June, 1886, and on divers other days and times between said 6th day of June, 1886, and the 21st day of June, 1887, wrongfully and unjustly sought and made the acquaintance of Edward H. Waldron, the husband of the plaintiff, and, then and there well knowing that said Edward H. Waldron was the husband of said plaintiff, wrongfully, wickedly, and unjustly besought, persuaded, and allured the said Edward H. Waldron to desert and abandon the said plaintiff, and thereby the affections of Edward H. Waldron for the plaintiff were alienated and destroyed; and also by reason of the premises the plaintiff has from thence hitherto been wholly deprived of the affection, society, and assistance of her said husband in her domestic affairs, which the plaintiff during all that time ought to have had, and otherwise might and would have had; and also, by reason of the premises, the said plaintiff, during all said time from thence hitherto, suffered great mental anguish and loss of social reputation."

These are the two special statements of the plaintiff's cause of action against the defendant. You will notice that the substance of the first is that the defendant, intending to injure the plaintiff, debauched and carnally knew the plaintiff's husband, and thereby the affection of the hus-

band for his wife was alienated and destroyed, and the plaintiff deprived of his affection, comfort, society, and fellowship. The substance of the second charge is that the defendant, wrongfully intending to injure the plaintiff, and to alienate and destroy his affection for the plaintiff, wrongfully and unjustly sought and made the acquaintance of the plaintiff's husband, and wrongfully, wickedly, and unjustly besought, persuaded, and enticed the said Waldron to desert and abandon the plaintiff, and thereby alienated and destroyed his affection for the plaintiff. These are two several and distinct statements of the same cause of action, intended to meet the proofs as they should appear on the trial. The substance and material part of each is the same, to-wit, that the defendant wrongfully and intentionally, either by debauching and carnally knowing the plaintiff's husband, or by beseeching, persuading, or alluring him to desert and abandon the plaintiff, deprived the plaintiff of his affection, society, and fellowship. There is no doubt, upon proper and sufficient proof, such action may be maintained, and the burden of the jury's duty will be to determine whether the charges, or either of them, in the declaration made, has been proven to your satisfaction by the evidence.

A man may maintain an action against another man for intentionally and wrongfully alienating the affections of his wife, or for enticing or alluring her to leave her husband. A woman may also maintain an action against another woman for wrongfully or intentionally destroying the affection of her husband, or persuading, enticing, or alluring him to desert or abandon her. The relation of marriage is a sacred and important relation. It is the foundation of family life and social happiness, and the family is, in an important sense, the foundation of the state in free and enlightened countries. This relationship is jealously guarded by the law, and should be revered by all good citizens. There is no greater injury, socially speaking, which one person can do to another, than to wantonly interfere with and break up the marital life of husband and wife. For such an injury to the rights of the individual the law gives a right of action on the case for damages against the wrongdoer in favor of the party injured. Such a charge, however, is one easily made, and, as it effects the person, the property, and the character of the person charged with the wrong, it should be proved by testimony convincing and satisfactory to the minds and consciences of the jury. The burden of proof is always upon the person making such a charge, and the charge should not be assumed to be true without evidence, or without a preponderance of evidence, to support it. The evidence adduced may be circumstantial in character, and usually is, in such cases; but it should be sufficent and satisfactory to induce the jury the believe the charges to be true.

The court will not undertake to discuss the evidence at length before you. It is very voluminous, though confined to but few material points, and it has been very fully and elaborately discussed by counsel. The court will content itself by calling your attention, as it has, to the one material issue in the case, to a statement of some of the leading facts that are either undisputed or clearly proven by the testimony, and to

the tendency and bearing of the evidence upon either side. It will be well for the jury to have these undisputed facts and their dates well fixed in your minds in order to understand and weigh to the best advantage the other evidence, and so determine the bearing of all upon the one main issue in the case.

The plaintiff, Mary Waldron, then Mary Beaucamp, was married to Edward H. Waldron on September 17, 1865, at Syracuse, N. Y., while there on a temporary visit. They had before that time both resided at La Fayette, in the state of Indiana, he boarding in her mother's family. Upon their marriage they returned to La Fayette, and resided there, and lived together as husband and wife, for some 20 years or more, excepting that during about two years of that time they lived at St. Louis. They had one child by the marriage, Winfield Willard Waldron, born on the 11th day of May, 1869, a young man now 21 years old, and a witness for the plaintiff on this trial. The plaintiff says she was born in 1833. Before her marriage to Waldron she had been previously married to William Beaucamp, about 1857 or 1858, when she was 24 or 25 years old. This marriage seems to have been an unhappy one. The plaintiff admits that she had a child some two months after the marriage, whom they named Edward Beaucamp. This son grew up to be a young man, and seems to have been the cause of some contention and trouble between the plaintiff and her husband, with whom he lived after her marriage to Waldron. He was profligate and shiftless, was convicted of crime, sentenced for a term of years to the state-prison, and afterwards died. At the time the plaintiff married Mr. Waldron, in 1865, she was about 32 years old, and Waldron 21. Previous to the marriage, and about the year 1860, some three years after the marriage to Beaucamp, she obtained a divorce from Beaucamp on the ground of desertion and failure to support; she all the time residing at La Fayette, Ind. The defendant was married to E. S. Alexander, September 23, 1857. They lived together as husband and wife until his death, on February 23, 1886. Waldron and Alexander were both railroad men, and friends, and the two families visited back and forth occasionally for many years previous to the death of Alexander. In June, 1886, Waldron left the plaintiff, and came to Chicago, and never lived with her after. He has since that time resided in Chicago. On June 20, 1887, the plaintiff filed a bill for a divorce in Tippecanoe county court, Ind., against her husband, E. H. Waldron. His appearance in the case was immediately entered, and on June 21st a decree of divorce was rendered dissolving the marriage contract relation between them absolutely. The effect of that decree was to free both of the parties from the obligation of the previously existing marriage relations between them, and to leave each of the parties free to contract marriage with other persons. In the fall of 1887, on October 25th, the defendant was married to E. H. Waldron, and since that time they have lived together in Chicago as husband and wife.

These are some of the leading undisputed facts in the case, and to be considered by the jury in connection with all the other evidence in the

case in determining the question here,—the main issue as to whether the defendant is guilty of the charges contained in the plaintiff's declaration. It will be noticed and borne in mind by the jury that the charges made against the defendant relate to the time between June 6, 1886, when Waldron came to Chicago to live, and June 21, 1887, the time when the plaintiff obtained her divorce from her husband,—a period of a little more than a year; and that is the period to which the plaintiff's evidence is mainly directed, so far as the charges against the defendant are concerned. The plaintiff can only recover by proving substantially the allegations contained in one or other of the two counts of her declaration; she cannot maintain her action by showing that her husband left her, although without good cause, came to Chicago, became intimate with the defendant, fell in love with and finally married her. The defendant cannot legally be made to answer in person or property on account of the shortcomings and misconduct, if such exist, of E. H. Waldron. She can be made to suffer only on account of a personal wrong, knowingly committed by her in the manner charged, against the marital rights of the plaintiff. A woman cannot be charged in such an action because a married man has become enamored of her, although after he becomes divorced from his wife she consents to marry him. There must be something more. There must be a direct interference on her part, a wrongful act or acts shown, whereby it is made to appear, to the satisfaction of the jury, as charged in this case, that she has wrongfully alienated the affections of the husband from the wife in one of the ways charged, either by debauching him, or by persuading or alluring him to desert and abandon the plaintiff, or in some way charged in the declaration. If E. H. Waldron alienated his own affections from his wife, or if they were alienated by the plaintiff's own conduct, or by Waldron's own conduct, or both, without the interference of the defendant, or if they were alienated by any other cause, known or unknown, over which the defendant had no control, or exercised no intentional direction or influence, then the plaintiff, howsoever unfortunate or wronged, cannot have her action against the defendant.

The defendant married E. H. Waldron in October, 1887, a year and eight months after her former husband's death, and four months after the decree of divorce dissolving the marriage relation between Mary Waldron and E. H. Waldron. She had an undoubted right to marry him when she did, and any intimacy existing between them after the marital relation between the plaintiff and Waldron were dissolved cannot be imputed as a wrong in this action; the wrongful act must have been committed previous to the divorce of June 21, 1887. Though alleged in one count of the declaration, I do not think it necessary to the plaintiff's case to prove that criminal relations ever existed between Waldron and the defendant. To find the defendant guilty under the first count, this would be necessary; but under the second count it would be enough to prove that she wrongfully persuaded, enticed, or allured him (Waldron) to desert and abandon the plaintiff, whereby the affections of Waldron for the plaintiff were alienated and destroyed. Did the defendant, between the times

alleged, lead E. H. Waldron from the path of virtue? Did she wrongfully debauch and carnally know him, whereby his affection for the plaintiff was alienated and destroyed, or did she wrongfully persuade, entice, or allure him to desert and abandon the plaintiff, whereby the affection of him (Waldron) for the plaintiff was alienated and destroyed? We know, as a matter of common knowledge and observation, that, as a general rule, men woo and women are wooed and won; that men seduce and allure and lead women from the path of virtue, and that women are allured, seduced, and led astray; but we also know, from common observation, that this general rule does not always hold, and that sometimes women woo men; that sometimes women allure, seduce, and debauch men; that women, upon occasion, induce, allure, and persuade men to abandon and desert their wives, and form new relations, lawful or unlawful. It will be for the jury to say, from all the evidence, what were the facts in this case, and whether the issue stands proved or unproved.

The plaintiff's evidence is directed to support the affirmative of the issue. It tends to show that previous to June 6, 1886, from the time of their marriage, in 1865, Mrs. Waldron and her husband had lived an ordinarily peaceful and happy married life; that she had a strong affection for her husband; that between June 6, 1886, and June 21, 1887, after Waldron came to Chicago, terms of friendship and intimacy sprang up and grew into unlawful proportions between Mr. Waldron and the defendant, then Mrs. Alexander; that he (Waldron) was seen at her house, on Michigan avenue, in this city, at almost all times of the day, and in the morning and evening; that they rode out together in her own carriage, in the day-time and the evening, on the streets and in the parks; that on one occasion, in Lincoln park,—on one or more occasions in the park,—they left the carriage in the evening, and took a walk together in the park, and afterwards returned to the carriage. That terms of endearment between them, as of lovers, were overheard. That on one occasion she kissed him, and was heard to say that she loved him, and that on one occasion, when she was ill, he (Waldron) lay upon her bed in the presence of other persons; that they were seen to embrace each other; that during the same period he ceased to provide for his wife's support in La Fayette; that he deserted and abandoned her, and failed to provide and care for her.

The defendant's testimony is directed to disprove this issue, and to deny and contradict the case attempted to be made by the plaintiff. Mr. Waldron and his wife, the defendant, flatly and positively deny that any unusual or improper relation existed between them prior to their engagement, in the fall of 1887. They deny that terms of endearment passed between them; that she ever kissed him, or said she loved him; that he was ever seen lying upon her bed; or that they ever embraced, or left the carriage and walked together in the park. The defendant's evidence is directed to prove that the marriage relations between Waldron and the plaintiff were infelicitous and unhappy; that at the time of the marriage, in 1865, she concealed from him the fact, of which he says he

had no knowledge, that she had lost her maiden virtue before her marriage to William Beaucamp, in 1857 or 1858, and that she had a child about two months after her said marriage, as also the fact that she obtained a divorce from Beaucamp, and that he was still living, whom Waldron supposed, at the time of the marriage to the plaintiff, to be dead; that she concealed from him the fact that she was a divorced woman, rather than a widow; that these concealments operated to injure and destroy the respect and affection he had entertained for his wife, and would otherwise have entertained; that after the discovery of these things their married life was unhappy; that he lost his respect and regard for her; that she was constantly jealous of him, and of his relations to other women, and this fact constantly made trouble between them; that he left her in 1884 and 1885 on one or two occasions, declaring his intent to never return to live with her; that after living apart for several weeks or months he was persuaded, by his wife and their friends, to return and live with her, and did so return, not because he was reconciled to or loved or respected her, but for the good of their son, Willard Winfield Waldron; that he finally left her in June, 1886, with the full, firm, and declared intention never to return; that his affections for his former wife were destroyed and alienated previous to his coming to Chicago, in June, 1886, and by causes disconnected with any act or influence done or exerted on the part of Mrs. Alexander, and over which she had no control. Gentlemen, this main issue it will be your duty to decide according as you believe the very truth to be from the evidence, the burden being upon the plaintiff to satisfy you by at least a preponderance in the testimony. You are to take the law and the evidence as your only guide, and, without fear or favor, follow these to a legitimate and just conclusion. If you do justice upon the law and the testimony given you in court, free from all other considerations, you will have fully discharged the obligation of your several oaths, and may safely allow consequences to take care of themselves. The weight and credence to be given to the testimony of any witness is a matter for the jury, under all the circumstances. You will consider the circumstances under which they severally give their testimony; their interest, if any, in the case; their bias or inclination, if any, to favor one side or the other; their manner and conduct upon the stand; the consistency and probability, or want of these, in their statements; and how they are corroborated or contradicted by other witnesses, or by the known facts in the case. If, under all the circumstances, you believe that little credit should be given a witness, or that his evidence cannot be relied upon, it will be your privilege to give him as little credence as, in justice, you may think right and proper, or reject his testimony altogether.

There has been an attempt to impeach two or more of the witnesses. One method of discrediting a witness is by showing that he has made statements out of court touching the cause that are inconsistent with his testimony, or would go to discredit him before the jury. So far as I know, it is a uniform rule of the courts of this country and England to allow such impeaching testimony; first calling the attention of the wit-

ness, upon cross-examination, to the matters, and asking him whether or not he has said or declared that which is intended to be proven. If he admits the words or declaration imputed to him, the proof on the other side becomes unnecessary, but if he denies it, or says he does not recollect, the adverse party may call a witness and contradict him. That is the course that was taken and allowed in this case. But it does not follow that because an attempt is made to impeach a witness, and witnesses are brought to contradict him, that therefore the witness is impeached, and his testimony is to be discredited. That is a question for the jury. After the impeaching testimony is in the jury are to consider both together, and give such credit, and no other or more, to the testimony, as you may think you ought to give under the circumstances.

The court has already adjudged that the decree of divorce obtained by the plaintiff from Mr. Waldron on June 21, 1887, is evidence conclusive in this case that the marriage relations between the plaintiff and Mr. Waldron were dissolved from the date of that decree. The decree of divorce acted on the *status* of the parties, and dissolved the marriage relation theretofore existing between them, and left each free to remarry; but the allegations contained in the bill of complaint in that case against Mrs. E. S. Alexander, the present defendant, are not evidence in this case, and were excluded by the court. The evidence also taken on the trial of that case is not competent evidence against the defendant in this case, and was also excluded; she not being a party thereto, and not permitted to appear and cross-examine the witnesses. Nor should the jury assume or infer from anything in evidence in this case that the judgment of divorce was granted upon the ground of adultery, as that is not one of the grounds alleged in the bill of complaint, nor upon any ground or for any causes having reference to the conduct of the defendant in this case. Such an inference has been sought to be drawn by counsel from the proceedings in that case, but it is an inference not warranted by the record in evidence, and unfair towards the defendant. The jury will try this case upon the evidence produced on this trial, and not assume or infer that other evidence might have been produced here, or was produced in some other case to which the defendant was not a party. If the jury should find for the defendant, you will have no question of damages to consider, and you will simply return a verdict of not guilty. If you find for the plaintiff, you will return a verdict that you find the defendant guilty, and you will assess the damages the plaintiff will be entitled in that case to recover. These should be apportioned and assessed according to the extent and character of the injury sustained by the plaintiff in consequence of the wrongful act of the defendant, from a consideration of all the circumstances in evidences in the case. If the injury caused by the wrongful act of the defendant has been great, the damages should be proportionately great. If the injury has been small, the damages should be proportionately small. If the jury should find from the evidence that the marital relations of the plaintiff and Waldron were unhappy; that when he left her, and came to Chicago, on June 6, 1886, he had already lost his respect and affection for the plaintiff; that

on account of the infelicity of their relations he then deserted and abandoned her without any hope of condonement or reconciliation; and that by reason of these things the marital relation existing between them was of little or no value to the plaintiff,—the jury, in such case, may, in the exercise of a sound discretion, if they think they are justified on a full consideration of all the evidence, return a verdict for a very small sum, or for nominal damages; but this is a question of fact wholly for the jury. The ground of damages will be mainly the injury to the plaintiff's feelings, the loss of her husband's support, his affections, his aid, society, and companionship, caused by the wrongful acts of the defendant, and should be fairly and dispassionately assessed, according to the nature and extent of the injury so sustained by the plaintiff, from a full and careful consideration of all the evidence and circumstances in the case, including, of course, the evidence given you of the pecuniary circumstances of the defendant; and, in addition to the damages compensatory in character, if the jury believe that the injury was inflicted wantonly and maliciously, they may, in their discretion, add thereto such sum as you may think just and proper as exemplary or punitory damages, as a punishment to the defendant.

Verdict for plaintiff for $17,500.

A motion for a new trial was made and overruled.

POWDER RIVER CATTLE CO. *v.* BOARD OF COMMISSIONERS OF CUSTER COUNTY.

(*Circuit Court, D. Montana.* January 15, 1891.)

1. TAXATION—ASSESSMENT—DEMANDING TAX-LIST.
Under Rev. St. Mont. 1879, div. 5, § 1011, providing that the assessor shall demand of "each tax-payer in the district" a list of his personal property, and, on his refusing to give it, the assessor shall list his property on information and belief, adding a penalty, the assessor has no jurisdiction to make an assessment without first demanding a list of the tax-payer or his agent, where, though not a resident of the county, the tax-payer has resident agents in charge of the property therein, and his address is known to the assessor.

2. SAME—ACTION BY EQUALIZING BOARD.
The county commissioners, acting as a board of equalization, cannot, in the absence of any statute authorizing it, assess property not listed and valued by the assessor.

3. SAME—RECOVERY OF ILLEGAL TAXES PAID.
Where, without demanding a list from the tax-payer, the assessor lists against him property which he owns and property which he does not own, and the county commissioners add other property which he does not own, the tax-payer may recover the illegal taxes paid under compulsion, and he is not required to apply to the board of equalization for an abatement.

4. SAME.
Illegal taxes on personal property having been paid under protest to avoid a threatened levy of a warrant, the tax-payer may recover the amount paid from the county which receives and holds the taxes.

At Law. On demurrer to complaint.
M. J. Liddell, for plaintiff.
W. H. Ross and *Strevell & Porter*, for defendant.

KNOWLES, J. This is an action brought to recover from Custer county a tax claimed to have been illegally collected from plaintiff, amounting to the sum of $3,485.40, with legal interest thereon from the 14th day of June, 1886, the date said collection was made. Plaintiff sets forth in its complaint that it is a corporation organized under the laws of the kingdom of Great Britain and Ireland, and doing business in the states of Wisconsin and Wyoming, in raising, breeding, buying, and selling cattle and horses. That defendant is a public corporation, existing by virtue of the laws of formerly the territory, now the state, of Montana. That among the possessions of plaintiff in 1885 were some 4,000 head of castle, ranging at a place called "Hanging Woman's Creek," in said Custer county. That said place was in said Custer county was a fact of which plaintiff was ignorant. That the assessor of said Custer county well knew the residence of the officers of plaintiff, and where those who had a right to list its said property lived. That its principal place of business was at Cheyenne, in the now state of Wyoming, and at its ranch on said Hanging Woman's creek, in the now state of Montana. That the said assessor of said Custer county made no demand on plaintiff or any of its agents, servants, or employes to list said cattle. That the said assessor well knew the post-office address of said agents, servants, and employes of plaintiff. That the said assessor, without making said demand on plaintiff, or any of its agents, servants, or employes to list said property, listed himself the same upon information and belief, and in such listing increased the amount from 4,000 cattle to 10,000, an excess of 6,000 over the amount plaintiff had in said Custer county. That in said list were included calves under one year old, and bulls, not taxed. That subsequently the county commissioners added to said list of property of plaintiff a certain number of horses, which it valued at $2,000, and that they did this without any notice to plaintiff. That the said tax so levied upon the property so listed was turned over to the treasurer of said Custer county, with a warrant for its collection. That the said treasurer, acting as collector of taxes, threatened to, and did attempt, during the month of May, 1866, to seize the property of plaintiff, namely, its cattle, for the purpose of selling the same to pay said taxes, and that the said treasurer was only prevented from so doing by plaintiff paying to said treasurer the amount of $4,954, claimed as taxes, and $495.40 as a penalty added thereto for not paying said taxes within the time provided by law. That the said sums were so paid by plaintiff under duress of its property, and to save the same from seizure and sacrifice, and under protest, alleging that said tax was void; that the assessor had no jurisdiction to list said property, by reason of the fact that he had made no demand upon the company or its officers or agents for a list of its property; and for the reason that said assessment list and roll contained no description of plaintiff's property subject to taxation

in said Custer county, and no valuation of the same, as required by law, and that the action of the board of county commissioners in listing and valuing plaintiff's horses for taxation was without authority of law, and notifying defendant that plaintiff would resort to appropriate remedies at law to recover the money so paid back. The defendant filed its demurrer to this complaint, and the questions presented for consideration arise in considering the same. The facts stated in the complaint must be considered as true.

The first point that arises is, was the tax illegally assessed? The statute requires that every assessor shall demand of each tax-payer in his district a list of his property. At the date of the assessment in this case the district of the assessor of Custer county embraced the whole of that county. It is a general rule of the United States courts that they will follow that construction of a state statute which it has received by the highest court of that state. *Moores* v. *Bank*, 104 U. S. 625; *Fairfield* v. *Gallatin Co.*, 100 U. S. 47; *Tioga R. Co.* v. *Blossburg & C. R. Co.*, 20 Wall. 137; *King* v. *Wilson*, 1 Dill. 556. The supreme court of Montana Territory in the case of *Railroad Co.* v. *Carland*, 5 Mont. 146, 3 Pac. Rep. 134, interpreted the statute under consideration requiring a demand to be made by the assessor upon the tax-payer to list his property subject to taxation. In speaking of that statute, it says, by Chief Justice WADE:

"Under the provisions of our statute it is the first duty of the assessor to demand a list of the property from the tax-payer or the person whose property is to be assessed. This is the first and important step towards assessing his property for taxation. If the list is not furnished on such demand, then, and not until then, has the assessor the right himself to make a list and value the property. The demand is a condition precedent to the right of the assessor to act in the premises. That, and the neglect or refusal of the person having taxable property, alone gives to the assessor the right to make the list himself. If this were not so, the sovereign power of taxation becomes an arbitrary exaction, subject to the caprices of a single individual, without the knowledge and behind the back of the person most interested, and whose property is to be taken for the public use. Therefore it is that our statute has wisely provided that the person having taxable property shall have the right to list the same for taxation. The assessor has no right or jurisdiction to make the list until the tax-payer or person having the property subject to taxation has neglected or refused to make it."

This decision very fully and decisively determined the question that there must be a demand on the tax-payer or person in charge of taxable property for a list of the property possessed by him and a refusal to list the same, before the assessor has any jurisdiction to list such property himself. It is true this was a decision of a territorial court. But the same reason for the rule in relation to the decisions of state courts should prevail. It was a territorial court interpreting a statute of its territory, which became a rule for the conduct of revenue officers of the territory in prosecuting their official duties. If it is not of controlling authority the rule expressed in that decision should, I am of the opinion, commend itself to the judicial mind. As to statutes providing for taxing property, it may be said as a general rule: "When the regulations pre-

scribed are intended for the protection of the citizen and to prevent a sacrifice of his property, and by a disregard of which his rights might be, and generally would be, injuriously affected, they are not directory, but mandatory." *French* v. *Edwards*, 13 Wall. 506. The failure to make a demand of a tax-payer for his list of property might, and generally would, injuriously affect his rights; for, if the tax-payer must list his property, whether any demand for the same is made upon him or not, then the assessor may, on mere information and belief, list his property, and add 20 per cent. to the value thereof. Information and belief is a very poor guide in arriving at one's property. Certainly, the law that requires a demand to be made of the tax-payer for his list of property is intended for his protection. It is therefore a mandatory statute. It is urged, however, that this demand should be made only of tax-payers who reside in the district of the assessor. The statute does not say so. The language of the statute is: "Between the first day of February and the tenth day of September in each year [referring to the assessor] he shall demand of each tax-payer in his district a list, as hereinafter provided, of his, her, or their property." Section 1011, div. 5, Rev. St. Mont. 1879. In interpreting a statute the whole statute should be construed together. End. Interp. St. § 35. In section 1004, div. 5, of said Revised Statutes it provides "that every inhabitant of the territory of full age and sound mind shall list all property subject to taxation in this territory of which he is the owner or has the control or management." Again, "all personal property shall be listed, assessed, and taxed in the county where the same may be found." Section 1005, Id. Again, "all persons required to list property in behalf of another, shall list in the same county in which he would be required if it were his own." Section 1006, Id. As every one is required to list the property he owns or has control or management of in the county where the same may be found, it cannot reasonably be contended that only the tax-payers who reside in the district of the assessor should receive a demand to list their property. Statutes should, if possible, be so interpreted as to make the intent of the legislative power reasonable. End. Interp. St. § 245. If it is only those who live in the same district as the assessor that are entitled to receive a demand for a list of taxable property, then it is only the property of those who live in the district of the assessor who are liable to have their property listed by the assessor upon a refusal or neglect to list after a demand and 20 per cent. penalty added to the value thereof. For we have seen that it is after a demand that the assessor has the jurisdiction to list taxable property. If it is only of those who live in the district of the assessor who are to receive a demand for a list of their taxable property, how can the property of a tax-payer who does not live in an assessor's district be listed if he refuses or neglects to list the same, and what penalty is to be inflicted on him for his refusal or neglect to list his property? I think it appears evident that the legislature did not intend that the demand should be made only of the tax-payers who reside in the district of the assessor, and the words of the statute are that the demand should be made of every tax-payer in his (the assessor's)

district. The plaintiff, being a tax-payer in the district of the assessor of Custer county, should have received in some way a demand of the plaintiff or its agents or employes having control or the management of its property in that county for a list of its taxable property found therein, or show some reasonable excuse for not making the demand. This was mandatory, and his failure to do so rendered the listing of the property of plaintiff by the assessor illegal and void. The county commissioners of Custer county had no right to list the horses of plaintiff without some statutory authority. I have been unable to find any such authority. The listing of said horses was therefore illegal. *People* v. *Reynolds*, 28 Cal. 108. That board could not list, or, in the first place, before any action of the assessor, make any valuation of any property of a tax-payer. *Ferris* v. *Coover*, 10 Cal. 590; *People* v. *Reynolds*, 28 Cal. 108. The listing of the property of plaintiff was therefore illegal and void, and it had no place on the tax-roll of Custer county.

It is true that all the property plaintiff had in Montana, not exempted by statute, was subject to taxation; but that tax could be collected only as was provided by law. The plaintiff admits that it had about 4,000 head of cattle subject to taxation, and that the tax on the same was $1,964. This amount it does not seek to recover back from defendant. But the complaint shows that it paid some $3,485.40 more than was the proper tax. In other words, the defendant has received from plaintiff $3,485.40 more than it was lawfully entitled to, and this plaintiff seeks to recover back. It is urged by defendant that, if this is an illegal tax, the remedy for plaintiff to have pursued in the matter was for it to have appealed to the board of county commissioners as a board of equalization, asking to have this tax properly adjusted. When a tax is illegal, one is not obliged to apply for an abatement, unless the statute makes that the sole remedy. Cooley, Tax'n, p. 528. When one has paid an illegal tax, the right to recover the same back from the corporation to whom the same has been paid exists, although the tax-payer had not appeared before the board of equalization to contest the assessment. 2 Desty, Tax'n, § 131, p. 787. In the case of *Stanley* v. *Supervisors*, 121 U. S. 535, 7 Sup. Ct. Rep. 1234, Justice FIELD, in speaking for the court, says, (page of opinion 549, 121 U. S., and 7 Sup. Ct. Rep. 1239:)

"It is only where the assessment is wholly void, or void with respect to separate portions of the property the amount on which is ascertainable, or where the assessment has been set aside as invalid that an action at law will lie for the taxes paid or for a portion thereof."

Again, in same case, on page of opinion 550, 121 U. S., and page 1239, 7 Sup. Ct. Rep., the justice says, in speaking of boards of equalization or revision:

"To these boards of revision, by whatever name they may be called, the citizen must apply for relief against excessive and irregular taxation where the assessing officer had jurisdiction to assess the property."

In this it appears by implication that, where the officer had no jurisdiction to assess property, and the assessment was void, there was no necessity to appeal to a board of equalization to correct the assessment.

In the case at bar the assessor had no jurisdiction to list the property of plaintiff, and, the property not being listed, he had no right or authority to value the same. It is only property that has been listed that an assessor can value. The whole scope of the statute of 1879 upon taxation shows this. The statute does not say that an appeal to the board of equalization is the only remedy for illegal taxation a tax-payer shall have. It is said that, where there are any errors and irregularities in assessing or collecting taxes, the law has provided a special tribunal in the shape of a board of equalization or revision; even in some states the statute seems to require an appeal to such a board in the case of illegal taxation. The decisions are quite uniform that an assessor in valuing property acts judicially. But we have seen *supra* that in this case his acts in listing and valuing the property were illegal and void; that is, that his judgment as to value was void. Can it be that a void judgment can be rendered valid and of binding force by a failure to appeal from the same to this special tribunal, the board of equalization, and object to the same, or ask to have it corrected? Such are not the views entertained of a judgment in a court of general jurisdiction. See Freem. Judgm. (2d Ed.) § 117. There is no reason in a rule that would give greater weight to the determination of a special officer. The fact that the assessor placed the list of property that he had made upon the assessment roll, and the valuation of the same he had made thereof, would not cure the fatal defects in the preliminary proceedings. Says Judge Cooley, in his work on Taxation, page 259:

"Of the necessity of an assessment no question can be made. Taxes by valuation cannot be apportioned without it. Moreover, it is the first step in the proceedings against individual subjects of taxation, and is the foundation of all which follows it. Without an assessment they have no support, and are nullities."

In an early case in Massachusetts it was held, where the assessor had no jurisdiction to assess a tax-payer, that there was no necessity for applying to a board of review to correct the error complained of. *Preston* v. *Boston*, 12 Pick. 7. The case of *Railroad Co.* v. *Patterson*, (Mont.) 24 Pac. Rep. 704, I do not consider in point. It is true that there are some assertions in that opinion which seem to cover the ground that no action can be maintained in equity to enjoin the collection of a void tax until there has been an appeal to the board of equalization, but, taken altogether, I think it does not controvert the doctrine that it is only in cases where there are errors and irregularities in the assessment that an appeal must first be made to the board of equalization. In it the court quotes from High on Injunctions, (volume 1, 2d Ed. § 493:)

"Where, therefore, a particular manner is provided by law, or a particular tribunal is designated, for the settlement and decision of all errors or irregularities on behalf of persons dissatisfied with a tax, they must avail themselves of the legal remedies thus prescribed, and will not be allowed to waive such relief and seek in equity to enjoin the collection of the tax."

It will be observed here that the words "errors or irregularities" are used. I do not think that these words can cover the case of a void tax,

—that is, where the assessor has acted without jurisdiction. The courts generally assert that a court of equity cannot sit to revise the action of an assessor in valuing property. If the case of *Railroad Co.* v. *Patterson*, *supra*, can be construed to hold that, where the assessor acted without jurisdiction, the only remedy for a party aggrieved is to appeal first to a board of equalization before any other action can be maintained, I do not think the authorities support such a view, nor do I think that such a case was presented to that court to decide. It was admitted that part of the tax was proper, and plaintiff had not offered to pay this. And the court seems disposed to adopt the rule in Massachusetts, that, where a man is assessed upon property he does own and on property he does not own, it is simply an overvaluation of the property he does own. If this rule was not sustained by a long line of decisions, rendered by most able and justly distinguished jurists in that state, it would not commend itself very strongly to the legal profession. A legal rule based upon matters not true as facts ought not to be laid down or followed. It is not true as a fact that listing to a man property he does not own is only an overvaluation of the property he does own. It is a general rule that, where a party owes part of a tax a court of equity will not enjoin the collection of any of it until this part is paid. And if there was in that case only an overvaluation, then most all the decisions express the rule that an appeal should be made to the board of equalization, or by whatever name such a board may be called, to correct this error; and, in the absence of fraud or mistake, there is no power to set its determination aside. This I understand to be the extent of the decision in *Railroad Co.* v. *Patterson*, *supra*. But where an assessment is void, no such rule prevails. In the case of *Supervisors* v. *Stanley*, 105 U. S. 308, the United States supreme court says:

"If the officers who assessed and collected this tax were utterly without authority to collect any tax whatever, or, if there was no law by which in any case they could assess and collect a tax on shares of national banks, then it is of no consequence to inquire of anything beyond the fact that plaintiff's assignors did pay such tax under legal compulsion."

When this case came up again for consideration, (see 121 U. S. 545, 7 Sup. Ct. Rep. 1236,) that court again says:

"If he had debts, the assessment without a deduction for them in the estimate of the taxable value of the stock was only voidable. The assessing officers, in making the assessment, were acting within their authority, until duly notified of the debts which were to be deducted. In such case, therefore, the duty devolved upon the stockholder to show to the assessing officers what his debts were, and to take such steps as were required by the law to obtain a correction of the overassessment."

Here, I think, the line is distinctly drawn between a void and an erroneous or voidable tax. In the first place, it is of no consequence to inquire of anything beyond the fact that the party did pay such tax under legal compulsion. In the second place, the party is required to take such steps as were required by the law to obtain a correction of the overassessment. The conclusion I reach is that the plaintiff need not

show that he applied to the board of equalization of Custer county to correct the wrongs it complained of.

It was urged by counsel for defendant that plaintiff ought not to have paid the tax, but should have resorted to a court of equity to have enjoined its collection. There is nothing presented in this case which would have warranted plaintiff in resorting to such a forum. In the cases of *Dows* v. *City of Chicago*, 11 Wall. 108, and *Hannewinkle* v. *Georgetown*, 15 Wall. 547, the United States supreme court held that a suit to enjoin an illegal or void tax would not lie "unless there were some special circumstances bringing the case under some recognized head of equity jurisdiction, such as that the enforcement of the tax would lead to a multiplicity of suits or produce irreparable injury, or, where the property is real estate, throw a cloud upon the title of the complainant." No circumstances such as would bring this case under the head of any recognized rule awarding equitable relief appear in the record. The only remedy left for plaintiff, then, was to allow its property to be seized and sold, and then bring an action against the collector in trespass, or to pay the tax claimed when the legal compulsion was presented under protest, and bring its action to recover the same back. I think enough appears in the complaint to show that the payment of what was claimed as a tax was made under compulsion. A warrant had been issued for its collection, and the collector had attempted to seize the property of plaintiff thereunder, and payment was made with the view of preventing this. When a tax is paid involuntarily,—that is, under legal compulsion,—it may be recovered back in an action at law, and from the county who has received and holds the tax. *Newman* v. *Supervisors*, 45 N. Y. 676; 2 Desty, Tax'n, p. 795; *Detroit* v. *Martin*, 22 Amer. Rep. (notes) 519–520. Numerous authorities might be cited to sustain the above proposition. For the above reasons it is ordered that the demurrer to the complaint be, and the same is hereby, overruled.

SEARLES *v.* MANN BOUDOIR CAR CO.

(Circuit Court, S. D. Mississippi, W. D. March 5, 1891.)

1. CARRIERS OF PASSENGERS—SLEEPING-CARS—SALE OF BERTHS.
A sleeping-car company has the right to sell a whole section to one person, and no cause of action arises from the refusal of its conductor to sell the upper berth in such section to another passenger, though that berth was in fact unoccupied.

2. SAME.
Where a berth in a sleeping-car has been sold for occupancy to a certain point, no cause of action arises for the refusal of the conductor, before that point is reached, to sell another person a ticket entitling him to such berth from there to the end of the journey.

At Law.

Action to recover damages for alleged wrongful refusal of defendant's conductor to sell plaintiff a berth in a sleeping-car. On the 30th day